



IMMOVABLE PROPERTY LAW OF CAMBODIA

An Overview

Prepared by East-West Management Institute, Inc.
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TABLE OF CONTENTS

INTRODUCTION	1
THE PURPOSE OF THIS BOOK	1
STRUCTURE OF THE BOOK	2
WHAT THE BOOK COVERS.....	2
CHAPTER 1 BASIC CONCEPTS OF IMMOVABLE PROPERTY	5
WHAT IS PROPERTY (<i>TROI</i> P)?	6
WHAT IS OWNERSHIP (<i>KAM'SITT</i>)?.....	7
TANGIBLE VERSUS INTANGIBLE.....	9
IMMOVABLE VERSUS MOVABLE	10
LEGAL TRADITIONS INFLUENCE CONCEPTS OF PROPERTY.....	12
CIVIL AND COMMON LAW CONCEPTS OF IMMOVABLE PROPERTY	13
REAL RIGHTS.....	16
RESTRICTIONS ON REAL RIGHTS.....	19
IMMOVABLE PROPERTY UNDER THE 2001 LAND LAW	20
<i>Immovable Things under the Civil Code</i>	20
<i>Categories of Immovable Property under the 2001 Land Law</i>	22
<i>Immovable Property by Nature</i>	22
<i>Immovable Property by Purpose</i>	23
<i>Immovable Property by Law</i>	23
<i>Conclusion</i>	26
CHAPTER 2 HISTORICAL VIEW OF CAMBODIA'S LAND LAW	27
ANCIENT CAMBODIAN LAW	28
THE FRENCH PERIOD	30
CAMBODIAN INDEPENDENCE.....	31
DEMOCRATIC KAMPUCHEA	32
THE PRK ERA	32
THE SOC ERA	33
THE KINGDOM OF CAMBODIA	35
<i>The 2001 Land Law</i>	35
<i>Summary of Key Changes made by the 2001 Land Law</i>	37
<i>Civil Code of 2007</i>	39

<i>Law on Co-ownership by Foreigners</i>	40
<i>Conclusion</i>	40
CHAPTER 3 COMPARISON OF 1992 AND 2001 LAND LAWS AND THE 2007 CIVIL CODE	42
WHY A NEW LAW?	42
NEW LAW VERSUS AMENDING EXISTING LAW	44
LAND LAW AND 2007 CIVIL CODE COMPARED.....	48
<i>Major Different Areas</i>	48
1. Leases	48
2. Succession.....	48
3. Acquisitive Possession.....	48
4. Concessions (General)	50
5. Social Land Concessions	51
6. Co-ownership.....	52
7. Cadastral Surveys.....	52
8. Indigenous Minority Community Ownership	53
<i>Conclusion</i>	54
CHAPTER 4 CLASSIFICATION OF IMMOVABLE PROPERTY	57
WHAT IS CLASSIFICATION?	57
CLASSES OF IMMOVABLE PROPERTY UNDER THE 2001 LAND LAW.....	59
1. State Public Property.....	60
2. State Private Property.....	61
3. Private Property	61
4. Collective Properties.....	61
WHO CLASSIFIES IMMOVABLE PROPERTY AND HOW.....	63
LEGAL EFFECTS OF IMMOVABLE PROPERTY CLASSIFICATIONS	66
<i>State Public Property</i>	67
<i>State Private Property</i>	68
<i>Buddhist Wat Property</i>	70
<i>Indigenous Minority Community Properties</i>	70
<i>Classifications under the Forestry Law</i>	74
Permanent Forest Estate.....	74
Classification of Forests.....	75
<i>Conclusion</i>	78

CHAPTER 5 REAL RIGHTS – OWNERSHIP	79
OWNERSHIP	80
<i>Ownership in a market economy</i>	81
OWNERSHIP UNDER CAMBODIAN LAW.....	81
ACQUISITION OF OWNERSHIP.....	83
<i>Grant from the state</i>	83
<i>Acquire from another owner</i>	84
Acquire by Contract	85
Acquire by inheritance	86
Acquire by other causes under Article 160-186	86
EXTENT OF OWNERSHIP.....	87
<i>Which Land can be owned by private persons</i>	87
<i>To What Extent Can a Private Person Own Land</i>	90
<i>Restrictions on ownership rights</i>	93
THINGS PERMANENTLY ATTACHED TO THE LAND.....	94
<i>Ownership of improvements made by people</i>	97
Improvements made in ‘bad faith’	100
Improvements made in ‘good faith’	101
<i>Accretion by nature – Alluvial deposits</i>	102
Avulsion – Losing a portion of land.....	103
Newly formed land masses in the middle of waterways.....	104
Islands formed in navigable waterways.....	104
Islands formed in non-navigable waterways	104
Dry river beds.....	106
<i>Conclusion</i>	107
CHAPTER 6 FORMS OF OWNERSHIP	108
UNDIVIDED JOINT OWNERSHIP [KAM’SITT ARK-VI-PHEAK].....	110
<i>Rights and Duties of Undivided Joint Owners</i>	112
Agreements related to administration of the property	113
Right to transfer share of undivided joint property.....	113
Rights of person buying share in undivided joint property.....	114
<i>Partitioning (dividing) undivided joint ownership</i>	114
Agreements to prohibit partition of undivided joint ownership.....	115
<i>Renunciation of undivided joint ownership</i>	116
<i>Agreements among undivided joint owners</i>	117

<i>Undivided joint ownership rules apply to shared property rights other than ownership</i>	118
<i>Registration of undivided joint ownership</i>	118
INDIVISIBLE JOINT OWNERSHIP [ET-THA-SITT-PHEAP].....	119
<i>Responsibility for maintenance</i>	120
<i>Rights of use to joint-walls</i>	122
CO-OWNERSHIP [SAK-HAK-KAM’SITT].....	123
<i>Rights to the common areas</i>	128
Rules regulating common areas	128
Responsibility for the common areas	130
How the responsibilities are enforced	131
<i>Management Board for Co-owned Building</i>	132
Board makes binding decisions related to common areas	132
Managing without a management Board	133
<i>Conclusion</i>	134
CHAPTER 7 REAL RIGHTS – POSSESSION	135
REVIEW OF REAL RIGHTS	135
<i>Separation and Merger of Real Rights</i>	137
Separation of rights	138
Transfer of ownership does not terminate existing separated real rights.....	138
Merger of rights	139
POSSESSION (SITT-KAN-KAB).....	140
ACQUISITIVE POSSESSION (POKEAK)	141
<i>Obtaining Acquisitive Possession Under 1992 Land Law</i>	142
<i>Legal Requirements for Acquisitive Possession</i>	144
<i>Type of Land Subject to Acquisitive Possession</i>	145
Privately Owned Property cannot be a subject of Acquisitive Possession	147
<i>Differences between Acquisitive Possession and Ownership</i>	147
Acquisitive Possession is temporary; Ownership is permanent	148
Acquisitive possessor must maintain continuous use and occupation.....	149
<i>The Rights of an Acquisitive Possessor</i>	150
<i>Converting Acquisitive Possession to Ownership</i>	151
<i>Abandoned Land</i>	156
<i>Possession that does not comply with the Land Law requirements</i>	158
PREScriptive POSSESSION (SITT KAN-KAB TAM-ARCH-NHAR-YUK-KARL)	161
<i>Public policy issues supporting prescriptive possession</i>	162
<i>Claiming prescriptive possession</i>	164

<i>Time period for owner to challenge prescriptive possession</i>	165
<i>Effect of good faith by prescriptive possessor</i>	166
<i>Classification of land subject to prescriptive possession</i>	167
<i>Acquisition of registered land through prescriptive possession</i>	168
<i>Presumptions of certain facts</i>	169
<i>Conclusion</i>	170
CHAPTER 8 USUFRUCTUARY REAL RIGHTS	172
REVIEW OF REAL RIGHTS	172
TYPES OF USUFRUCTUARY REAL RIGHTS	173
PERPETUAL LEASE.....	174
<i>Definite and Indefinite Term Leases</i>	175
<i>Duration of Perpetual Leases</i>	179
<i>Assignment or Sublease of Perpetual Lease</i>	180
<i>Alterations to leased property by perpetual lessee</i>	181
<i>Lessee's Real Right under a Perpetual Lease</i>	183
<i>Lessee's right of use and profit of lease property</i>	184
<i>Repairs and Maintenance of Leased Property</i>	184
Property Inspection	185
<i>Lease of state properties and transfer of lease rights</i>	186
USUFRUCT	188
RIGHTS OF USE AND STAY	190
<i>Purpose of Use and Stay Rights</i>	191
EASEMENTS	194
<i>General Concepts of Easement</i>	194
<i>Creation of Easement by Contract</i>	197
<i>Easements and Prescription</i>	199
Acquisition of easement by prescription acquisition	200
Time period for prescriptive acquisition of easement.....	200
Extinction of Easement by Prescriptive Extinction	201
Time period for Prescriptive.....	202
<i>Conclusion</i>	204
CHAPTER 9 IMMOVABLE PROPERTY REAL SECURITY RIGHTS	205
<i>Review of Real Rights</i>	205
TYPES OF REAL SECURITY RIGHTS	206
<i>Immovable property real security rights prior to the Civil Code</i>	208

REAL SECURITY RIGHTS UNDER THE CIVIL CODE.....	210
<i>Registration of Real Security Rights Pertaining to Immovable Property</i>	211
PLEDGE.....	212
HYPOTHEC	214
RETENTION RIGHT	218
PREFERENTIAL RIGHTS	221
<i>General and special preferential rights</i>	222
<i>Ranking of Different Types of Preferential Rights</i>	226
<i>Effect of Preferential Rights</i>	227
<i>Conclusion</i>	229
CHAPTER 10 REGISTRATION AND TRANSFER OF IMMOVABLE PROPERTY.....	230
LAND REGISTRATION – AN OVERVIEW	230
CAMBODIA’S CADASTRAL REGISTRATION SYSTEM	232
SYSTEMATIC LAND REGISTRATION.....	235
<i>Steps in the Systematic Land Registration Process</i>	235
<i>Sporadic Land Registration</i>	240
<i>Steps in the Sporadic Land Registration Process</i>	241
<i>Complementary Land Registration</i>	246
REGISTRATION PROCEDURES FOR SPECIAL TYPES OF OWNERSHIP	247
SUBSEQUENT REGISTRATION	248
<i>Subsequent Registration of ownership transfers</i>	249
<i>Subsequent Registration of real rights other than ownership</i>	249
<i>Formalities for ownership transfer documents</i>	250
<i>Contracts for Ownership Transfers</i>	252
THE EFFECT OF REGISTRATION.....	255
<i>Cadastral Registration System versus Document Recordation System</i>	256
<i>Effect of Registration in the Land Register</i>	259
<i>Presumptions regarding registration</i>	262
DUPLICATED OR TRIPPLICATED LAND CERTIFICATE	263
<i>Conclusion</i>	265
CHAPTER 11 EXPROPRIATION OF PRIVATE PROPERTY.....	266
INTRODUCTION TO EXPROPRIATION.....	266
<i>What is meant by the term “Expropriation”?</i>	268
EXPROPRIATION LEGAL FRAMEWORK	268
<i>The Constitution</i>	269

2001 Land Law	270
Law on Expropriation.....	271
BASIC STAGES IN EXPROPRIATION PROCESS.....	273
Stage 1: Design project and obtain approval in principle to begin expropriation procedures.....	274
Stage 2: Prepare and approve the Expropriation Request.....	275
Stage 3: Issue Declaration on Expropriation Plan.....	275
Stage 4: Carry out the expropriation.....	276
PUBLIC INTEREST NATURE OF THE PROJECT.....	277
Different standards for public interest.....	277
Standards in the 2001 Land Law	277
Standards in the Law on Expropriation	278
Expropriation of Communal Land of Indigenous Minority Communities	279
Public physical infrastructure projects.....	280
Nature of project determined on case-by-case basis	281
FAIR AND JUST COMPENSATION.....	283
Who receives compensation in case of expropriation?.....	283
1. Immovable property owners and/or rights holders	285
2. Lessee.....	285
Compensation Standards.....	286
Compensation standards for tangible property	287
Replacement cost and market price	288
Compensation for other types of property	290
Compensation Options	291
Payment of Compensation in Advance	293
Responsibility for property after payment of compensation	294
Payment in case of dispute	297
COMPLAINT PROCEDURES	298
Complaint about Proposed Project Nature, Design and Scope Determination	300
Complaint about rights or interests to affected land or property	302
EXPROPRIATION UNDER INVESTMENT PROTECTION AGREEMENTS.....	302
Conclusion.....	307

ANNEXES.....	308
1. LIST OF STUDY QUESTIONS	ERROR! BOOKMARK NOT DEFINED.
2. LIST OF TABLES.....	ERROR! BOOKMARK NOT DEFINED.
3. LIST OF FIGURES.....	ERROR! BOOKMARK NOT DEFINED.

CHAPTER 1

BASIC CONCEPTS OF IMMOVABLE PROPERTY

Topics Covered
in this Chapter

What is Property (*Troip*)?

What is Ownership (*Kam'sitt*)?

Tangible versus Intangible

Immovable versus Movable

Legal Traditions Influence Concepts of Property

Civil and Common Law Concepts of Immovable Property

Real Rights

Restrictions on Real Rights

Immovable Property under the 2001 Land Law

The purpose of this chapter is to explain basic concepts that will help the reader understand the more complex topics discussed in later chapters of this book. These basic concepts are:

- Property (*Troip*, *troip sombath*)
- Ownership (*Kam'sitt*)
- Tangible and intangible property
- Immovable and movable property
- Real rights
- Categories of immovable property

In the following sections, you will learn that there may be different words used to describe these basic concepts in Khmer and English (the two languages used for this book). And things get also be confusing because in English, there are different terms used in different legal systems, depending on whether the system is based on the civil law or common law tradition. We will begin with general concepts of property (*troip*) so that readers will get a fuller understanding of this term, and move to the more specific meaning of the term under Cambodian law.

What is Property (*Troip*)?

Broadly stated, the term “property” refers to the rights of a person with respect to a thing, generally with a strong connotation of ownership of the thing. Although people often think of property as the rights of ownership of the thing, as we shall see, one person may have ownership of the thing, but other people may have other rights to the same thing – such as possession, lease and other rights we will discuss in this book.

The Constitution and laws of Cambodia, like those of other democratic countries, recognize and protect private property rights, that is, ownership of a thing as well as other rights to that thing. These laws are important because they help decide disputes and protect people from having their property taken from them by other people or by the state.

Let’s start our discussion by looking at property rights from the perspective of ownership, and what “things” can be privately owned.

For example, try and answer the simple questions below.

Study Question 1: What is property?

What sorts of things can be property (things that can be owned)?

What sorts of things can NOT property (things that cannot be owned)?

What are some of the necessary characteristics of property? In other words, what are the differences between things that can be owned and things that cannot be owned?

Why is it important to have laws about property ownership?

A good place to start when defining a word or concept is a dictionary. Because property is both a legal concept and an everyday word we will look in both ordinary language dictionaries as well as legal dictionaries.

In an ordinary dictionary, property is defined as follows:

Property: 1. That which a person owns; the possession or possessions of a particular owner. 2. Goods, land, etc considered as possessions. 3. Ownership, right of possession, enjoyment, or disposal of anything especially of something tangible. 4. Something

Ordinary
meaning of
“property”

at the disposal of a person, group of persons, or the community or public (Webster's New Universal Unabridged Dictionary, 1996).

Property: things, resources, assets etc. Khmer people use this term for things such as gold or money being owned by someone (Institut Bouddhique's Dictionnaire Cambodgien, Fifth Ed., 1967).

But in a legal dictionary, property is defined as follows:

Legal meaning
of "property"

Property: 1. The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel [personal or movable property]); the right of ownership <the institution of private property is protected from undue governmental interference>. 2. Any external thing over which the rights of possession, use and enjoyment are exercised. (Black's Law Dictionary, Seventh Edition, 1999).

Property is
anything that
can be owned

Thus, the basic characteristic of property is that it can be owned. It is this *right* of ownership that is the difference between something that is property and something that is not. If it is not possible to own something (either by law or circumstance) then that thing cannot be property.

What is Ownership (*Kam'sitt*)?

In order to understand property, one must understand "ownership."

Dictionary
meaning of
"ownership"

Again, for general guidance, we will look at a law dictionary.

Ownership: The collection of rights allowing one to use and enjoy property, including the right to convey it to others. (Black's Law Dictionary, 7th Ed. 1999).

In Cambodia, the term "ownership" has a legal definition under the 2007 Civil Code. The Civil Code definition is similar to that in the legal dictionary:

'Ownership' in
the 2007 Civil
Code

Civil Code 2007, Art 138

Ownership [kam'sitt]: the right of an owner to freely use, receive income and benefits from and dispose of the thing owned, subject to applicable laws and regulations.¹

From the above definitions and the Civil Code, we conclude that

¹ Article 138 of the Civil Code as amended by Article 81 of the Law on the Application of the Civil Code.

property is something that is possible to own, that is, the legal right to use and enjoy its fruits exclusively, and to alienate or convey to others (by way of sale for example).

Study Question 2: What things can be property?

Take a look at the list of “things” below and decide which could be considered property and which could not and give reasons for your answers.

1. *Your house*
2. *Your dog*
3. *Your child*
4. *Your liver*
5. *The air*
6. *The rain*
7. *A right to operate a KFC Restaurant under a franchise agreement*
8. *A right to publish a book that you wrote and protected by copyright*
9. *A right to sell your special fish sauce under your registered trademark*

One way to understand the concept of property is to think of things that can be owned and transferred to others, by way of sale, or some other means. Items like clothes, cars, and houses all meet this general definition, and people can sell or transfer these items for whatever terms or conditions the owner and buyer agree upon.

Things that are capable of being property (capable of being owned and transferred) may be determined by law or by circumstance. For example, in most countries, the state retains ownership of certain rivers and lakes. This means that under the law in these countries, rivers and lake cannot be property of private persons. Other “things,” such as the open air, cannot be property because it cannot be owned or transferred to others. Open air, for example, is not able to be used to the exclusion of others. So even if it were legal to own air, as a matter of practical application it is not possible to do so. The same is true for the things like rain, fire, the moon, etc.

Items of Property are those things that are capable of being transferred to others

Study Question 3: Things that are not considered property

What sorts of things could be considered as property, but are not, or should not?

Think of yourself as a lawmaker. Which of the following should be allowed to be property and which should not, and why?

Government positions

Election results

A license to run a hotel

A license to practice medicine

The Tonle Sap River

A license to fish a certain area of the Tonle Sap River

Tangible versus Intangible**Study Question 4: Tangible and Intangible Things**

Consider the following things:

1. *Your car*
2. *Your diamond ring*
3. *Your clothes*
4. *Your mobile phone*
5. *A right to operate a KFC Restaurant under a franchise agreement*
6. *A right to publish a book that you wrote and protected by copyright*
7. *A right to sell your special fish sauce under your registered trademark*

What is the significant difference between items 1-4 and items 5-7?

Tangible property is a physical thing, and intangible property is a right

The best answer to the above discussion question is probably that the first set of items are things that you can touch, smell, or see, whereas the second set are rights, not objects with a physical existence. You cannot see, smell or touch the right to operate a franchise restaurant, or the right to sell your own brand of fish sauce. Even though these things have no solid existence they are still property because they can be owned, used to the exclusion of others, and transferred.

These examples help illustrate another aspect of property; that is, some property can be touched, smelled or seen and other types of property

cannot. Another way of stating this is that property can be either *tangible* or *intangible*. Essentially, tangible items are “things” and intangible items are “rights.” Both are legally recognized as property because people can own them.

Take a look at the dictionary definitions of “tangible” and “intangible.”

Ordinary dictionary:

Ordinary meaning of “tangible” and “intangible”

Tangible: Capable of being touched, discernible by touch; material or substantial; real or actual rather than imaginary or visionary; having actual physical existence. (Webster’s New Universal Unabridged Dictionary, 1996).

Intangible: Not able to be perceived by a sense of touch; existing only in connection to something else. (Webster’s New Universal Unabridged Dictionary, 1996).

Legal dictionary:

Legal meaning of “tangible” and “intangible”

Tangible: Having or possessing physical form; capable of being touched and seen; perceptible to the touch; capable of being possessed or realized; capable of being understood by the mind. (Black’s Law Dictionary, 7th Ed. 1999).

Tangible asset: An asset that has a physical existence and is capable of being assigned a value. (Black’s Law Dictionary, 7th Ed. 1999).

Intangible: Not capable of being touched, impalpable; something that is not tangible; esp., an asset that is not corporeal, such as intellectual property. (Black’s Law Dictionary, 7th Ed. 1999).

Immovable versus Movable

The difference between movable and immovable property

Another important classification relates to the difference between immovable and movable property. This is particularly important in studying laws related to land, whether these laws follow the common law or civil law tradition. The basic difference between immovable and movable property is that immovable property is land and everything pertaining or permanently or firmly attached to that land, while movable property is anything that can be moved in space or can move itself and that does not fall under the immovable property category. It is important to understand this distinction as the rules applying to property

usually differ depending on whether the property is movable or immovable.

The distinction between these terms is a legal one, and is defined in a legal dictionary as follows:

Legal meaning
“immovable”
and “movable”
property

Immovable: Property that cannot be moved; an object so firmly attached to land that it is regarded as part of the land; land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land; can be either corporeal [tangible] such as soil and buildings, or incorporeal [intangible] such as easements. (Black’s Law Dictionary, 7th Ed. 1999).

Movable: Property that can be moved or displaced, such as personal goods; any movable or intangible thing that is subject to ownership and not classified as [immovable] property. (Black’s Law Dictionary, 7th Ed. 1999).

The 2007 Civil Code defines immovable and movable property in very similar ways. However, you will note that the Civil Code does not use the word property in these definitions, but uses the word “thing” (*vathuk*). As we shall see later, provides specific types of things in each category.

Civil Code
meaning of
immovable and
movable

Article 120, Civil Code

- (2) *An immovable [thing] comprises land or anything immovably fixed to land, such as a building or structure, crops, timber, etc.*
- (3) *A movable [thing] is any thing that is not an immovable [thing].*

Accordingly, in law the significant features of “property” are that it is something that can be owned, it can be tangible or intangible, and is classified as either movable or immovable.

In this book, we will be focusing solely on immovable property under Cambodian law.

Different countries have different social traditions, cuisines and languages. And, different countries have different legal traditions, with different concepts of immovable property based on the legal traditions

of the country. Before looking specifically at immovable property under Cambodian law, we will briefly review some aspects of different legal traditions related to property law in general and immovable property in particular.

Legal Traditions Influence Concepts of Property

Some of the major legal traditions are civil law, common law, socialist law and Sharia or Islamic Law, to name a few. While Cambodia has its own unique legal tradition, historically Cambodia's legal tradition was based on civil law. In recent years there has been some influence from common law traditions in the drafting of laws in the country, including the drafting of some provisions of the 2001 Land Law. However, the civil law tradition continues to be the dominant influence on Cambodia's legal system.

Legal concepts of property are different under legal traditions

The concepts of property law under the civil law tradition are different from property law concepts under the common law tradition. Therefore, it is very important to understand these basic differences as they help in understanding Cambodia's unique property law with its own cultural and legal traditions.

The civil law tradition is older than the common law tradition, dating back to early Roman law (450 B.C.). By contrast, common law was developed by the Anglo Saxons during the Middle Ages. The generally accepted date of the beginning of the common law tradition is 1066.² Legal traditions have spread through various means, including colonial expansion, trade and decisions by various countries to modernize their legal systems.

Civil law is older than common law

Civil law is more influential than common law

The civil law tradition has spread more widely and is more influential than common law. Civil law tradition forms the basis for the legal systems in Western Europe, Central and South America and parts of Asia and Africa. Civil law forms the basis for international

² John Henry Merryman, David S. Clark & John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia, Cases and Materials* 4 (The Michie Company 1994) [after this, Merryman, Clark & Haley *The Civil Law Tradition: Cases and Materials*].

organizations and international law. Cambodia follows the civil law tradition, which was introduced during the French Protectorate period.

By contrast, the common law tradition is much more limited, and is followed in England, the United States, most of Canada, Australia, New Zealand and other Commonwealth countries.³

Legal system
versus
legal tradition

Legal traditions are not the same as legal systems. A legal system is “an operating set of legal institutions, procedures, and rules” that a particular country adopts to govern itself.⁴ Legal traditions, on the other hand, are “deeply rooted and historically conditioned attitudes about the nature of law” that give cultural context to the legal system.⁵

Each country's
legal system is
unique based
on its own
history and
culture

In addition to the influences of a particular legal tradition, each country adds its own cultural traditions that influence its legal system. In this way, each country has its own unique legal system based on the various cultural and legal influences experienced by the country. Thus, while Cambodia follows the civil law tradition, Cambodia’s history and cultural traditions have contributed to give Cambodia’s property law very distinct characteristics that make it different from the property law of other civil law countries. We will discuss the historical perspective of Cambodia’s immovable property law in more detail in the next chapter, but first, we will review the general civil and common law concepts of property.

Civil and Common Law Concepts of Immovable Property

Of all the areas of private law that make up a country’s legal system, “property [that is, immovable property] is one of the most dramatically different between the civil law and common law traditions.”⁶

³ John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 1-5 (2d ed., Stanford University Press 1984) [after this, Merryman, *The Civil Law Tradition: An Introduction*].

⁴ Merryman, *The Civil Law Tradition: An Introduction* at 1.

⁵ Merryman, Clark & Haley *The Civil Law Tradition: Cases and Materials* at 3-4.

⁶ Merryman, Clark & Haley *The Civil Law Tradition: Cases and Materials* at 1191.

Understanding some of the major distinctions will help the Cambodian reader, as well as legal practitioners from common law legal systems better understand Cambodian land law. The next few paragraphs, indicated by *italics*, are based on sections from a comparative law textbook, and provide a simple explanation of these distinctions.⁷

Ownership is
indivisible under
civil law

The land law of civil law jurisdictions is based firmly on the Roman concept of ownership that strongly resists fragmentation. If you say "I own this land," it implies that others do not. For if others own the land, how can it be yours? When the land is transferred, it is transferred totally or not at all. Legal ownership is exclusive, single and indivisible. Only one person can own the same thing at the same time.

Of course, there are some exceptions to this basic rule to meet the demands of society. For example, more than one person can own the land in common or through joint ownership. . . . But in theory, ownership is indivisible in function as well as time.

Common law is
concerned with
rights and
interests in land

The contrast between the civil law theory of ownership and English theory is very great. In England, the ownership of all the land belonged to the King. The distribution and retention of land was carried out under the theory of tenure. Most of those who actually occupied and used the land in England were not the owners of the land, but the holders of rights derived from the king or from the king's tenants. The concept of ownership never came into play. Rather, the major concern was with tenure and the rights and duties of tenants.

A simple example will help illustrate the difference between the Anglo-American law, which is concerned with "rights and interests" in land, and Roman law, which recognizes indivisible "ownership."

Civil Law =
Box of
Ownership

The Roman (civil) concept of ownership can be thought of as a box, with the word "ownership" written on it. Whoever has the box is the "owner." In the case of a complete, unencumbered ownership, the box contains certain rights, including use and occupancy, fruits or income, and the power of alienation. The owner can, however, open the box and remove one or more of the rights and transfer them to others. But as long as he keeps the box, he still has the ownership, even if the box is empty.

⁷ The sections indicated by *italics* are paraphrased from Merryman, Clark & Haley *The Civil Law Tradition: Cases and Materials* at 1191-1204.

Under a country's civil code, which is typical in most civil law jurisdictions, there are usually a limited number of rights that an owner can grant to others with respect to a particular parcel of land. We shall explore those rights later, but for the present, it is important to remember that the holders of these rights are not considered "owners," as there can only be one owner of the land.

Common Law =
Bundle of
Rights

The comparison with Anglo-American law of property is simple. There is no box. There are merely various sets of legal interests. One who has the fee simple absolute⁸ has the largest possible bundle of the sets of legal interests. When the owner conveys one or more of them to another person, a part of the owner's bundle is gone.

Under the common law tradition, the king was the "owner" of the land itself, but the king granted rights and interests to the land, which were called "estates." The persons who owned the estates were called tenants. Estates could be bought, sold, transferred, sub divided or otherwise alienated. Under the common law tradition, several different persons often had different interests to the same parcel of land at the same time. And the people who had these interests frequently transferred them independent of the other persons who held their interests. Of course, the right being transferred was subject to the rights of other persons who had rights to the same parcel of land.

Owner of
interests under
common law

What developed from this practice was a system of complicated estates with different types of tenancies, fees, remainders and fee tails that law students in common law jurisdictions spend many sleepless nights trying to understand. Even the common law terminology related to land ownership focuses more on the "right and interests" than "ownership" of the land.⁹ People who own rights and interests in land often consider

⁸ Fee simple absolute is an inheritable interest in land, constituting the maximum legal ownership. *Black's Law Dictionary* 629 (Bryan A. Garner ed., 7th ed., West 1999).

⁹ In many USA jurisdictions, the term "tenancy" is used to refer people who occupy land as renters, as well as to owners of the land. Certain types of owners of land are referred to as tenants in common (when 2 or more people own a parcel of land); and in some states, married couples can own land as tenants by the entirety (where the surviving spouse inherits the interests of the deceased spouse). See the definitions of the different types of "tenancy." *Black's Law Dictionary* 1477-1479 (Bryan A. Garner ed., 7th ed., West 1999).

themselves “owners” of those rights, which can be very confusing for some people from civil law traditions. So in common law jurisdictions, the question needs to be asked: what exactly does the person own? The total bundle (fee simple absolute) or some other interest to that land?

In summary, the terminology under the civil law tradition is much clearer. Land ownership is indivisible – there is only one “owner” of a particular parcel of land. However, the owner can, and often does, grant others rights to this land, thus limiting the owner’s rights to the land.

Only one owner
of land under
civil law
tradition

While these persons are not “owners,” they do have rights attached to the land that must be recognized by the owners and all other persons.

Since this book is about Cambodian law, we will use the civil law terminology and the concept that there is only one owner of a parcel of land, but that other persons can have rights and interests attached to that land. Next, we will discuss the rights and interests that may be attached to a particular parcel of land.

Real Rights

If a person becomes the “owner” of land, what actual rights does that person have to the land? As noted earlier, the owner has the right (i) to freely use, (ii) receive income and benefits from, and (iii) dispose of the thing owned.¹⁰ But is this true in practice for the owner of land? Does the owner always have the rights to freely use the land, or are there times when others have rights to that land that limit the owner’s rights?

What are real
rights?

There are two terms that are often used to describe private rights related to land. The Civil Code uses the term “real rights.” The Land Law describes them as rights “*in rem*.” Both terms are based on Latin terms that refer to rights attached to a specific thing and the rights of people with respect to that thing.¹¹ In most cases, real rights and rights *in rem* can be used interchangeably, but to keep things simple, we will use only

¹⁰ Civil Code 2007, Article 138.

¹¹ In comparison, the law recognizes personal rights, or rights “*in personam*,” which refer to private rights attached to a natural or legal person. Typical personal rights are a contract, tort or license.

one term, real rights.

Real rights have value – in many cases they can be bought and sold, or otherwise transferred by the persons who hold these rights. Real rights can refer to any type of property or thing, but most often the term is used in relation to immovable property. Since this book is primarily concerned with land rights, we will limit our discussion to real rights with respect to immovable property.

Book Three of the Civil Code is about real rights. As provided in Article 131, real rights are statutory. This means that, as a general rule, the only real rights recognized under Cambodian law are those listed in the Civil Code or a special law.

The classes of real rights listed in Article 132 of the 2007 Civil Code are:

1. Ownership
2. Possession
3. Usufructuary real rights
4. Security rights

Real rights are statutory and can be asserted against all persons

Ownership is the strongest of all the real rights; however, there are other real rights that the owner can grant or create in others that limit the extent of the owner's rights to the property. There are also sub-categories of each of these real rights. Later chapters of this book explain these real rights in more detail.

The important point is that in the context of immovable property, (i) real rights are statutory (meaning they are recognized by law), (ii) real rights attach to a specific parcel of land and (iii) these rights can be asserted against all persons.

A simple study question may help in understanding the concept of real rights:

Study Question 5: Real Rights

Ms. Sophy owns a parcel of land, and wants to borrow \$50,000 to build a house on her land. In order to borrow money from a bank, she grants the bank a security interest in her immovable property (that is, the land and house). The security interest gives the bank the right to sell Sophy's land if she fails to repay her loan. The security interest was made in accordance with relevant law.

Later, Ms. Sophy sells her land to Mr. Sok, for \$100,000. She still owes the bank \$40,000, but Ms. Sophy does not pay off the debt to the bank when she sells the land. Later, when neither Ms. Sophy nor Mr. Sok pays off the loan to the bank, the bank seeks to force Mr. Sok to sell the land and house to pay off the loan. Mr. Sok says the bank needs to go find Ms. Sophy because the bank loaned the money to Ms Sophy, not him.

Who is correct, the bank or Mr. Sok?

Let's change the facts just a bit: Rather than going to the bank, Ms. Sophy borrowed money from her friend Ms. Pania, and promised Ms. Pania to repay the debt when she sold her immovable property. But Ms. Sophy did not grant Ms. Pania a security interest to the immovable property because they are very close friends and trust each other. Later, when Ms. Sophy sells her property, but does not repay her loan to Ms. Pania, can Ms. Pania force Mr. Sok to repay the loan?

Obviously, all the participants in the first example have to follow certain requirements to protect their rights. (Later chapters will explain these requirements.) But this example helps explain the concept of real rights in very simple terms.

In the first example, the bank's security interest is a real right and when created according to law, is attached to the land – not to Ms. Sophy. The bank retains the security interest in the immovable property, and the bank can assert the security interest against the new owner if the loan is not repaid. That is, the bank can force Mr. Sok to sell the immovable

property if Ms. Sophy's loan is not repaid.

In the second example, Ms. Pania does not have a security interest in the immovable property – thus, she has no real right. The promise to repay is not attached to the land, but only to the person – in this case, Ms. Sophy. This second example shows the basic difference between a real right and a personal right. Which type would you want if you lend someone a large sum of money?

Remember, a real right attaches to the immovable property and can be asserted against any person, including a new owner.

Restrictions on Real Rights

So far we have discussed mostly property concepts that relate to a private person. In fact, the laws of Cambodia (such as the Civil Code and the Land Law) are designed specifically to protect private ownership. There are many social and economic reasons for a country to protect private property rights so that citizens can feel secure and can acquire different types of movable and immovable property to improve their lives.

Need of the state to restrict real rights in certain circumstances

However, there are situations where a government might (and perhaps must) regulate how certain property is transferred and controlled by limiting ownership or real rights to certain specifically designated property. For example, a government might want to protect natural sites from development and pollution despite the possible profits that would flow from exploitation of the land. Therefore, the government might place natural sites under state ownership and only allow restricted or specified use of the sites (such as developing public facilities for tourists to visit the site, or granting a conservation concession), but not the full set of rights associated with land ownership.

Even with private property the government may restrict use, for example, by permitting certain uses (such as farming or residential), and prohibiting other uses (such as commercial or industrial activities).

Immovable Property under the 2001 Land Law

Now that we have an understanding of the general legal concepts related to immovable property, we can move on to the main topic of this book, the Land Law. As discussed earlier, the Civil Code of 2007 is a collection of general laws that define the broad range of private rights recognized under Cambodian law – including rights specifically related to immovable property. The 2001 Land Law is concerned with one specific type of property, that is, immovable property. We will begin our discussion of immovable property under the 2001 Land Law by first looking at the Civil Code.

Immovable Things under the Civil Code

Book Three of the 2007 Civil Code sets out the general rules related to “real rights.” In our discussion so far, we have used the term “property” in its broad sense to refer to any thing that can be owned. But as we focus specifically on the 2001 Land Law and the 2007 Civil Code, we will begin to use the exact terms used in these laws, which use “tangible thing,” “intangible thing” and “movable thing” and “immovable thing.”¹² In English, we would generally substitute the word “property” for “thing,” but any of these terms would be correct and would be generally understood.

Things and
components of
things

The general provisions at the beginning of Book Three of the Civil Code state that there are two types of things – movable things and immovable things. A thing can be comprised of components. Under Article 121 a component of a thing cannot be separated from the thing if separating the component would destroy the thing or change its essential nature.

If you own a thing comprised of components, one of your rights as owner of the thing is that you can separate the components, change the thing – even destroy it. However, if the thing is destroyed, it is no longer that thing – but something else.

¹² The same is true for the old Civil Code and the 1992 Land Law.

For example, a car has wheels, doors, windows, seats and all the other “components” essential to make a car. The car owner may take the wheels and doors off, and take out the windows and the seats and sell each of these items. But if the car owner sells these items, the owner no longer has a “car;” the owner has car parts. And the people who are buying these separated components are not buying a car, but are only buying parts of a car. The practical result of Article 121 of the Civil Code is this – if you tell someone you own a car, it has to be the car with all its essential components.

This example helps understand the rules about the components of land, for which there is a specific rule.

Article 122 of the Civil Code: (Component of a land; principle rule)

Things attached to land or comprising component of land, particularly buildings or structures constructed on land that cannot be moved to another place, or seeds planted in the ground, crops in the fields or plants growing on the land, are components of the land as long as they are not¹³ separated from the land, and may not be the subject of independent rights except as otherwise provided.

Components of
land

So, under this rule, if a parcel of land has a house constructed on it, the house is a component of the land, and unless provided by law, the house cannot be the subject of rights separate from those that apply to the land. For example, one person cannot be the owner of the land while another person is the owner of the house built on the land – unless, of course, this is permitted by another rule. (These rules are discussed in more detail in later chapters.)

¹³ The official Khmer Article 122 states that seeds, crops and plants “are components of the land as long as they are not separated from the land.” This is consistent with the general rules about components in articles 121 and 124. Compare this with Section 94 of the German Civil Code: “(1) The essential parts of a plot of land include the things firmly attached to the land, in particular buildings, and the produce of the plot of land, as long as it is connected with the land. Seed becomes an essential part of the plot of land when it is sown, and a plant when it is planted.” See also Article 520 of the French Civil Code: “Harvests standing by roots and the fruit of trees not yet gathered are also immovables. As soon as crops are cut and the fruit separated, even though not removed, they are movables. Where only a part of a harvest is cut, this part alone is movable.”

Categories of Immovable Property under the 2001 Land Law

Article 2 of the 2001 Land Law defines three categories of immovable property:

Definition of
immovable
property in the
Land Law

- **Immovable properties by nature** means all natural grounds such as forest land, cleared land, land that is cultivated, fallow or uncultivated, land submerged by stagnant or running waters and constructions, or improvements firmly affixed to a specific place created by man and not likely to be moved;
- **Immovable property by purpose** means things fixed to the ground or incorporated into the constructions and which cannot be separated there from without damaging them or altering them, such as trees, decorative attachments, as well.
- **Immovable property by law** means all rights *in rem* (or real rights) over immovable and movable properties that are defined by law as immovable property.¹⁴

Immovable Property by Nature

This includes things like land, cultivated or uncultivated fields, or buildings *firmly affixed* to a place. If the building is a permanent structure, such as a house with a concrete foundation or made with bricks, it is considered to be attached to the land, and would be transferred with the land in the event of a sale. (There may be exceptions to this rule where the parties specifically agree to treat the building and land as separate legal objects; this will be addressed later.)

Buildings are
considered as
part of the land

What is legally important is the *permanence* of the land or building. The more permanent the item, the more likely it is that the building or structure can be defined as immovable property by nature, and hence fall under the 2001 Land Law.

¹⁴ Although Article 2 of the 2001 Land Law has not been repealed, the meaning of this point is not clear under the Civil Code. See Art. 126 of the Civil Code and the discussion on this point below.

Immovable Property by Purpose

This refers to an area of law commonly referred as the law of *fixtures*, which covers things that were once movable property and could be moved from a place, but have become inseparable parts of the land or structure through the way they are used or attached to the structure. The 1992 Land Law has a slightly different definition but with the same effect. Article 8 of the 1992 Land Law defined fixture as:

Fixtures
(attachments to
buildings/land)

Article 8 1992 Land Law

[O]bjects that enter into combination with immovable property to become immovable property, and if they are separated from the immovable property to become movable property, it would destroy the usefulness and the beauty of the immovable property which they used to support.

What is important in determining if an item is immovable property by purpose is whether the item is somehow affixed or attached to the land or structure so that owners and buyers would normally expect the property to transfer with the items intact.

Example of
fixtures

For example, although it is technically possible for someone to sell a house and remove the windows and doors or sell a piece of land and take away its trees, such removal would not be legal (without a prior agreement between the parties) because a normal buyer would assume these items are included and the usefulness of the building or land would be significantly reduced if these items were not included. In addition, fixtures like fans or lights installed directly into a ceiling would be considered as part of the structure and immovable by purpose, while a portable table fan or lamp that is temporarily connected to an electrical outlet would not be immovable property by purpose because it is not firmly affixed or attached to the land or building.

Immovable Property by Law

Article 131 of the Civil Code states clearly that “Real rights *may be created in form and content recognized by this Code or special law*

only.”¹⁵ The real rights recognized under the Civil Code are ownership, possession, usufructuary real rights, and security rights.

Rights in
immovable
property are
themselves
immovable
property

Real rights are deemed immovable property because they are so connected to the immovable thing that they are in fact a part of it. If the immovable thing in question is destroyed, then the *real right* in question could no longer exist independently of the destroyed property. For example, a usufructuary right to live in a house could not exist if the house no longer existed. The same is true for property secured by a hypothec (security interest, mortgage). If the property secured by the hypothec is destroyed (for example, a privately owned island sank) then the hypothec holder’s right to force a sale of the property to recover the debt would no longer exist (although the debt itself may continue to exist).

Because certain rights cannot be separated from the immovable thing, the law classifies the *right* as immovable property and such rights are then covered by the immovable property rules.

Personal thing
classified as
immovable
property by law

Article 2 of the 2001 Land Law seems to indicate that it is also possible for items of movable property to be classified as immovable property by law. This would change the status of an item of property from movable to immovable without changing the substance of the item itself.

As an example, look at Study Question below, where the 1992 Land Law included farm implements and farm animals as immovable property when farmland was sold.

Study Question 6: Immovable Property by Law

One of the significant changes from the 1992 Land Law is in defining what is classified as immovable property. The 1992 Land Law was primarily designed to deal with agricultural land and people’s possessory rights to agricultural land and the means required for cultivate the land. Accordingly, many items that would not ordinarily meet the definition of immovable property were

¹⁵ This quote is the literal translation Article 131. The unofficial English translations states: “No real right may be created except as permitted by this Code or under special law.”

classified as immovable property under Article 8 of the 1992 Land Law – items such as farming equipment and farm animals. As such, upon “sale” of the farmland, the associated equipment and farm animals would also transfer to the new owner.

Under the 2001 Land Law, farm equipment and farm animals are not listed as immovable property. Does this mean that under the 2001 law, equipment and animals used on a farm would or would not be transferred when the farm land is sold to another person? Does Article 126 of the Civil Code affect your answer?

The rationale for this rule (which is based on French law) is that someone buying a farm needs to have equipment and animals to carry out the farming enterprise. These same items would not be considered immovable property if the land is residential land. However, it is not clear whether this concept has any relevance under current Cambodian law, specifically under Article 126 of the Civil Code.

Study Question 7: Distinguishing immovable property from movable property

Mr. Sok owns a small parcel of land where he lives in a house with a concrete foundation and brick wall. He agrees to sell his land to Mr. Ran.

Mr. Sok is preparing to move to another place. Can he:

1. *Move the house to another piece of land, leaving only the surrounding land for Mr. Ran?*
2. *Leave the house but remove the windows, doors, and other items of value?*
3. *Leave the house but remove all of the trees and crops on the land?*
4. *Remove the beds, chairs, dishes, pots, pans, and other personal items?*
5. *Give a friend permission to use part of the land to graze his cattle for six months after Mr. Ran becomes the owner of the house and surrounding lands?*
6. *Give a friend permission to use the land before Mr. Ran becomes owner with continued use after Mr. Ran becomes owner?*

In discussing this question, consider the following questions:

- Are the items attached to the building or the land?
- Would a buyer expect that the items would be included in a sale?

- How would a normal owner use the items?
- Would the removal of the items greatly affect the value of the building or how the building can be used if the items are removed?
- How would it affect the rights of the new property owner?

Conclusion

This ends our look at the general concepts of property. For the rest of the book we will be focusing specifically on immovable property and will explore in much more detail the meaning of immovable property under Cambodian law and the rules that will apply to immovable property, especially under the 2001 Land Law and the 2007 Civil Code.

CHAPTER 2

HISTORICAL VIEW OF CAMBODIA'S LAND LAW

Ancient Cambodian Law
The French Period
Cambodian Independence
Democratic Kampuchea
The PRK Era
The SOC Era
The Kingdom of Cambodia

Topics Covered
in this Chapter

In this chapter, we will look at how the rules pertaining to *immovable* property rights have changed in Cambodia over the years. Analysis of the history of a particular area of the law is used in the legal field as an aid to interpret the different provisions of laws. Often, this historical analysis can help explain specific provisions that are unclear or ambiguous. To do this analysis effectively, it is useful to first think about what laws are and the role they play in a society.

Laws govern
relationships in
a society

Laws are the expressions of principles that govern the relationships among people living in society. Generally, by enacting laws, a State provides answers to social and economic needs of a particular society at a particular point in time.

Laws change as
society changes

A society's social and economic needs change over the years resulting in legal concepts that may have been satisfactory in the past but no longer meet current needs. Hence, laws have to be modified and adapted to meet these new needs.

For example, the population of Cambodia has increased from approximately 1,500,000 people in 1874,¹ to 4,600,000 in 1957,² to 11,700,000 in 1998,³ and to 13,400,000 in 2008⁴. It is reasonable to conclude that there is a greater need for access to land than there was in previous times. Given that farming is the principal economic activity of more than 80% of the population, the increased need for access to land is one of the circumstances that influence the evolution of the laws governing immovable property rights in Cambodia.

We will begin by looking at the laws that were in force between 1621 and 1877.⁵

Ancient Cambodian Law

Under ancient Cambodian law,⁶ the King was the owner of all the land in the Kingdom. However, the law recognized and protected people's right of possession – specifically “occupation and use” possession. During this period, Cambodian society was divided into different social classes. In addition to the Royal Family, the different social classes included Kshatryas (warriors), members of different religious groups (Brahmanism, Buddhism, Taoism), free men, and slaves.⁷ The division of the social classes most certainly resulted in persons having different rights depending on the specific class to which they belonged. Therefore, we cannot assume that all persons were entitled to this right to occupation and use possession; it may have existed only for members of certain social classes.

Right of
occupation and
use possession

¹ Kleinpeter, Roger, *Le Problème foncier au Cambodge*, Thèse pour le Doctorat, Paris, Les Éditions Domat-Montchrestien F. Loviton & Cie, 1937, p. 40 -41.

² Delvert, Jean, *Le paysan cambodgien*, Paris, Bouton & Co, 1961, p. 14.

³ National Institute of Statistics, National Census of 1998.

⁴ National Institute of Statistics, National Census of 2008.

⁵ LeClere, Adhémar, *Les Codes Cambodgiens*, Paris, 1898, 2 tomes. These volumes contain fifty laws of this era that have been translated in French. Attempts to locate the Khmer texts of these laws have been unsuccessful.

⁶ For a detailed analysis see: Kleinpeter, *Le Problème foncier au Cambodge*, *supra*.

⁷ Imbert, Jean, *Histoire des Institutions Khmères*, Annales de la Faculté de droit de Phnom Penh, Vol II, Phnom Penh, 1961, p. 35 to 38.

Clarification of meaning of "possession"	In referring to possession under ancient Cambodian law, we use the term "occupation and use" possession to distinguish it from other types of possession rights created by later laws. The ancient right of "occupation and use" possession did not lead to the acquisition of land ownership under any conditions. This point distinguishes this ancient right from "extraordinary acquisitive" possession (<i>pokeak</i>), which refers to possession with the intent to acquire ownership under the conditions provided by the 2001 Land Law.
Land needed to be worked to retain occupation and use possession	For the people who enjoyed the ancient right of occupation and use possession, the right was recognized when the land was cultivated (including clearing the land and building a house or a fence) in a continuous and public manner. ⁸
Occupation and use Possession could be transferred	Once acquired, occupation and use possession could be transferred by succession or will and could be the subject matter of a sale, loan or rental agreement. Apart from exceptional circumstances, this right could also be lost when the land was abandoned for a period of longer than three consecutive years. In case of abandonment, the new occupant's right was recognized and the former occupant was not entitled to reclaim the land. ⁹
No need to declare occupation and use rights	It appears that a person did not have to file a declaration with the local authority in order to have his occupation and use possession of the land recognized. ¹⁰ However, a possession declaration was required as a means of enforcing payment of taxes to the King.
Taxes were	Under ancient Cambodian law, land taxes as we know them today did not exist. Instead, taxes, in the form of royalties, were due on the crops

⁸ LeClere, *Les Codes Cambodgiens*, T. II, p. 617.

⁹ LeClere, *Les Codes Cambodgiens*, T. II, Kram Pohulla Tep, art. 02, p. 407.

¹⁰ Kleinpeter, *Le Problème foncier au Cambodge, supra*, pp 50, 91 to 97.

imposed on the
crops produced
not the land
itself

produced during the year.¹¹ Taxation did not attach to land but attached to the crop, and therefore to the farming activity.¹²

During harvesting, the “Achnha Luong,” or Royal Commissioners, went to the provinces. In each village, a list of the farmers and businesspersons was provided to them. With this list, the Royal Commissioners appraised the crop found at each farmer’s place and registered the taxes owed in a book.

Therefore, under ancient Cambodian law, declaration to the local authority was necessary for the collection of taxes by the State, but was not required for the recognition of the occupant’s possession right to land.

The French Period

French
Protectorate
Period (1863-
1953)

The Convention of 1884 between the Kingdom of Cambodia and France effectively resulted in the delegation of the administrative power of the State to the French. King Sisowath, who ascended to the throne in 1906, maintained a very close relationship with the French throughout his reign.

The Cambodian
Civil Code of
1920

It was under these circumstances that in 1920, the Civil Code of Cambodia was promulgated. The provisions of the Code relating to real rights were, for the most part, borrowed from the French Civil Code, and fundamentally altered the ancient Cambodian law of property. The 1920 Civil Code distinguished between movable and immovable property, recognized the right of ownership, created a new right of acquisitive possession, and recognized other real rights, such as usufruct, use and stay, easement, pledge and hypothec.¹³

¹¹ A royalty is a share in the crops or profits from real property reserved by the person who granted the right to the property.

¹² Kleinpeter, *Le Problème foncier au Cambodge, supra*, at 91 to 97.

¹³ See Article 635 of the Civil Code, 1967 (which is the latest version of the 1920 Civil Code as amended over the years).

Private ownership of land recognized by law

The King no longer owned all the land in the Kingdom. Private ownership was defined as the right to enjoy and dispose of property. This right was absolute and exclusive. However, it had to be exercised within the limits and conditions imposed by law.¹⁴ Article 7 of the Constitution of 1947 recognized this absolute and exclusive right of ownership.

Possession' recognized under the 1920 Civil Code, but with different legal effect

The 1920 Code continued to recognize a right of possession, known as acquisitive possession (*pokeak*), which as noted above, was substantively different from the previous “occupation and use” possession. That is, “occupation and use” possession under ancient Cambodian law could never lead to ownership; whereas acquisitive possession was for the express purpose of acquiring ownership. As a result of the 1920 Civil Code, persons who had lawful “occupation and use” possession under ancient Cambodian law had the right to acquisitive possession (*pokeak*), and through the process outlined in the Code, could ultimately acquire full ownership of their land.¹⁵

The first Cadastral system

With the adoption of the Civil Code of 1920, an attempt was made to establish a centralized Cadastral Conservation system¹⁶ throughout the country. The aim of the system was a written immovable property register, called the “Immatriculation Register,”¹⁷ that would constitute evidence of the various real rights. However, this aim was never attained in that the Cadastral Conservation was not implemented all over the country.¹⁸ In places where the Conservation did not exist, “ownership” as such could not be registered; however, persons who having the right of possession (*pokeak*) recorded their transactions at the

¹⁴ Art. 644 of the Civil Code of 1920; Art. 644 of Revised Civil Code, 1951. Note that the notion of public property creates such restrictions. Public property of the State cannot be alienated or transferred to another person through any act of possession.

¹⁵ For rules on this kind of possession (*pokeak*) see Articles 708-725 of the Code, 1967.

¹⁶ The first attempt to establish a land register was made in 1884. For a detailed analysis of the development of the land registration system during this period, see Kleinpeter, *supra*, pp 127 and the following pages.

¹⁷ See Articles 714, 720, 723 and 724 of the Civil Code, 1967.

¹⁸ Imbert, *supra*, Vol II, pp 181, 182; and Kleinpeter, *supra*.

commune – or *khum* – level.

Cambodian Independence

Independence
(1953 -1975)

Under the leadership of King Norodom Sihanouk, Cambodia became independent in 1953. The Romano-Germanic legal system of Cambodia, which had been in place for more than 30 years following the adoption of the Civil Code in 1920, continued to develop. The provisions of the 1920 Civil Code relating to property remained applicable throughout this period.¹⁹

Democratic Kampuchea

Democratic
Kampuchea
(1975-1979)

Private
ownership of
land prohibited

The land regime changed dramatically from 1975 to 1979. With regard to this period of Cambodian history, it is only necessary to mention that property law was non-existent and that records were destroyed. Private ownership of land was prohibited. Immovable property, along with all other important general means of production, was the “collective property of the people’s State and the common property of the people’s collectives.”²⁰

The PRK Era

People’s
Republic of
Kampuchea
(1979-1989)

During most of this period, individual property rights were not recognized by law. However, reform occurred in 1989 (shortly before the adoption of the new Constitution in 1993) through the adoption of a *Sub-decree on the granting of house ownership to the citizens of Kampuchea*, Sub-Decree No. 25, dated April 22, 1989.

Ownership of

Article 1 of Sub-decree 25 restates the collective nature of ownership of residential land. One significant change was made by Article 2, which

¹⁹ During this period, Cambodia went through different government regimes that affected leadership in the country, but not the basic laws under discussion here. (These were: the first Kingdom of Cambodia under then King Norodom Sihanouk, who subsequently abdicated in favor of his father to lead the Sangkum Reastr Niyum regime, and the Khmer Republic under General Lon Nol.)

²⁰ Constitution of Democratic Kampuchea, Article 2.

houses allowed provided that certificates of ownership titles on houses could be issued to individuals; and that such ownership titles could be legally transferred by will or sold.

Later on that year, the right of ownership of residential land was recognized through the adoption of the *Instruction on Implementation of Land Use and Management Policy*, No. 03, SNN of June 3, 1989.²¹ The criteria for granting ownership were not expressed in the Instruction.

Possession rights allowed for cultivation land With respect to rice fields and farm land, Article 10 of the Circular recognized the right of acquisitive possession (*pokeak*) of the household that was managing and using the land. Instruction No. 03 reaffirmed the principle that possession is essentially linked to the occupation and use of the land.

Acquisitive Possession limited to 5 HA This right of acquisitive possession was recognized with respect to rice fields and farm lands (*dei sre* and *dei chomkar*) of no more than 5 hectares. With respect to cultivation land (*dei dam dosh*) greater than 5 hectares, the Instruction provides for land occupation and use granted by the State in the form of a concession through the Ministry of Agriculture.

Possession and ownership rights needed to be registered Finally we should mention that the Instruction also attempted to put in place a system for the immovable property declaration and registration of ownership and possession (*pokeak*).

The SOC Era

The State of Cambodia (1989 – 1993) On October 13, 1992, the National Assembly enacted the *1992 Land Law*. The definition of ownership under Article 19 of the 1992 Land Law restated the legal principles of the Civil Code of 1920.²² That is, ownership was defined as the right to enjoy and dispose of property.

²¹ The land use and management policy allows local and competent authorities to grant up to 2,000 square meters of residential land to each household that submitted a proper request for such land.

²² Article 19 of 1992 Land Law is substantially identical to Article 644 of the 1920 Civil Code.

Land Law of 1992 This right was absolute and exclusive but had to be exercised within the limits and conditions imposed by law.

According to Article 10 of the 1992 Land Law only the following rights to immovable property were recognized by law:

- | | |
|---|--|
| Rights to immovable property recognized under the 1992 Land Law | <ol style="list-style-type: none"> 1. Ownership 2. Acquisitive possession (<i>pokeak</i>) 3. Authorization to cultivate land 4. Concession 5. Usufruct 6. Right of use and of stay 7. Easement 8. Secured loan on immovable property (<i>kar-ban-cham ak-chol-nak-vathuk</i>) 9. Hypothec |
|---|--|

This list of rights is exclusive – no other immovable property rights were recognized by law. With two exceptions, this list of rights contains substantially the same as real rights recognized under Article 635 of the previous Civil Code.²³

Only residential land could be privately owned The 1992 Land law marked the return – after more than 10 years – of private ownership to immovable property under Cambodian law. However, Article 19 of the 1992 Land Law specified that only residential land could be the subject of ownership and that a specific law would regulate land located in urban areas. The law on urban areas was adopted as part of the 1994 Law on Land Management, Urban Planning and Construction.²⁴

Ownership In general, the 1992 Land Law restated legal principles that were found

²³ The two new rights – authorization to cultivate land and concession – were not specifically explained in the 1992 law, but were to be determined by a separate law.

²⁴ Article 12 of the 1994 Law on Land Management lists a number of areas with public use nature and prohibits construction in those areas by private individuals or public entities. Some government institutions have expressed the view that those types of land areas cannot be the subject of lawful possession as they are considered state public properties, in addition to the properties listed in the Land Law.

acquisition in the previous Cambodian Civil Codes. The 1992 Land Law recognized that ownership could be acquired through succession, will, contract of sale, by gift, and by acquisitive possession (*pokeak*).

Acquisitive possession (*pokeak*) was recognized under Part II (Articles 61-76) of the 1992 Land Law. In order to become the owner of land through acquisitive possession (*pokeak*), a possessor (*pokee*) had to show that his or her possession was “lawful” in that it met the specific requirements outlined in the law and the land was not state public land. In order to convert acquisitive possession into ownership, the possessor make a declaration to applicable Sangkat Khum (Commune) or Sangkat, and regularly pay applicable land taxes or rental fees.²⁵

Several factors affected the implementation of the changes made by the 1992 Land Law. First, ownership title certificates were rarely issued due to the lack of technical, financial and human resources to carry out proper cadastral survey.

Problems with
the 1992 Land
Law on
possession

Secondly, it was difficult to make everyone aware of their legal obligation to register their land possession and regularly pay land taxes or rental fees. And if the people were not aware of these requirements and therefore did not comply, legally they could not claim ownership of land based on their possession.

This issue relating to possession registration and payment of taxes or fees is only one example of the problems raised by 1992 Land Law, leading to proposals for changes. Changes were subsequently made with the enactment of the Land Law of 2001, discussed below.

The Kingdom of Cambodia

The Kingdom of
Cambodia
(1993 –Present)

In 1993 with the promulgation of a new Constitution, Cambodia became a constitutional monarchy, renamed the Kingdom of Cambodia and took on a new form of democratic government. Article 44 of the

²⁵ Each of these elements is discussed in detail in Chapter 7.

Constitution recognizes the right of private ownership (*kam'sitt*), which, as we learned in the previous chapter, refers to ownership of movable and immovable property. However, only Khmer legal entities and citizens can own land (*dei*).

The 2001 Land Law

The Land Law of 2001

Following the promulgation of the 1993 Constitution, work began to draft a new land law that subsequently was enacted as the 2001 Land Law. The process of drafting the new law took place over several years, as outlined below:

- The history of the drafting of the 2001 Land Law
1. October 1998: The first version of the draft law, based largely on the 1992 Land Law, was presented to the Council of Ministers, where it met considerable opposition.
 2. April 2000: A second version of the draft law was prepared in French (April 2000 Draft). No written commentaries or explanatory notes on this draft are available.
 3. The April 2000 Draft was submitted to the Council of Jurists.²⁶ After analyzing the draft and consulting with NGOs and other stakeholders, the Council of Jurists modified the draft.
 4. August 2000: A new version of the draft law was prepared in Khmer, French and English (August 2000 Draft).²⁷ This draft was submitted to the Council of Ministers and after approval, was submitted to National Assembly.
 5. September to November 2000: Parliamentary Commission No.7 of the National Assembly considered the August 2000 Draft.
 6. Officials from the General Department of Cadastre and Geography (GDGG) of the Ministry of Land Management, Urban Planning and Construction (MLMUPC) attended the Parliamentary Commission's deliberations. After each session, the GDGG prepared a document containing (i) issues raised by the Commission, (ii) proposed modifications by the Commission and (iii) the opinion of the GDGG concerning the issues and proposed modifications. These documents

²⁶ The Council of Jurists is the administrative entity in charge of reviewing draft laws and regulations to ensure that the drafts are in harmony with other laws and that consistent terminology is used.

²⁷ The English version of the August 2000 Draft Land Law is not totally consistent with the Khmer version.

were submitted to the Working Group on Land Law of the MLMUPC for analysis and preparation of reports that expressed the final position of the MLMUPC.

7. November 2000: Reports of the MLMUPC were used for preparing a revised draft land law (November 2000 Draft). This draft is available in Khmer, French and English.
8. January 2001: A document entitled “Draft Review and Commentary on Draft Immovable Property Law” was prepared for the MLMUPC.²⁸ This document contains commentaries and proposed modifications to the August 2000 Draft. This document was initially written in English and later translated in Khmer and French.
9. March 2001: Parliamentary Commission No.7 of the National Assembly resumed deliberations on the November 2000 Draft.
10. July 2001: Parliamentary Commission No.7 released a new version of the draft law (July 2001 Draft), which was entitled draft Land Law, not draft Immovable Property Law.
11. July 20, 2001: The National Assembly adopted the July 2001 Draft without substantive modifications.
12. August 13, 2001: The Senate expressed its full support to the adopted draft law.
13. August 30, 2001: King Norodom Sihanouk promulgated the 2001 Land Law. Article 268 states that this law is “urgent,” with the effect that the law took effect, nation-wide, a day following the promulgation – August 31, 2001.

Summary of Key Changes made by the 2001 Land Law

The 2001 Land Law made many significant changes to clarify and protect ownership. Some of the key changes are listed here (and are discussed in greater detail in later chapters).

- | | |
|------------------------------------|---|
| Key Changes
by 2001 Land
Law | <ol style="list-style-type: none"> 1. Ownership rights are recognized and protected as stipulated in the 1993 Constitution. 2. Only lawful possession can lead to ownership 3. A new form of property ownership, called co-ownership “<i>sar-hak-kam'sitt</i>”, was established (different from common ownership “<i>kam'sith roam</i>” and indivisible joint ownership “<i>kam'sith ak-vi-peak</i>”). |
|------------------------------------|---|

²⁸ This document was prepared under Asian Development Bank Technical Assistance Grant, ADB TA 2591.

4. No new acquisitive possessions are permitted, however the law fully recognizes any lawful acquisitive possession begun prior to the effective date of the law (August 31, 2001).²⁹ Chapter 4 of the 2001 Law restates most, but not all, of the provisions for acquisitive possession under the 1992 Law.³⁰
5. As was the case under the 1992 Law, and the previous Constitutions, private persons are not allowed to acquire ownership to any kind of immovable property categorized as State public properties.³¹
6. Communal properties of indigenous minority people are recognized and protected.³²
7. Rules specifying the granting of economic land concessions added, and
8. A new type of social land concession is authorized to grant possession to state private land, which leads to land ownership acquisition under specific terms and conditions discussed in a later chapter.³³

Questions have been raised about the applicability of the 1992 Land Law since it was not expressly repealed by the 2001 Land Law. Article 267 of the draft 2001 Land Law submitted to the Parliament would have clearly repealed the 1992 Land Law. However, during parliamentary deliberations, Article 267 was changed to be a general, rather than specific, repeal of prior law. That is, the 2001 Land Law, like most other Cambodian laws, does not specifically repeal prior law, but states, “any provision contrary to this law shall be abrogated.” It is not clear whether this change was simply following Cambodia’s usual practice of not specifically repealing prior law, or whether as a result, some provisions of the 1992 Land Law remained in effect. This question, although raised during the drafting of the Civil Code, was not specifically resolved.

Status of
1992 Land Law

²⁹ See Articles 29, 17 (3) and 18 (last bullet point) of the 2001 Land Law.

³⁰ As noted below, the 2001 Law did not specifically repeal the 1992 Law, and questions have been raised about the effect of the 1992 Land Law.

³¹ See Articles 1, 4 and 16 of the 2001 Land Law.

³² See Articles 23-28 of the 2001 Land Law.

³³ See Articles 49 and 50 of the 2001 Land Law.

It is evident that the provisions of the 2007 Civil Code are intended to replace the provisions on **private** substantive rights set forth in the 1992 as well as the 2001 Land Laws.³⁴ The Law on the Application of the Civil Code specifically deleted the provisions on private substantive rights under the 2001 Land Law that are covered by the Civil Code, but it does not mention the 1992 Land Law. Article 83 of the Law on the Application of the Civil Code states that “other laws and regulations that are in force on the date of application and that contradict provisions of the Civil Code shall have no effect to the extent of the contradiction with the Civil Code.”

New questions likely will arise about how rights that were created or acquired under the 1992 or 2001 Land Laws will be treated under the Civil Code. It may be necessary to develop additional transitional provisions to address these issues as they arise.

Civil Code of 2007

The 2007 Civil Code made significant changes to the immovable property legal framework discussed in more detail throughout this book. A few of the key changes are:

Further
Changes made
by the 2007
Civil Code

- Two types of possession (*sitt-kan-kap*) are recognized (1) possession with intention to acquire ownership; and (2) possession with no intention to acquire ownership³⁵. Each type of possession may be held directly or indirectly.
- There are two sub categories of possession with the intent to acquire ownership: (i) acquisitive possession (*pokeak*) under conditions set forth in the Land Law, and (ii) prescriptive possession³⁶ of registered privately owned property under the conditions set forth in the Civil Code.

³⁴ See Article 1 of the 2007 Civil Code, which provides that “This Code sets forth the general principles governing legal relations in civil matters. Except where otherwise provided by special law, the provisions of this Code shall apply to property related matters and family relations.”

³⁵ See Articles 227, 228, 232, 234 and 235, 2007 Civil Code.

³⁶ In some jurisdictions, this type of possession is known as adverse possession.

- Prescriptive ownership acquisition is recognized for the first time; however, it only applies to registered private property, and does not apply to any State land including land under lawful possession (with or without possession certificate).³⁷
- Real Rights are statutory³⁸ and include the following four general types:
 1. Ownership
 2. Possession (*sitt-kan-kap*)
 3. Usufructuary real rights (use and enjoyment real rights)
 4. Security rights
- New and expanded statutory property rights for spouses were established.³⁹
- More detailed and modern rules for succession were established.⁴⁰

Law on Co-ownership by Foreigners

Foreigners' co-ownership to co-owned building

This law clarifies the extent to which foreigners can own immovable property in Cambodia. Article 44 of the Constitution recognizes the right to private ownership in Cambodia; but it specifically provides that only persons with Khmer nationality have the right to own land (*dei*). Thus it was not clear that foreigners could own other types of immovable property (such as buildings).

This law, promulgated in late 2009, resolved these questions by specifying rules and procedures for a foreigner to acquire legal ownership to co-owned building as well as interests in the land being used for developing the co-owned building.

Conclusion

Cambodian immovable property law is a complex subject that cannot be understood just by looking at the 2001 Land Law. As this chapter

³⁷ See Article 162, 2007 Civil Code, and Articles 14 and 15 of the Law on Application of the Civil Code, 2011.

³⁸ See Articles 131 and 132, 2007 Civil Code.

³⁹ See Articles 968 – 974 and 977, 2007 Civil Code.

⁴⁰ See Book VIII, Chapter II, 2007 Civil Code.

illustrates, the historical development of land rights provide the legal context needed for an accurate understanding of current law.

The table below lists the laws, regulations and other resources that were used in developing this historical view of Cambodia's immovable property law, and will be used in the more detailed discussions in the following chapters.

Table 1: References on history of Cambodia's immovable property legal framework

Cambodian Civil Codes	<ul style="list-style-type: none"> • Cambodian Laws in Force, 1898⁴¹ • Cambodian Civil Code, 1920 • Revised Cambodian Civil Code, 1967 • Cambodian Civil Code, 2007 • Law on Application of the Civil Code, 2011
Prior and current laws and regulations	<ul style="list-style-type: none"> • Sub-decree on Agricultural Land Use Management, ANK 06, May 6, 1985 • Sub-decree on granting of house ownership, ANK 25, April 22, 1989 • Phnom Penh Municipality Circular 5, Implementation of Sub-decree 25, June 5, 1989 • Decision on Land Use and Management Policy, 1989 • Instruction on Implementation of Land Use and Management Policy, No. 03, SNN, June 3, 1989 • Ministry of Agriculture Circular 131 on Land Use and Management Policy Implementation, April 10, 1990, • Council of Ministers Cabinet Letter No. 94, concerning MAF request to extend period to receive Land Occupation Applications, January 17, 1990, • Land Law of 1992, October 13, 1992 • Land Law of 2001, August 30, 2001
Other relevant Laws and Regulations	<ul style="list-style-type: none"> • Constitution of 1993 • Law on Land Management, Urban Planning and Construction, 1994 • Sub-decree on Declaration as State property, ANK 53, June 23, 1995 • CLP-MLMUPC Decision 53, State Land Classification Criteria, December 25, 2006. • Law on Providing Ownership Rights in Private Units of Co-owned Buildings to Foreigners, 2009 • Forest Sector Management Law, 1988 • Forestry Law of 2002 • Law on Nature Protection Areas of 2008 • Expropriation Law of 2010
Drafting of 2001 Land Law	<ul style="list-style-type: none"> • Draft Land Laws: April 2000, August 2000, November 2000, and July 2001 • "Draft Review and Commentary on Draft Immoveable Property Law," January 1, 2001, prepared for MLMUPC, ADB TA 2591
Other	<ul style="list-style-type: none"> • Kleinpeter, Roger, <i>Le Problème foncier au Cambodge</i>, Thèse pour le Doctorat, Paris,

⁴¹ Leclere, Adhémar, *Les Codes Cambodgiens*, Paris, 1898, 2 tomes, which contain 50 laws of this era, translated in French. We have not been able to locate the Khmer texts of these laws.

sources	<p>Les Éditions Domat-Montchrestien F. Loviton & Cie, 1937.</p> <ul style="list-style-type: none">• Delvert, Jean, <i>Le paysan Cambodgien</i>, Paris, Bouton & Co., 1961.• Imbert, Jean, <i>Histoire des Institutions Khmères</i>, Annales de la Faculté de droit de Phnom Penh, Vol II, Phnom Penh, 1961.• LeClere, Adhémar, <i>Les Codes Cambodgiens</i>, Paris, 1898, 2 tomes.
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CHAPTER 3

COMPARISON OF 1992 AND 2001 LAND LAWS AND THE 2007 CIVIL CODE

Topics Covered
in this Chapter

Why a New Law?

**New Law versus Amending Existing Law
Land Law and 2007 Civil Code Compared**

In this chapter, we will look at the differences between the 1992 Land Law and the 2001 Land Law and between the 2001 Land Law and 2007 Civil Code. This will give us a better understanding of how the land regime is changing in Cambodia and specifically what the law is trying to achieve, and why.

Before we begin the comparison, try answering the following questions:

Study Question 8: The need to make changes to the land law

1. *Why did Cambodia develop the 2001 land law given that it already had a law from 1992?*
2. *What are some rules from the 1992 Land Law that are no longer suitable in current day Cambodia?*
3. *What are some property rules that the 1992 and 2001 laws failed to address?*
4. *To whom did the 1992 Land Law apply?*
5. *Who made the 1992 Land Law?*
6. *Which aspects of the 1992 Land Law proved difficult to implement?*

Why a New Law?

As societies
become more
complex, new
laws are
needed

Before we address this question it is important to reflect on the role that law plays in a society (the purpose of law). As mentioned previously, laws regulate the conduct of members of a society. As societies become more and more complex, laws necessarily become more complex. Laws

generally reflect the standards and norms in a society, so as norms change, laws need to keep up with the changing times. Sometimes laws are even used to *change* norms. An example of this is a law imposing high taxes on cigarettes in order to try and reduce the amount of smoking in society.

Study Question 9: Reasons for making changes to the land law.

Think about the statement above concerning reasons why new laws are created. Of the two reasons suggested (societies becoming more complex or the need to change behaviors of people in society) which, if either, do you think is the more likely reason for the 2001 Land Law? If you think neither reason, what other reason do you think was the cause for the creation of the 2001 Law?

As societies
change so do
laws

Societies change over years – some more so than others. In nearly all countries and societies the norms and standards of today are different from those of decades ago. What is acceptable behavior today may not have been acceptable in past eras. Conversely, what was acceptable in past eras may not be acceptable today. As standards and norms (accepted behavior) change, laws will change to reflect the new ways. A classic example of this is the death penalty. In past eras almost every country and society accepted the death penalty as a punishment for serious crimes (and in some cases for crimes that today would not be deemed so serious). However, over the years most countries' views on this issue have changed and today a large number of countries do not find the death penalty an acceptable form of punishment in any circumstance. So, as society's views changed on the issue of the death penalty so did the laws change to reflect the new views. Most countries today have laws that prohibit the death penalty. (Cambodia is one of these countries – Article 32 of the 1993 Constitution specifically prohibits the death penalty).

Study Question 10: Changed attitudes and practices about land ownership in Cambodia

Think about Cambodian norms and standards with regard to land possession and ownership (in doing this think again about the history of Cambodian possession and ownership in Chapter 2). What has changed with regard to the way that land is used and dealt with today from the way it was in the 1980s and 1990s that may have required changes in the law?

New Law versus Amending Existing Law

Although societies change over time, in most cases the changes are not so dramatic as to require entire new laws to be written to replace existing laws. Usually amendments will suffice to bring the law into line with the new norms or to address a situation that was not covered in the law. For example, if Cambodia changed its views on the use of the death penalty, it would not require a new constitution. A mere amendment deleting the 2nd sentence of Article 32 of the 1993 Constitution would be sufficient.

Why not just amend the 1992 Land Law?

So, we come back to our question: Why was it necessary to write a new land law for Cambodia given that one already existed from 1992?

What changes took place in Cambodia to necessitate a new land law?

Less than 10 years after the 1992 Land Law was promulgated, work began to draft what subsequently became the 2001 Land Law. Often laws stay on the books for decades before society changes to such a significant degree that it is necessary to change a law entirely. Incremental changes in society are usually addressed by simply amending an existing law. What significant changes occurred in Cambodia since passage of the 1992 Land Law to necessitate replacing that law with an entirely new law?

The 1993 Constitution changed Cambodia's system of governance and people's rights

Probably the best answer to the question above is, "the promulgation of the new Constitution of 1993." This Constitution made substantial changes to the system of governance in Cambodia. It changed Cambodia from a centrally controlled, regulated society based on socialist principles to a free market-based democracy. This in turn

affected the property rights of Cambodian citizens and the manner in which Cambodians were free to transact with one another. It also affected the way that laws were made in Cambodia. Accordingly, the changes were so extensive with regard to norms and standards that, rather than amend the law of 1992, it was considered more appropriate to have an entirely new land law that reflected the new type of society that Cambodia has under the Constitution.

The land law
needs to be
consistent with
the Constitution

To be valid, laws must comply with the country's constitution. Whereas the 1992 Land Law may have been consistent with the Constitution of 1989, it conflicted with certain free market and property rights provisions of the 1993 Constitution. Accordingly, the decision was made to develop the 2001 Land Law to make the country's land laws fully consistent with the principles of the 1993 Constitution.

At the same time that drafters were developing what was to become the 2001 Land Law, another group of drafters was drafting what was to become the 2007 Civil Code. Almost six and a half years after the 2001 Land Law was promulgated, the Civil Code of 2007 was promulgated. This new Civil Code includes provisions related to immovable property that were intended to replace the provisions of the 2001 Land Law. These provisions did not apply until the subsequent Law on the Application of the Civil Code became applicable on December 21, 2011.¹ Article 80 of the Law on the Application of the Civil Code specifically deleted a large number of provisions in the 2001 Land Law that are now covered by the 2007 Civil Code.

Below is a table comparing the major headings of the 1992 and 2001 Land Laws and headings from related provisions of the 2007 Civil Code. Keep in mind that many of the provisions from the 2001 Land Law in the chart below have been specifically deleted (see the chart at the end of this chapter).

¹ The Law was promulgated in May 2011, and became applicable on December 21, 2011, according to the Notification of the Ministry of Justice No. 10, dated December 20, 2011, on the Date of Application of the Civil Code.

Table 1: Main Headings 1992 and 2001 Land Laws and 2007 Civil Code Provisions

1992 Land Law	2001 Land Law	2007 Civil Code
General Provisions and Types of Immovable Things (Title I, Ch 1, Sec 1)	General Provisions and Definitions of Immovable Things	Book 3 “Real Rights” General Provisions • Things • Real Rights
Immovable Thing Ownership (Title I)	Private and Public Ownership (Title I)	Ownership (Book 3, Ch 2)
Real Rights (Ch 1)	Principles of Ownership and Public Ownership (Ch 1 & 2)	-----
Monastery Immovable Things of Buddhist Wat (Ch 5)	Communal Ownership (Ch 3) • Immovable Things of Buddhist Wat • Immovable Things of Indigenous Minority Community	Book 3, Chapter 8 • Ownership and other real rights of Buddhist Wat • Ownership and other real rights of Indigenous Minority Community • Ownership and other real rights of other Communities
Acquisition of Ownership (Title I, Ch 6)	Acquisition of Ownership (Title II)	Acquisition of Ownership (Book 3, Ch 2, Sec 4)
Possession (<i>pokeak</i>) (Title II)	Reconstitution of ownership of immovable things by extraordinary acquisitive possession (<i>pokeak</i>) (Ch 4)	Possessory Rights. Two types of possessions. Protection of special possessors (Ch 3)
-----	Land Concessions (Ch 5)	Land Concessions (Ch 9)
Contracts (Title VI) • Sale (Ch 1) • Exchange (Ch 2) • Donation/Gift (Ch 3) • Succession (Title V)	Means of Acquiring Ownership (Ch 6) • Sale (Sec 1) • Exchange (Sec 2) • Gift (Sec 4) • Succession (includes some succession rules) (Sec 3) •	Ownership acquisition (Ch 2, Sec 4) • Contract • Succession • Prescription (added by Civil Code)
Succession Rules	Succession Rules	Succession Rules
Some rules in Title V	Some additional rules in Title II, Ch 6, Sec 2	New and detailed rules in Book 8
Ownership to Immovable Things (Title I)	Private ownership regime (Title III)	Ownership (Book 3)
Rights of Ownership (Ch 2)	Rights and Obligations of Owners (Ch 7)	Meaning and limitations of Ownership (Ch 2, Sec 1)
Rights to Accession of Objects (Ch 2, Sec 1)	Accession to Fruits and Products of Ownership (Ch 7, Sec 2)	Relationship between adjacent land parcels (Ch 2, Sec 2)
Rights to Accession (accretion) - natural objects and human made objects (Ch 2, Sec 2)	Rights to Accretion – Accretion by nature and by human acts (Ch 7, Sec 3)	Relationship between adjacent land parcels (Ch 2, Sec 2)
-----	Leases on Immovable Things (Ch 7, Sec 4)	Perpetual Lease (Ch 4)
-----	Land Rules (Ch 7, Sec 5)	-----

1992 Land Law	2001 Land Law	2007 Civil Code
Ownership Dismemberment (Title III)	Ownership Dismemberment (Title III)	-----
<ul style="list-style-type: none"> • Usufruct (Ch 1) • Rights of use and <i>stay</i> (Ch 2) • Easements (Ch 3) 	<ul style="list-style-type: none"> • Usufruct (Ch 8, Sec 1) • Right of use and <i>stay</i> (Ch 8, Sec 2) • Easements (Ch 8, Sec 3) 	<ul style="list-style-type: none"> • Usufruct (Book 3, Ch 5) • Right of use and <i>stay</i>² (Book 3, Ch 6) • Easements (Book 3, Ch 7)
-----	Forms of ownership (Title IV)	-----
Common Ownership " <i>kam'sitt roam</i> " or Co-ownership " <i>sar-hak kam'sitt</i> " (joint = indivisibility " <i>ark-vi-pheak</i> ") (Title I, Ch 3)	Undivided joint ownership (<i>kam'sitt ark-vi-pheak</i>) (Ch 9)	Undivided joint ownership (<i>kam'sitt ark-vi-pheak</i>) (Book 3, Ch 2, Sec 5)
-----	Co-ownership (<i>sar-hak kam'sitt</i>) (Ch 10)	-----
Partitions (<i>et-tha-sitt-pheap</i>) (Title I, Ch 4) <ul style="list-style-type: none"> • Partition walls • Partition ditches, fence, dikes 	Partitions (<i>et-tha-sitt-pheap</i>) (Ch 11) <ul style="list-style-type: none"> • Partition walls • Partition ditches, fences, dikes 	Partitions (<i>et-tha-sitt-pheap</i>) (Book 3, Ch 2, Sec 6) <ul style="list-style-type: none"> • Partition walls • Partition ramparts (ditches, fences, dikes)
Immovable Thing Surety (Title IV)	Immovable Thing Surety (Title V)	Obligation Guarantee (Book 6)
-----	-----	Right of retention (Ch 2)
-----	-----	Preferential Rights (Ch 3)
Hypothec	Hypothec	Hypothec (Ch 5)
Immovable Thing Pledge (1) ³	Antichresis (antichrèse in French) (property held by creditor)	Antichresis Pledge over an immovable (Ch 4)
Immovable Thing Pledge (2)	Gage (placing the property title certificate on hold by the creditor)	Gage no longer permitted for immovable property; if registered it is deemed a Hypothec and property title certificate must be returned to the property owner ⁴ .
Immovable Things Rights Conservation (Title VII)	Cadastré (Title VI)	-----
----	Cadastral Administration (Ch 15)	-----
----	Cadastral Surveys (Ch 16)	-----
----	Cadastral Register and Documents (Ch 17)	-----
----	Cadastral Certificates and Information (Ch 18)	-----
Penalty Provision (Title VIII)	Penalty Provisions (Title VII)	-----

² The English translations of these three laws use different terms for right of use and "stay," "habitation," and "residence." The Khmer laws use one term "*ar-srai-nouv*" for stay, habitation, and residence.

³ A *Pledge* of an immovable thing under the 1992 Land Law (Article 148) could have been exercised either in the form of Antichrèse or Gage under the 2001 Land Law.

⁴ Law on the Application of the Civil Code, Article 55.

Land Law and 2007 Civil Code Compared

Major Different Areas

There are 8 main areas of difference between the Land Law and the Civil Code:

1. Leases

Leases added in 2001 Land Law, now covered by Civil Code

The 2001 Land Law contains a section on leases (Articles 106-113), and provided that a long term lease of more than 15 years is a real right.⁵ Leases were not included in the 1992 law as they were covered in Decree #38 Contract Law of 1988. The 2007 Civil Code also treats immovable property leases of more than 15 years as real rights, called “perpetual” leases, which can be registered in the Land Register. Other leases are treated as contracts under Book 4, Obligations.

2. Succession

Rules on property transfer by succession added in 2001 Land Law now covered by Civil Code

Although succession is addressed in the 1992 and 2001 Land Laws, it is done so only by acknowledging succession as one of the methods of transferring immovable property and providing conditions for lawful transfer of possession through succession (Articles 71-79). The 2001 Law does not actually lay down any new rules of property division by succession. It does not tell us who will be the beneficiaries when someone dies intestate or what the rules are to make a valid will. etc. The 2007 Civil Code, at Book 8, Succession (Articles 1145-1304), sets out detailed provisions related to succession. Most of the succession provisions of the Land Law have been deleted.

Acquisition of land ownership through new acquisitive possession prohibited by 2001 Land Law.

3. Acquisitive Possession

A major difference between the 1992 and 2001 land laws is that the 2001 Land Law prohibits any new acquisitive possession as a means of acquiring land ownership (which was permitted by articles 61-76 of the 1992 Land Law). Although the 2001 Law has provisions concerning

⁵ These articles were deleted by Article 80 of the Law on the Implementation of the Civil Code applicable December 21, 2011.

this issue it is only there to confirm that those having legally valid acquisitive possession of land which began prior the time the 2001 land law came into effect will be allowed to be registered as the owner of the land (Article 30). Articles 242-243 of the Civil Code refer to the same type of land possessor (special possessor in the sense of acquisitive possessor). See also Article 14 of the Law on the Application of the Civil Code.

No new
possession
rights under the
2001 Law

However, the 2001 Law makes it very clear that there will be no recognition of any claim of acquisitive possession that commenced after the 2001 Land Law took effect (Articles 29 and 34). This means that under the 2001 Law people will not be able to acquire land ownership in the customary way by taking possession of land that is not possessed by another person, even if this customary practice has the approval from local authorities.

Another significant difference between the 1992 and 2001 laws concerns the requirements that must be satisfied in order to be recognized as the legal possessor of land (Articles 32 and 38 of 2001 Land Law).

2001 Land Law
made it easier
to be
recognized as a
possessor

Under the 1992 Land Law, to be classified as a possessor of land, the possessor had to file an application for land occupation and use, called an "immovable property possession declaration," which was filed with the Chief of the Commune in which the land was located. The declaration had to have been lodged *before* possession commenced, but not necessarily before actual land use or occupation.⁶ As more fully explained in Chapter 2 (and later in Chapter 7 on Possession) very few people knew of the law's requirements and the state lacked both human and financial resources to carry out the registration. Thus, most people had not (or were not able to) comply with the registration requirements of the 1992 Law.

Article 42 of the 2001 Land Law addresses this situation by ensuring that failure to register possession under the 1992 Land Law did not

⁶ See Article 66 of the 1992 Land Law.

Anyone in legal possession of land before effective date of 2001 Land Law entitled to ownership of that land

deprive lawful possessors of their rights to convert their possession to ownership, as follows:

Article 42, 2001 Land Law

Any person who fails to register his/her lawful possession, whether by negligence or ignorance, shall have the rights to be protected under the power of Article 29, Article 30 and Article 31 of this law.

While this provision removes the possession registration requirement, it does not change other conditions of lawful possession, including the requirement of property declaration to the chief of the commune where the land is located. This point is discussed in more detail in Chapter 7 on Possession.

4. Concessions (General)

Concession rights under the 2001 Law

The 2001 Land Law created land concessions (Articles 48-62), which allowed people to apply to occupy and use state land as a concessionaire. However, the occupation and use of that land has to be for a particularly approved purpose as set out in a specific concession agreement or the book listing land encumbered by concessions.

Land concessions are for three different purposes: – (1) economic (for industrial agricultural use of state private land); (2) social (for residential or subsistence use and occupation of state private land) (Article 49); and (3) “others” (use, management, and exploitation of state public or private land for purposes such as mining, airports, ports, fishing, industrial development) (Article 50). The first two types of land concessions are governed by the 2001 Land Law. The “other” concessions are governed by separate laws.⁷ Only social land concessions can lead to ownership.

Concessions – other than social land concessions – are for a maximum of 99 years with a maximum size of 10,000 hectares held by one individual or legal person.

⁷ Among these separate laws are the Forestry Law of 2002, Fishery Law of 2006, Law on Mineral Resources Management and Exploitation of 2001, and Law on Concessions of 2007 (for public physical infrastructure development).

5. *Social Land Concessions*

A particularly significant difference between the 1992 and the 2001 land law is the creation of *social land concessions*. As we have seen, the right to acquire land through *a new acquisitive possession* has been prohibited in the 2001 Land Law (Articles 29 and 34).

Social Concessions are a new form of land right in the 2001 Land Law.

The scheme for *acquisitive possession* under the 1992 Land Law was the method originally devised as a means of transferring land from the State to the citizens after the re-introduction of private ownership in 1989 (until close to mid-1989 everyone was a user of the land that they occupied – the State was the owner). The situation had changed twelve years later when the 2001 Land Law was promulgated. The demand for land was increasing in response to population growth and economic development. The 2001 Land Law reflects the government’s decision that the tradition of acquiring land by taking a new acquisitive possession of state land was no longer an appropriate or acceptable method of land ownership acquisition.

However, the 2001 Land Law acknowledges that the existing acquisitive possession scheme did not result in all Cambodians becoming owners of land. Many, for various reasons, were landless or at risk of becoming landless or having insufficient land for residential and/or subsistence agricultural purposes.

Social land concession rights allow landless household to obtain land for free.

To address this, the concept of social land concessions was introduced (Articles 48 and 49). Social land concessions allow an eligible landless or land-poor household to apply for a parcel of land from the State private domain for residential and/or subsistence farming purposes at no cost to the applicant (Article 51). The social land concessionaire may ultimately be registered as the owner of that property (Article 52). The actual application of this scheme is determined by sub-decree⁸ (Article 60).

See Article 307 of the Civil Code, which states that the provisions of the

⁸ This sub-decree was issued in 2003, entitled Sub-Decree # 19 on Social Land Concessions.

Civil Code related to perpetual leases apply to land rights created by concession within the scope of the conditions that apply to the concession. Also note that the Law on the Application of the Civil Code did not delete any Land Law provisions on Land Concessions.

6. Co-ownership

A separate form of co-ownership was addressed in the 2001 land law (Articles 175-185). This form of ownership is designed to deal with an apartment block type situation (condominium) where a building is divided into a number of private units each owned by different owners.

If there is no agreement between the individual owners concerning responsibility for the common areas (Article 176), then the rules in the 2001 Law will apply. These rules cover the rights and responsibilities of the individual owners with regard to the common areas, including such things as maintenance and rights of use (Articles 177-183).

Ownership of
condominium:
rights and
obligations

Co-owners are legally liable (at the risk of incurring court imposed fines) for the condition of the common property (Article 185). They may set up a management body to be responsible for the property, or failing to set up such a body the law will make all owners equally liable and the court may even appoint an administrator to take over the responsibility of the property (Article 184). Any co-owner who disobeys a decision of the management body or the administrator appointed by the court will be legally liable and could be subject to fines by a court (Article 184).

The Civil Code only covers “indivisible joint ownership” and the Law on the Application of the Civil Code did not delete provisions (on co-ownership) of Chapter 10 of 2001 Land Law.

Cadastral
surveys
required of all
properties in
Cambodia

7. Cadastral Surveys

In usual practice, it is not the function of Civil Code to deal with this issue. Rather, it is usually dealt with in a special law or regulation, as is the case in Cambodia, where the 2001 Land Law deals with this issue.

The 2001 Land Law specifically requires that Cadastral Index Maps be made of all properties in Cambodia (Article 238). It gives the responsibility for creating these maps to the Cadastral Administration under the Ministry of Land Management, Urban Planning and Construction (Article 226). All properties need such a special map in order to be registered in the Land Register. The Ministry of Land Management sets up a central cadastral office (General Department of Cadastre and Geography) to do this and also sets up capital/provincial and district/municipal/Khan cadastral administration offices to assist.

The Cadastral administration may request the local authorities, the military, or the police to assist in undertaking cadastral surveys and making cadastral maps (Article 235). Private individuals having property within the area covered by the cadastral survey are obligated to participate in the making of the cadastral surveys and cadastral index maps (Article 236). The relevant Administrative Committee is responsible for conciliating any disputes regarding the accuracy of the survey and the cadastral index maps that arise in the systematic land registration procedure (Article 237).


8. Indigenous Minority Community Ownership

Articles 23-28 of the 2001 Land Law introduce the concept of *indigenous minority community* property as a form of property ownership. This recognizes that indigenous minority groups exist in Cambodia (such as hill tribes) who use the land in a traditional communal fashion (which is vastly different from the normal individual ownership of land common amongst the rest of the population). They do not own the land as individuals but rather as a community. Thus the community, rather than the individual members of the community, is recognized as the legal entity owning the land for the purpose of the land title registration.

Communal
ownership of
land for
indigenous
minority groups

Indigenous minority community land ownership includes all the rights and protections of regular private individual ownership, except as provided in the Article 26 of the 2001 Land Law. The land may continue to be used in the traditional communal manner, although it is

still subject to laws of general enforcement related to land use, such as forestry and environmental laws. There are also other property rights recognized under the Land Law for the individual members of the community, which are discussed in more detail in Chapter 6.



Although the 2001 Land Law is more specific in recognizing and addressing the unique traditions of indigenous minority groups, these communities were recognized in Article 14 of the 1992 Law, as follows:

In order to manage their possession, the community who own the property shall be considered also as a person called a legal person which shall have a personality separate from the personality of a member of the community, and in which it shall represent in the enjoyment of all rights.

In order to manage and administer their own property whether it is public or private, the community shall be subjected to a separate law.

Conclusion

The following table summarizes the comparisons discussed in this chapter. The table is a cross reference between the major legal areas covered by the 1992 and 2001 Land Laws. The first column lists the articles from the 1992 Law, and the second column lists the corresponding articles from the 2001 Land Law. The third column shows the current status of the articles from the 2001 Land Law as a result of Article 80 of the Law on the Application of the 2007 Civil Code, which specifically deleted provisions of the 2001 Land Law that are not longer required as a result of the applicability of the 2007 Civil Code.

Table 2: Status of selected provisions of 2001 Land Law after the 2007 Civil Code

LEGAL AREA	1992 LAW ARTICLES	2001 LAW ARTICLES	STATUS AFTER CIVIL CODE
What are immovable things	8 (cows) 9 (ships)	2	No Change
State private property	15	14,16, 17, 18,	No Change
State public property	16,17, 5, 217	15, 16, 17, 18, 19	No Change
Right to own immovable things	19	4	No Change
Only Cambodians can own land	2	8, 66	66 deleted
Pre 1979 land rights	1	7	No Change
Min. of land administers land	203	3	No Change
Possession (<i>pokeak</i>) to ownership (<i>kam' siff</i>)	62,66,74,	29-47 (see: 30, 42)	No Change
Immovable Things of Buddhist Wat	56,58	20-22	No Change
Immovable Things of Indigenous Minority Community	-	23-28	No Change
Extent of ownership – sub soil	4 no	90 yes	Deleted
Extent of ownership – air above	-	91	Deleted
Rights/benefits of ownership	12-14,19-21	85-95	Deleted
Rights to additions to land (accretion):			
a. man made	22-23,	96-98	Deleted
b. natural	24-35	99-105	Deleted
Land Concessions	-	48-62	No Change
Transferring land (sale, gift, exchange)	177-202	63-70	Deleted except 2nd point of 69
Succession	170-176	71-79	71, 75, 76, 78, 79 Deleted
Selling land not registered	Void 203	Not valid 69, 252, 253	Point 1 of 69 deleted; 2nd point of 253 deleted
Land sold at unfair price (½ price)	183	-	--
Illegal sales	180	66	Deleted
Latent defects	-	68	Deleted

LEGAL AREA	1992 LAW ARTICLES	2001 LAW ARTICLES	STATUS AFTER CIVIL CODE
Succession (reduced)	170-171	71-79	71, 75, 76, 78,79 Deleted
Usufruct	78-105	119-137	Deleted
Use and Stay	106-110	138-141	Deleted
Easements (by nature, law, contract)	111-140	142-167	142-147, 149-167 Deleted
Undivided Joint ownership	36-44	168-174	Deleted
Indivisible Joint right [Partition rights] (partition ramparts, partition walls)	45-55	186-196	Deleted
Co-ownership	Co-ownership (common/ joint undivided ownership) (36-44)	175-185	No Change
Hypothecc	163-169	198-205	Deleted
Pledge (Antichresis and Gage)	142-162	206-225	Deleted
Admin of land (reg. of land, transfers etc)	203-217	226-246	No Change
Penalties for infringements against property (generally)	-	247-250	247 amended
Penalties for infringements by <i>individuals</i> : a. against private property b. against public domain property	221-227	251-258 259-260	253 amended No Change
Penalties for infringements by <i>Administrative Authorities</i>	218-220	261-266	No Change

CHAPTER 4

CLASSIFICATION OF IMMOVABLE PROPERTY

Topics Covered
in this Chapter

What is Classification?

Classes of Immovable Property under the 2001 Land Law

Who Classifies Immovable Property and How

Legal Effects of Immovable Property Classifications

Classification of immovable property is often a complex and highly technical process. It is beyond the scope of this book to discuss in detail different land classification systems that are being developed and used in Cambodia. Rather, our objective is to help the reader understand the general concepts of immovable property classification under the 2001 Land Law and other relevant laws and the legal effects of classification.

What is Classification?

The term “classification” is often used interchangeably with the term “categorization,” though they are different. Both terms relate to grouping things in ways that help people deal with the variety and complexity of their surroundings. Categorization is more general, and it refers to grouping things on the basis that they share some common similarities, often depending on the context. Categorizations are not rigid, and can change depending on the context – for example, shrimps are my favorite seafood.

Classification is grouping things into known and fixed classes with common characteristics

Classification is more specific and refers to grouping things into known and fixed classes on the basis that those things share common traits or characteristics. Classification assumes an orderly and systematic process of assigning things to the various classes within the system. A classification system is rigid; each thing being classified can belong in only one specific class of that particular classification system.

Some of the classification systems that you may have studied are those systems of classifying plants, animals, soils, land use and land cover. For example, there are over 300 species of shrimps and prawns, arranged by class, subclass, order, suborder and family. Each different type of shrimp found in the seas around Cambodia belong its own distinct class (unless it is a new species that has never been classified). Fish sellers and restaurants probably have no idea or interest in the biological classification of shrimp, unless they are exporting their products. Classification may make a significant difference in the marketability of shrimp (and other products) in the international market

Certain systems
for classifying
immovable
property have
legal and
economic
effects

Classification systems can be established to accomplish different goals and objectives. For example, if the objective is to find out what type of soil is found in different parts of the country, then the soil will be analyzed to determine where it fits in a known, fixed soil classification system. However, governments can create immovable property classification systems to achieve important government policy objectives, such as to promote development, or to preserve certain types of forests, or historical sites. Immovable property classification systems are often complex and difficult to create and implement. The traits and characteristics of the classes (and subclasses) need to be clear and unambiguous. Someone (often several people) have to assess each land parcel to determine its class or subclass on the basis of the classification criteria. As we shall see, depending on the system, classification of immovable property can achieve important government objectives but also have significant legal and economic implications for the owner or other person who has an interest in the property.

We are not going to discuss technical aspects of immovable property classification, just some basic concepts. And, we will not be rigid about whether something is a category or class or type.

Study Question 11: Categories of immovable property

Can you suggest some different categories that a government may use to sort immovable property into groupings?

What are some reasons to group immovable properties in the ways you suggest?

One way governments may sort immovable property would be by the property's use, for example, residential, commercial, industrial, and agricultural. One reason to sort by use may be to help with land use planning and zoning. A government may establish policies to protect or encourage certain types of land use and support those policies through taxation on land use. For example, the government may decide that agricultural and residential land needs protection from commercial or industrial encroachment, and apply lower property taxes for these classes of property compared to commercial or industrial property.

There are different ways that the 2001 Land Law and other Cambodian laws sort immovable properties, and for different purposes. And as in the examples above, there may be economic and legal consequences as a result of the way the property is sorted.



For this section, you may find it helpful to read the following:

- 2001 Land Law, Articles 12-21, 23-28
- 1992 Land Law, Articles 5 and 217
- 1994 Land Management Law, Article 12
- 1989 Decision on Land Use and Management Policy, Sec. II
- 1993 Constitution, Article 58
- 2002 Forestry Law, Articles 10-12

Classes of Immovable Property under the 2001 Land Law

The 4 broad classes of immovable properties under the 2001 Land Law

Immovable property is one of two types of property under Cambodian law – these are movable and immovable property. The 2001 Land Law establishes 4 broad classes of immovable property: state public, state private, private, and collective. Although these classes are quite broad,

they are fixed, and a particular land parcel belongs to only one of these classes.¹ Below is a brief description of each of these classes.

1. State Public Property

State public property is held by the state authorities in the public interest. Article 15 of the 2001 Land Law lists some types and examples of properties that fall within this category:

- Any property that has a natural origin, such as forests, courses of navigable or floatable water, natural lakes, banks of navigable and floatable rivers, and seashores;
- Any property that is specifically developed for general use, such as quays of harbors, railways, railway stations, and airports;
- 1. State Public - Any property that is made available, either in its natural state or after development, for public use, such as roads, tracks, oxcart ways, pathways, gardens and public parks, and reserved land;
- Any property that is allocated to render a public service, such as public schools or educational institutions, administrative buildings, and all public hospitals;
- Any property that constitutes a natural reserve protected by the law;
- Archeological, cultural and historical patrimonies;
- Immovable properties being royal properties that are not the private properties of the royal family (the reigning King manages royal immovable properties).

These descriptions of state public properties are not new to the 2001 Land Law. Rather, they are substantially similar to the categories in prior laws, specifically Articles 5 and 217 of the 1992 Land Law, and Article 12 of the 1994 Land Management Law.²

¹ Indigenous minority community property is comprised of parcels from the state private and state public categories (Articles 26 and 27), as discussed later in this chapter.

² The concept of state public land goes back to the Civil Code of 1920, which for the first time, recognized private ownership of immovable property in Cambodia, and provided that public properties of the state could not be alienated or transferred to another person. See Chapter 2, on the discussion of the French Period.

2. *State Private Property*

2. State Private This is any property belonging to the state that (1) does not fall into the state public property categories (above) and (2) is not private ownership as described in Article 12 (below). State private property is the catch-all, or default category property under the 2001 Land Law. That is, if a parcel is not state public property or private property (including collective property) then by default, it is state private property.

3. *Private Property*

3. Private This is any property that has passed legally into the private (non-government, non collective) domain (Article 12).

4. *Collective Properties*

4. Collective Collective properties (2001 Land Law, Chapter 3, Articles 20-28) are divided into two types:
- a. Buddhist Wat **a. Buddhist Wat Immovable Property** (Articles 20-22) includes any properties that exist within the premises of Buddhist Wats.
- b. Indigenous Minority Community **b. Indigenous Minority Community Properties** (Articles 23-28) are the **lands** (but not necessarily including other immovable properties) where indigenous minority communities have established their residences and where they carry out their traditional agriculture practices. To hold land communally, an ethnic minority community must adopt by-laws and be officially recognized as a legal person.³

Study Question 12: Classes of properties under the 2001 Land Law

Based on the information above (and on your own understanding of the situation in Cambodia), assign each of these properties to one of the classes: (1) state public, (2) state private, (3) private or (4) collective property.

³ 2001 Land Law, Articles 23 and 25; Article 4, Sub-decree on Procedures for Registration of Indigenous Community Land, 83 ANK.BK, June 9, 2009.

Where it is unclear try and think of what further information would be needed for you to decide the class of the property.

Class	Property
1. _____	1. The Royal Palace
2. _____	2. Lucky Supermarket
3. _____	3. Hun Sen Park
4. _____	4. Kirirom National Park
5. _____	5. The Ministry of Justice
6. _____	6. The National Assembly
7. _____	7. The Supreme Court
8. _____	8. Wat Koh
9. _____	9. Chatamuk High School
10. _____	10. The Royal University of Law and Economics
11. _____	11. The Prime Minister's house
12. _____	12. The banks of the Tonle Sap
13. _____	13. Sokha beach in Sihanoukville
14. _____	14. A closed down public school
15. _____	15. Monivong Bridge
16. _____	16. Phnom Penh International Airport
17. _____	17. The Olympic Stadium
18. _____	18. The Old Stadium
19. _____	19. The Chinese Embassy
20. _____	20. P'sar Thmei

Who Classifies Immovable Property and How

As you can see from doing the above exercise, it is not always a simple matter to identify the class of a particular land parcel. You probably can identify most of the properties in the study question because you are familiar with the property and may pass it on a regular basis. But some cases are not clear at all. For example, exactly what is considered to be the bank of the Tonle Sap? Obviously, more legal definitions and information about each property are required for accurate classification.

The 2001 Land Law establishes and describes these broad classes. But an actual land parcel does not get a classification until competent officials actually look at the property (including boundaries and other relevant information) and make a determination about the class of that specific property.

Study Question 13: Categories of immovable property

Can you think of any immovable property in Cambodia that does not fall under one of the 5 classes listed above?

Article 238 of the 2001 Land Law gives some information about who is responsible for classification of immovable property.

The Cadastral Administration has the obligation to produce cadastral index maps and a Land Register.

The Cadastral index maps cover the zones that have been systematically registered and the boundaries of all public and private properties demarcated and the classification of the land, such as cultivation land, forest land, submerged land, lands for industrial construction, etc.

The Land Register identifies classification

The Land Register shows, according to each parcel number of ownership, the name of owners and the means of identification of such land parcel, the description of the ownership, the size of land parcel, the easements and other charges that encumber it. Any subsequent changes in such data must be registered as soon as the Cadastral Administration is informed of such changes. Such register shall be maintained in three copies, one copy kept at the central

Cadastral Administration Office and the other two copies kept at the provincial or municipal and Srok/Khan Cadastral Administration Offices.

The Land Register shows, by reference to the number of the title of ownership, the mortgages, antichrèse and gage, long-term leases that encumber the ownership.

Land Register is open to the public

Once registration of all land parcels is complete it should be a relatively simple task to ascertain the class of each parcel of land in Cambodia by viewing the Land Register at the Cadastral Administration. Since every one has the right to see the Land Register under Title VI of the 2001 Land Law (Articles 229, 240, and 243) people will be able to easily find out not only the class of the property, but ownership and other information about a particular parcel as specified in Article 238.

Extra due diligence required until Land Register is fully established

It may be many years before all the land parcels in the country have been registered in the Land Register. In the meantime, due diligence will require more than merely checking the records in the Land Register (Ownership Register) or Immovable Property Register (Possession Register) at the Cadastral Conservation offices of the Cadastral Administration. The actual circumstances of a particular land parcel would need to be analyzed to ascertain to which class the property belongs. For example, by inspecting the property, one would usually, but not always, be able to ascertain whether the property falls under one of the categories of state public property listed in Article 15 of the 2001 Land Law.⁴ For instance, the seashore is clearly state public property, as is a railway station or a public school. A Buddhist Temple would clearly be Buddhist Wat immovable property.

Questions about the specific boundaries of property will remain until the property is demarcated using modern technology and the property is registered in the Land Register. And before the property can be registered in the Land Register ownership will have to be definitively determined.

⁴ See Criteria of State Land Classification specified in CLP-MLMUPC Decision # 52 of 2006.

Read Article 15 of the 2001 Land Law. Consider the examples below, and based on the law, try and determine whether the properties are state public properties and how you would determine this before the Land Register is fully established:

Study Question 24: Property classification, example 1

Mr. Sok offers to sell his land to Ms. Ran for \$5000. He is not the registered owner of the land but has been in possession of it for over 15 years. All his neighbors agree that Mr. Sok is the rightful possessor.

Ms. Ran inspects the land and notices that there is a pathway on the land that many people in the village use to get to the market. This has always been the case and Mr. Sok has never objected to the other villagers using the pathway across his land as a public pathway. In fact he likes the people using it as he constantly gets to talk with those walking across his land.

The pathway has always been there as long as Mr. Sok can remember. Everyone acknowledges that it is on Mr. Sok's land and they all think he is a nice man for letting them use it. On occasion he has altered the route of the path when he has made alterations to the way he uses his land.

*Is the land Mr. Sok is trying to sell in fact public land because of the pathway?
Is he the legal possessor of the pathway?*

Study Question 15: Property classification, example 2

Another land that Ms Ran looked at surrounds a small natural lake. The land is actually comprised of 4 different parcels with 4 different owners. They have always shared the water in lake as their parcels completely surround it. If Ms. Ran buys all the parcels the lake will be completely within her land holdings. She believes that this would add enormously to the value of the property.

If Ms. Ran buys the all 4 parcels is she also the owner of the lake?

Study Question 16: Property classification, example 3

On another parcel of land that Ms. Ran looked at, she noticed that there were ruins of an old temple-type structure at the bottom of the land. The possessor told her that he went there to pray and he thought it was a very old relic although he had never had it checked out by an expert to know exactly what it is. It may have been built before the war by the owners of the land as a private family worship place to be passed on, as a family patrimony, to each successive generation who stayed on the land. Or indeed, maybe it is very historical and valuable. He just doesn't know.

If Ms. Ran agrees to buy the land would she also be the legal owner of the ruin? Or is it in fact state public property?

Study Question 17: Property classification

Who would be responsible to classify the properties in the above situations (before the Land Register is fully developed)?

Ultimately the Cadastral Administration would have to conduct a process for determining whether a particular land parcel is state public land or one of the other property classifications. The 2001 Land Law gives guidance as to how to classify a property although, as we have seen, it is not sufficient to give a clear answer in each possible situation.



Question: Why is it important to know the class of a particular property?



Answer: The classification of a property determines whether the property can be privately owned or not.

Legal Effects of Immovable Property Classifications

The historical development of Cambodia's immovable property legal framework, discussed in Chapter 2, is important because it adds context for the 2001 Land Law. There are some important changes between the

2001 Land Law and prior law, but as discussed in earlier chapters, many of the fundamental concepts in the 2001 Land Law are based on prior (pre-1975 and post 1979) enacted law and traditional practices that go back more than 100 years. Yet, there is much confusion about basic property rights, particularly the conditions for acquiring ownership through acquisitive possession (*pokeak*).

Understanding the four basic classes of immovable property under the 2001 Land Law will lead to a better understanding of acquisitive possession (*pokeak*), which is the basis for private property ownership in Cambodia. “*Only legal possession can lead to ownership.*” (Article 6 of the 2001 Land Law).

Restrictions on
rights of
acquisition or
transfer of
certain classes

State public properties cannot be sold to private owners nor acquired through acquisitive possession. This means that if a person purchases a parcel of state public property, the sale is void. Likewise, registered Buddhist Wat properties cannot be sold or exchanged. Land registered as collective property of an indigenous minority community cannot be sold, exchanged or transferred to any person outside of the indigenous community that has the ownership rights to the land. However, no such restrictions are placed on properties that are classified as private properties or state private properties.⁵

Let’s look more closely the restrictions placed on the different types of properties (other than private property).

State Public Property

Rights to state
public property

According to Article 16 of the 2001 Land Law, land classified as state public property cannot be sold to private owners, nor can anyone acquire it through acquisitive possession. This restriction ensures that such property remains for public interest use only.

⁵ However, the state can expropriate monastery property or indigenous minority community land (as well as private property) for public or national interests. Expropriation is discussed in Chapter 13.

The state may grant a short-term lease or authorize temporary occupation and use of such properties (although not by way of social or economic land concession). It can also be the made part of an indigenous minority community properties with some restrictions as provided in Article 26 of the 2001 Land Law (discussed below).

State public property cannot be transferred to private ownership; however, if the property loses its public interest use or characteristic, the state can reclassify the property as state private property. Once reclassified, the property is used as any other property in the state private property classification. (Article 16, 2001 Land Law)

Subsequent
registration
when property
is reclassified

Reclassification of registered state public property needs to be done by way of transfer and such a transfer, to be legally effective, would need to be registered with the Cadastral Administration under procedures for subsequent registration. The changed property classification would be noted on the Land Register and in Cadastral remarks on the property title certificate. In this way, people will be able to learn of the reclassification by viewing the Land Register.⁶

State Private Property

State private
property can be
transferred to a
private person

State private property is all immovable property of the state that is not classified as state public property. State private property also includes (1) escheat property, (2) property voluntarily donated to the state by the owner, and (3) property that is neither a subject of lawful private property nor under possession in accordance with provisions in Chapter 4 of the 2001 Land Law.⁷ Land parcels that are encumbered through acquisitive possession or social land concessions remain state private property until the possessor or concession holder fulfills the conditions for ownership acquisition including registration of the property. (The

⁶ Most state public land has not yet been registered in the Land Register; however, it may be recorded in the State Property Inventory maintained by the Ministry of Economy and Finance. When such unregistered public state land is reclassified, this change can be effective without subsequent registration of the transfer in the Land Register, since it has not been registered in the first place. In any event, the transfer must be made in compliance with the legal requirements for transferring property ownership from the State to a non-state party.

⁷ See Article 12, 2001 Land Law, and Article 5, Sub decree 118 of October 7, 2005 on State Land Management.

real right of possession is discussed in Chapter 7.)

One key distinction between state public and state private property is that the state can sell or otherwise transfer state private property to private persons. Under the 1992 Land Law, state private land was subject to acquisitive possession, which could lead to ownership. The 2001 Land Law prohibited new acquisitive possessions, but provides that state private land can be transferred to social land concessions, through which social land concession holders may acquire ownership. State private land may be granted through economic land concessions of up to 99 years (but economic land concessions do not lead to the acquisition of ownership).

The state as the owner of state private property exercises similar rights over the property as private owners have with respect to their private properties. (Article 17, 2001 Land Law). However, owners of private property can sell, lease or otherwise transfer or encumber their property in any way that suits their needs. In contrast, state officials, who are responsible for managing the inventory of state private property, must carry out their duties according to laws and regulations. The conditions and procedures for management of state properties (public and private property of the state) are set out in two sub-decrees:

Sub-decrees on
State Land
Management

- Sub-decree 118 of October 7, 2005, on State Land Management
- Sub-decree 129 of November 11, 2006, on Rules and Procedures for Reclassifying (*anuk-prayuk*) Public Properties of the State and of Public Legal Entities

Both the 1992 and 2001 Land Law specify that persons cannot acquire legal possessor (*pokee*) status through the occupation or use of state public property. Although a person may have occupied state public property innocently and in complete ignorance of the fact that it is state public property, the person will not be allowed to convert such possession into ownership.

No Possession
rights over state
public property

Furthermore, Article 19 of the 2001 Land Law requires such occupants to vacate the property with no compensation or reimbursement for

monies spent on improving or maintaining the property.

Buddhist Wat Property

Properties that constitute the premises or that are placed under the exclusive control of Buddhist monasteries are classified as Buddhist Wat immovable properties upon registration in the Land Register.

Article 20 of 2001 Land Law:

Immovable properties in the form of land and structures existing within or outside the premises of Buddhist Wats are a patrimony allocated in perpetuity to the Buddhist religion and are available to its followers, under the care of the Temple Committee.

As is the case with state public properties, Buddhist Wat properties cannot be sold, exchanged, or donated and cannot be converted to private ownership through prescriptive acquisition. The properties remain the property of the Buddhist Wat to which they are registered.⁸

Rights over
Buddhist Wat
property

The property may be rented or ‘sharecropped’ for profit (so long as the profits are used for religious purposes). The management of, and responsibility for, Buddhist Wat property is the duty of the members of the temple committee selected in accordance with the procedure determined by Prakas of the Ministry of Cults and Regions (Article 21, 2001 Land Law).

Indigenous Minority Community Properties

Rights over
indigenous
minority
community
property

Lands where indigenous minority communities have established their residences and where they carry out their traditional agriculture are classified as indigenous minority community properties upon registration in the Land Register. There are two parts of collective properties of an indigenous minority community: the state private land part granted by the state of private ownership of the community, and the state public property over which the community is granted collective use

⁸ It is not clear whether the Land Law would permit exchange of *unregistered* monastery land with private land or other type of property, with the full consent of all members of the pagoda committee on the basis that the exchange is in the best interest of the pagoda community.

rights pursuant to an agreement signed with the trustee authority of the concerned land. (Article 6, Sub-decree 83.)

Indigenous minority community properties, like monastery properties and state public properties, are bound by specific legal restrictions concerning who may own, acquire use rights or buy such properties. The restrictions on indigenous minority community property apply to the land itself, but not to other types of immovable properties such as houses built or trees planted on the land registered as collective property of an indigenous minority community.

In order to protect their land by collective title ownership an indigenous minority community is required to incorporate as a legal entity.⁹ Interim provisions provide that the concerned indigenous minority group can continue their traditional use of immovable properties that were cleared and occupied or used in accordance with their customary practice prior to the effective date of the 2001 Land Law.¹⁰ This means that the 2001 Land Law prohibits indigenous minority groups from commencing new possessions of state land after August 31, 2001 – the same prohibition that applies to the rest of the population.

The land belongs to the group as a whole not individual members

Lands registered as indigenous minority community properties do not belong to any one individual member of the community but rather to the registered community (the indigenous group as a whole). The lands are granted by the state to the indigenous minority community as collective ownership (Article 26, 2001 Land Law). Collective ownership enables indigenous minority groups to continue living or working on the lands in accordance with their traditional practices (which involve collective rather than individual use of their community land).

However, the 2001 Land Law does not force any indigenous minority person or household to continue their traditional lifestyle and practice. An indigenous minority household can decide to refrain from joining a

⁹ Sub-decree on Procedures for Registration of Indigenous Community Land, 83 ANK.BK, June 9, 2009.

¹⁰ See Article 23 (2) of the 2001 Land Law.

Criteria and
choice of
membership in
a legal
indigenous
minority
community

legal indigenous minority community when the community adopts bylaws and establishes itself as a legal entity. If an indigenous minority household decides not to join in the community, the household cannot be forced to place the household's lawful possession land under collective ownership of the legal indigenous minority community (Article 27 of the 2001 Land Law). If a household refrains from joining as a member of the legally recognized community, the 2001 Land Law does not prohibit the household from subsequent admission into the recognized community. But once the household is admitted as a member, the household must agree to place the household's ownership or possession land under the collective property of the legal community (Article 13, Sub-Decree 83).

Collective
ownership
enjoys same
rights and
protection as
private
ownership

Collective ownership of land granted by the state to an indigenous minority community has the same rights and protections as private ownership. Traditional community authorities exercise ownership rights and establish conditions of land use. The community's decision making mechanisms must be subject to their customary norms as well as laws of general application related to immovable property, such as environmental protection laws (Article 26, 2001 Land Law).

Right to alienate
minority
community
property

Presumably, the ownership rights of a community holding collective title to their community property would include the right to sell or otherwise transfer the *private* part of their property to other persons, which would be done in accordance with the community's by-laws (or internal rules regarding land use). However, the Land Law clearly prohibits the alienation of the public part of the collective property that was granted to the community for collective use only. (Article 26 (1) and (2), 2001 Land Law).

In an attempt to preserve the traditional way of land use by indigenous minority communities, the Council of Land Policy adopted a policy paper recommending that indigenous minority people and communities be prohibited from selling or otherwise transferring any collectively owned property to any person outside the community. This recommendation would have prohibited alienation of both the state

public land and state private land granted to and registered under the name of the community.¹¹ However, the sub-decree that was subsequently adopted by the Royal Government only prohibits an individual member or household of the community from alienating collective properties, but the community itself is not prohibited from alienating the collective properties. (See the definition of “collective title” at Article 4, Sub-Decree 83 of 2009)

Transfer of
indigenous
minority
community
property to an
individual who
leaves the
community

In the event that a member of the community wants to leave the community or its traditional way of life, a share of the alienable portion of the community property may be transferred to that individual in the individual’s personal capacity (Article 27 (1), 2001 Land Law). Alternatively, the community can pay the individual fair compensation for the individual’s share of the community property (Article 14 Sub-Decree 83 of 2009). However, the share that is transferred cannot be land that falls under the definition of state public property (Article 27 (2) of the 2001 Land Law). When an individual leaves the community and acquires his or her share of the community property, the individual apparently is then free to sell or otherwise transfer or encumber the property in the same way as any other private owner.

Authorities
prohibited from
acquiring
indigenous
minority
community
property

Article 28 of the 2001 Land Law specifically prohibits any authority outside the indigenous minority community¹² from acquiring *any* rights to immovable property – not only ownership, but other rights of use such as leases, usufruct, etc. However, Article 28 would not apply to the immovable property rights of an individual who leaves the community and acquires his or her share of the community property.

The last paragraph of Article 26 of the 2001 Land Law makes it clear that the state is not prohibited from undertaking public works for serving national interest need or national emergency need. This would include building roads, schools, hospitals and power transmission lines, for example. Taking property for such public works is discussed in

¹¹ Council for Land Policy, *Policy on Registration of Land and Land Use Rights of Indigenous Minority Communities in the Kingdom of Cambodia*, April 24, 2009, see point 6, at page 5.

¹² The term “authority” refers to a state actor or agency.

Chapter 11, Expropriation.

Classifications under the Forestry Law

Exactly one year after the promulgation of the 2001 Land Law, the Forestry Law was enacted to define the “framework for management, harvesting, use, development and reservation of the forests” of Cambodia.¹³ The Forestry Law is a comprehensive law related to one specific type of immovable property that is listed in the definition of state public property at Article 15 of the 2001 Land Law: “property that has a natural origin, such as forests.”

Forestry Law
applies to all
forests

The Forest Law applies to all forests, whether natural or planted (Forestry Law Article 2). Management of forests are under the general jurisdiction of the Ministry of Agriculture, Forests and Fisheries (Article 3), although management of “flooded forests shall be governed by a separate law, and management of nature protected areas is delegated to the Ministry of Environment.¹⁴

Permanent Forest Estate

Forest property – called the Permanent Forest Estate – consists of two categories:

- Permanent Forest Reserve; and
- Private Forest (which is privately owned)

Forest
Categories

The Permanent Forest Reserve consists of three sub-categories:

- Production Forest (for the sustainable production of timber products and non-forest timber products)
- Protection Forest (maintained primarily for protection of the forest ecosystem and natural resources therein)
- Conversion Forest (for other development purposes), (the Khmer translation is literally “wild land for conversion”).

¹³ Article 1, Forestry Law, promulgated August 31, 2002.

¹⁴ The Ministry of Environment manages natural protected areas under the Law on Natural Protected Areas, the Law on Environmental Protection and Natural Resources Management, the Royal Decrees on Creation of Natural Protected Areas and other legal sources.

Conversion
forest

Conversion consists of vacant land, comprised mainly of “*bon-toip bon-som*” [accessory, or not essential] vegetation, not yet designated to any sector. Conversion forest is temporarily classified as Permanent Forest Reserve until the government designates the land for a specific use and purpose. Much of Cambodia was covered by natural forests that have been cleared over the decades – including the past years of conflict in the country. Since the boundaries of state public land generally, and forest land in particular, have never been definitively determined, determining boundaries for the category of conversion forest could be very challenging.

Classification of Forests

Responsibility
for classifying
forest land

Article 11 of the Forestry Law provides that the Ministry of Agriculture classifies and set boundaries for all forests within the Permanent Forest Estate and in carrying out this work, shall coordinate with local communities, concerned authorities, and the Ministry of Land Management and Urban Planning. This coordination between the Ministry of Agriculture and the Ministry of Land Management is important because under 238 of the 2001 Land Law, the Cadastral Administration is responsible for demarcating boundaries and registering all land parcels, including state public land.

Reclassification
and
declassification
of forest land

The 2001 Land Law and 2002 Forest Law are different with regard to the reclassification of state public land. The Land Law provides when state public land loses its public use purpose, it can be reclassified as private property of the state by *law* transferring the state public property to state private property.

Article 12 of the Forestry Law has a more defined system for changing the classification or declassifying different classes of forests by sub decree.

Article 12 of the 2002 Forestry Law:

The Royal Government of Cambodia has the authority to declassify forest from the Permanent Forest Estate. Such decision shall be subject to the public interest and be consistent with the National Forest Policy, the National Forest Management Plan and technical,

social, and economic data provided by the Ministry of Agriculture, Forestry and Fisheries. Pursuant to provisions of this law, the declassifying forest from the Permanent Forest Reserve for a non-forest purpose, the RGC shall consider the following priorities:

- 1. to declassify conversion forest for other development purposes,*
- 2. to declassify other forest in the Permanent Forest Reserve when current demand is greater than the previous determined use.*

If a forest is declassified from the Permanent Forest Reserve, then the Ministry of Agriculture, Forestry and Fisheries may request the Royal Government to designate vacant wild land (phteï dei preï tom ney) for the purpose of protection and reforestation and to maintain permanent forest cover.

The Ministry of Agriculture, Forestry and Fisheries may request the Royal Government to approve a change in the classification of a forest area to another category within the Permanent Forest Reserve based on new date and function of the forest area.

Study Question 18: Purpose of forest classification

- 1. In the definition of conversion forest above, what do you think is the meaning of “vacant (dei tom ney)?*
- 2. Can you think of policy reasons that the state would classify property defined as conversion forest as part of the state public land classification, rather than state private property?*
- 3. What is the difference between “declassify” and “reclassify” as used in Article 12 of the Forestry Law?*

This brief discussion focuses only on a few of the provisions of this comprehensive Forestry Law as an example of different classifications and categorizations of immovable property. There are inconsistencies between the Land Law and the Forestry Law, as well as other laws and regulations, such as laws and regulations for nature protection areas (*dom-bon kar-pea thom-cheat*, or areas for protection of nature). As a practical matter, the provisions of the many laws and regulations related to immovable property are being harmonized and coordinated in their implementation. For example, see the two sub-decrees related to the identification and management of state properties, Sub-decree 118 and 129, noted above.

The table below summarizes the discussion in this chapter about the classification of immovable property based on whether the property can be transferred, and if so, to whom.

Table 1: Rights to transfer immovable property under the 2001 Land Law

Type of Registered Property	Can Transfer?	To Whom (or to what class)?	Conditions	Subject to Acquisitive Possession (<i>pokeak</i>)?*
State Public	Yes	State Private	No longer serves public purpose	No
State Private	Yes	Anyone with Cambodian nationality	None, except procedural requirements	Yes
Buddhist Wat	No	Cannot transfer	Not relevant	No
Indigenous Community	Yes	(a) Member of community (b) Perhaps to outsiders as well	(c) Must be leaving community or have special arrangement (d) By decision of community, not individual member (e) Only state private property portion	No
Private	Yes	Anyone with Cambodian nationality	None, except contractual and procedural requirements	No

The last column in the chart above answers the question of whether a particular class of land under the 2001 Land Law could have been acquired by acquisitive possession (*pokeak*). As the chart above shows, only one classification of land was subject to *pokeak*, and that was *state private land*. The right to start a new acquisitive possession ceased to exist on August 31, 2001, the date the 2001 Land Law took effect.¹⁵

*Note about prescription under 2007 Civil Code

¹⁵ If a person claims this right, the *first* thing a person must show is that the possession of private state land started before August 31, 2001. This is only the first; the person must show that he or she meets the other criteria for lawful possession, as set forth in Chapter 4 of the Land Law (which are discussed in Chapter 7 of this book.)

The 2007 Civil Code recognizes a new type of possession that can lead to ownership by private persons. The provisions creating this right, which is called “*prescriptive acquisition*” (*anya’yokal nei latakam kam’sitt*), started to apply on December 21, 2011.¹⁶ This right was not recognized under prior Cambodian law; however, many jurisdictions do recognize prescription. We will study this right in Chapter 7.

Conclusion

Immovable property in Cambodia is divided into 4 broad classifications that are based primarily on who can acquire ownership over the property and what restrictions are placed on the ownership of the property. In the following chapters, we will look at ownership and other real rights related to immovable property. As we shall see, these rights may vary according to the way that the property is classified.

¹⁶ These provisions became applicable from the application date of the Law on the Application of the Civil Code, December 21, 2011.

CHAPTER 5

REAL RIGHTS – OWNERSHIP

Topics Covered
in this Chapter

Ownership

Ownership under Cambodian law

Acquisition of Ownership

Extent of Ownership

Things Permanently Attached to the Land

In Chapter 2, we discussed basic concepts of immovable property, including what is meant by property, ownership and real rights. We also briefly discussed the difference between the civil and common law traditions of ownership. You may find it very helpful to go back and review Chapter 2 to make sure that you fully understand the following basic concepts:

- The basic characteristic of property is that it can be owned.
- Ownership [*kam 'sitt*] is the right of an owner to freely use, receive income and benefits from and dispose of the thing owned.
- Immovable property is land and everything pertaining or permanently or firmly attached to that land.
- Immovable property ownership is indivisible – there is only one “owner” of a particular parcel of land.
- The owner of immovable property can, and often does, grant others rights to his or her property, thus limiting the owner’s rights. While these persons are not “owners,” they do have rights, called “real rights.”
- The 2007 Civil Code recognizes the following real rights:
 1. Ownership
 2. Possession
 3. Usufructuary real rights
 4. Security rights
- Real rights are statutory (meaning they are recognized by law); real rights attach to a specific parcel of land and these rights can be

Review of basic
concepts of
immovable
property

asserted against all persons.

In this and the next chapters, we will discuss these real rights in more detail, beginning with the strongest real right – ownership.



Because the 2001 Land Law was enacted while Cambodia was still drafting a civil code, the 2001 Land Law included many provisions that normally would have been part of the civil code. As we begin discussing ownership and other real rights, you will see that most of these rights are now covered by the 2007 Civil Code, and the corresponding provisions have been deleted from the 2001 Land Law.

From this point forward, unless specifically noted otherwise, all references to the Civil Code refer to the 2007 Civil Code.

Ownership

Ownership is the most secure and absolute right that anyone can acquire over property – whether it is movable or immovable property.¹ Ownership is protected by Cambodia’s Constitution, which at Article 44, provides that

Constitution Article 44

All persons, individually or collectively, shall have the right to ownership [m’chas kam’sitt]. Only Khmer legal entities and citizens of Khmer Nationality shall have the right to own land [dei].

Legal private ownership [m’chas kam’sitt] shall be protected by law.

The right to take ownership [kam’sitt] from any person shall be exercised only in the public interest as provided for under law and shall require fair and just compensation in advance.

¹ In Chapter 12 we will discuss how people acquire and register ‘definite’ ownership, which is acquired when the concerned property is registered in the Land Register (Property Ownership Register/Immatriculation Register).

**Notes:**

M'CHAS refers to person who possesses or owns the thing.

KAM'SITT refers to the definite and exclusive right to the thing.

In common usage, people generally refer to a person who has control over a place or thing, such as an owner, possessor or tenant, as *M'CHAS*.

State recognition and protection of private ownership is one of the key characteristics for market economic systems around the world. Article 56 of the 1993 Constitution states that Cambodia shall adopt a market economy system.

Ownership in a market economy

Market
economy
concept of
ownership

In market economy systems, whether civil law or common law, the concept of ownership entails certain *rights* that the owner (and only the owner) has with regard to the property owned.

These 'exclusive' rights of an owner are:

Exclusive rights
of an owner

1. Right to enter, use and stay
2. Right to exclude others
3. Right to grant rights to the property to others
4. Right to dispose of the property (transfer to others)
5. Right to alter or destroy the property (within the limits permitted by law and regulation)

Study Question 19: Ownership Rights

Take a look at each of the 'exclusive' rights listed above.

What do you think are some common examples of each of these rights in Cambodia?

Ownership under Cambodian law

In Chapter 2, we looked at how private ownership of immovable property was first recognized in the 1920 Civil Code, and continued to

develop until the period from 1975, when private ownership was prohibited. Private ownership of certain types of immovable property was reintroduced in 1989, and in more firmly established by the 1992 Land Law. Let's begin by looking at how ownership has been defined in the 1992 Land Law, the 2001 Land Law and the Civil Code.

The 1992 Land Law included the following definition of ownership:

Definition of
ownership
under 1992
Land Law

Article 19, 1992 Land Law

Ownership is the right to manage absolutely and exclusively any property, provided that is not prohibited by the law.

In the Land Law of 2001, Article 85² deals with this issue. It states that:

Definition of
ownership
under 2001
Land Law

Article 85, 2001 Land Law

The owner of immovable property has the exclusive and extensive right to use, enjoy, and dispose of his property, except in a manner that is prohibited by law.

The 2007 Civil Code defines ownership as follows:

Article 138, Civil Code

Ownership refers to the right of an owner to freely use, receive income and benefits from and dispose of the thing owned, subject to applicable laws and regulations.

Definition of
ownership
under Civil
Code

Article 13(1) of the Law on Application of the Civil Code clarified that the right of ownership of land includes the “free development or alternation of the type and original structure of the land under the uses the owner wishes to make pursuant to laws and regulations.” Paragraph (2) of this same Article 13 lists some of the development activities, such as land clearance, land filling, flattening of mountains, well drilling, rock mining, and the right to develop the land for different purposes. Article 13 does not significantly change prior law, as the

² Article 85 of the 2001 Land Law was deleted by Article 80 of the Law on Applicability of the 2007 Civil Code, applicable on December 21, 2011.

same rights of ownership existed under Articles 88 and 89 of the 2001 Land Law.

Study Question 20: Ownership Rights

Take a look at definitions of ownership from the 1992 and the 2001 Land Laws. Do you see any real difference between the two? Remember that the 1992 law predated the current Constitution and thus technically did not have to conform to market economy principles.

Now compare the 2001 Land Law definition and the Civil Code definition. Do you see any significant differences in the scope of ownership? Anything different about what could be owned?

Acquisition of Ownership

There are two basic ways for a person to acquire ownership of immovable property under Cambodian law:

Two basic ways
to acquire
ownership

- Grant from the state, and
- Acquire from someone who has ownership.

Grant from the state

Historically, the usual way for Cambodian citizens to acquire land ownership was through grant from State, through the process of acquisitive possession (*pokeak*), which has been recognized since 1989. The 2001 Land law prohibited new acquisitive possessions after the effective date of that law. However, as provided in Article 29, persons in lawful possession prior to the effective date of the 2001 Land Law have a right *in rem* (real right) that can be converted to “definitive ownership.” Acquisitive possession is discussed in more detail in Chapter 7.³

Grant from state
Acquisitive
possession

The state still has the right to grant ownership over immovable property, but only under the strict limits of the 2001 Land Law:

³ See also the discussion in Chapter 2 – Historical View.

Article 6, 2001 Land Law

Only legal possession can lead to ownership.

The state may also provide to natural persons or legal entities of Khmer nationality ownership over immovable property belonging to the State within the strict limits set forth in this law.

One of the ways that the state continues to grant ownership over immovable property is through social land concessions established pursuant to Chapter 5 of the 2001 Land Law and Sub-decree 19 ANK/BK, March 19, 2003, on Social Land Concessions. As provided in the 2001 Land Law and Sub-decree 19, social land concessions can lead to ownership:

Social land
concessions

Article 18, Sub-Decree 19 on Social Land Concessions

After correctly complying with the criteria of the social land concession program for five (5) years the target land recipient has the right to ownership of the land and may request ownership title according to procedures determined in the instruction of the Minister of the Ministry of Land Management, Urban Planning and Construction.

Acquire from another owner

If the state does not grant a person ownership over immovable property, the only other way to acquire ownership is from another owner, as provided in the Civil Code.⁴

Acquire from
other owners

Article 160, Civil Code. (Acquisition of ownership over immovable)

Ownership over an immovable may be acquired not only via contract, inheritance or other causes set forth in [Articles 160-186] but also based on the provisions set forth in this Code and other laws.

⁴ Chapter 6 of the 2001 Land Law, Articles 63 – 84, provided for the acquisition of ownership through sale, exchange, gift, or succession. Chapter 6 of the 2001 Land Law has been deleted by Article 80 of the Law on the Application of the Civil Code.

Keep in mind that only Khmer natural and legal persons can own land, but foreigners have ownership rights for co-owned immovable property, as discussed in Chapter 6 of this book.

We will discuss briefly the three basic ways to acquire ownership over immovable property from other owners under the Civil Code:

1. Contract
2. Inheritance
3. “Other” causes under Articles 160-186

Acquire by Contract

Immovable property transfers are typically made by contracts, which are now governed by the Civil Code. Contracts related to immovable property share many similar characteristics with other types of contracts, but there are some important distinctions.

Contracts to acquire title must be by authentic document

- Contracts to transfer or acquire title to an immovable must be made by authentic⁵ document.

Article 336 (Formation of contract via offer and acceptance)

(1) A contract comes into effect when an offer and an acceptance thereof conform to each other.

(2) Notwithstanding the provisions of paragraph (1), a contract in which one of the parties bears a duty to transfer or to acquire ownership on an immovable, shall come into effect only when such contract is made by authentic document.

- Transfer of title of immovable comes into effect only when the transfer is registered.

Transfer of title effective only when registered

Article 135, Civil Code. (Requisite of transfer of title by agreement pertaining to an immovable)

Notwithstanding Article 133 and 134, transfer of title by agreement pertaining to an immovable, shall come into effect only when the transfer of right is registered in accordance with the provisions of the laws and ordinances regarding registration.

Different types of contracts

There are different types of contracts through which a person can acquire immovable property ownership. These are:

⁵ Note that the tentative English translation of Article 336 of the Civil Code refers to this as a notarial document. We think the English term should be “authentic” and have used it here.

1. Contract of Sale

Article 515, Civil Code. (Definition of sale)

A sale is a contract whereby one party, called the 'seller', is obligated to transfer ownership or other property rights to the other party, called the 'buyer,' and the buyer is obligated to pay the purchase price to the seller.

2. Contract of Exchange:

Article 566. Civil Code. (Meaning)

An exchange shall take effect when parties agree to transfer to one another property rights other than money.

3. Contract of Gift

Article 568, Civil Code. (Definition)

A gift is a contract that comes into effect when one party declares the intention to give property to another party free of charge, and the other party accepts it.

Acquire by inheritance

Inheritance

Inheritance refers to acquiring ownership of property (whether movable or immovable) as a result of the death of the owner, whether the owner died without a will (statutory inheritance), or with a will (testamentary inheritance). See Book 8 of the Civil Code for the rules of succession.

Acquire by other causes under Article 160-186

Prescriptive acquisition

In addition to the commonly known and recognized means of property ownership acquisition, Article 162 of the Civil Code introduced a new way to acquire ownership, called “acquisition of ownership by prescription,” which leads to “prescriptive ownership.”

Article 162, Civil Code. (Prescriptive acquisition of ownership over immovable)

(1) A person who peacefully and openly possesses an immovable for a period of 20 years with the intention of ownership shall acquire ownership thereof.

(2) A person who peacefully and openly possesses an immovable

for a period of 10 years with the intention of ownership shall acquire ownership thereof if the possession commenced in good faith and without negligence.

Prescriptive acquisition must be through peaceful and public possession with the intent to acquire ownership. The ten-year possession period applies to a possessor in good faith and without negligence, while the longer 20-year possession period applies without regard to good faith or negligence.

No prescriptive acquisition of state property

However, prescriptive acquisition of ownership is not permitted against any type of state property whether state public or state private property, including state private land being held or granted as lawful acquisitive possession (with or without certificate of possession) under the Land Law. This is because land subject to acquisitive possession (*pokeak*) remains state private property until the land ownership certificate is issued and the land is registered in the Land Register (Ownership Register).

Extent of Ownership

As noted above, ownership of immovable property grants to the owner exclusive rights to do all things legally allowable with the property. However, what the ownership definition does not tell us is *which* kind of immovable property a person is allowed to own and to *what extent* a property is owned. Let's look at the two issues separately, beginning with the following articles of the 2001 Land Law.

Which Land can be owned by private persons

One of the most significant differences between the 1992 and the 2001 Land Laws concerns the types of land that can be privately owned in Cambodia. Let's briefly review the historical development of this issue in the 1992 and 2001 Land Laws.

From June 1989 to August 1992 (before the 1992 Land Law), Cambodians could *own* their house, and *occupy and use* their residential land of up to 2,000 m² per household, with the possibility that provincial authorities would subsequently grant the household

Distinction
between
ownership of
residential land
and non-
residential land

ownership to the household's *residential land*.⁶ This right was granted to households, not individuals, and if the household held residential land larger than the 2,000 m² limit, after the effective date of the Circular, land in excess of the limit was treated as possession land.

While it was possible for households to own their houses and residential land, they could only *possess* their rice fields or farm land of up to 5 hectares per household. Occupation and use possession of rice fields and farm land were granted by district authorities, and included the *rights to exploitation and succession only*.⁷ In addition, the Ministry of Agriculture could grant to Cambodian households *concession* land in excess of the 5 hectare limit that applied to rice and farm land.⁸

1992 Land Law
evolved from
1989 land use
policy

This distinction between residential land and other types of land (production land) was consistent with the type of society that had evolved in Cambodia prior to the 1993 Constitution. The society was based on socialist principles whereby the State controlled the means of production and the people used the land in accordance with state directives.

Under the 1992 Land Law (August 1992 to August 2001), Cambodian households could *own* their houses as well as residential land granted by provincial authorities.

Article 19, 1992 Land Law

Land ownership can only be acquired on residential land.

A household could only *possess* other types of land granted by district

⁶ See section I (a), Circular No. 003 SNN, dated June 03, 1989, on Implementation of Land Use and Management Policy. For a better understanding of the policy and procedure for granting and acquiring rights to houses and residential land in Phnom Penh, see Circular No. 003 as well as Sub-decree No. 25 on granting house ownership to Cambodian people. See also Circular No. 05, dated June 05, 1989, issued by the Phnom Penh Municipality to guide the implementation of the sub-decree.

⁷ Under the 1989 land use policy, ownership of this land stayed with the State, and therefore the land could not be sold by the possessor.

⁸ See Section I (b), last bullet point, of the Circular No. 003 SNN of 1989.

authorities; however, they could acquire ownership after 5 years lawful *acquisitive possession (pokeak)*.

Article 73 of the 1992 Land Law provided that an acquisitive possessor could transfer any part of their possession rights to another person through succession or contract in authentic form. This was interpreted to mean that possession land could be the subject of sale, exchange or donation in addition to succession.⁹

The restricted immovable property ownership rights under the 1992 Land Law were not compatible with the right of ownership as well as the market economy established in the 1993 Constitution. Accordingly, private ownership was further strengthened in the 2001 Land Law to cover all types of land, without any restrictions on the amount of land that an owner can own.¹⁰

Article 1, 2001 Land Law:

This law has the objective to determine the regime of ownership for immovable properties in the Kingdom of Cambodia for the purpose of guaranteeing the rights of ownership and other rights related to immovable property, according to the provisions of the 1993 Constitution of the Kingdom of Cambodia.

Article 4, 2001 Land Law:

The right of ownership, recognized by Article 44 of the 1993 Constitution, applies to all immovable properties within the Kingdom of Cambodia in accordance with the conditions set forth by this law.

Under the 2001 Land Law, Cambodians have the right to own both residential land and production land (including agricultural land, commercial land, industrial land, etc) that has been granted by the State. Also, they may continue their lawful acquisitive possession of

2001 Land Law does not distinguish between residential and farm land or restrict amount of land that a person can own

⁹ Although practice in that period revealed that possession rights were used and recognized as debt surety, the 1992 Land Law provisions did not contain any thing about using possession rights for such purpose.

¹⁰ As noted in the previous chapter, there are restrictions on ownership of State public land, monastery properties, and indigenous minority community properties.

land that commenced prior to August 31, 2001.¹¹ In addition to the traditionally recognized rights of exploitation and succession, the 2001 Land Law clearly provides that acquisitive possession can be the subject of exchange, transfer or other business transactions (such as sale or loan security).¹² There are no restrictions on the number of land parcels that a person can own as the Land Law allows Cambodian to freely buy and sell immovable property.¹³

To What Extent Can a Private Person Own Land

Consider the following questions:

Study Question 21: The extent of a person's land ownership

If someone buys a parcel of land in Cambodia, does that person own the vertical space located beneath the land surface? If so, how deep?

What about the airspace above the land?

Does the land owner own the airspace above their land? If so, to what height?

These questions raise very important issues for land owners in Cambodia. Issues such as:

Rights against someone who encroaches on, under, or over the land

- Whether as the land owner you can prevent someone from using the airspace above your land (like flying an airplane over your land, or building an extension on the upper stories of their house that extends over your land boundary).
- Whether someone can dig under your land from their land.

Ownership rights to areas above and below the

The answers to these questions were addressed in the 2001 Land Law, but are now covered by the Civil Code. Article 139 of the Civil Code answers the question about ownership of areas above and below the

¹¹ No new acquisitive possession could begin after August 31, 2001. For more information about acquisitive possession (*pokeak*), see Chapter 7, Possession (*Sitt-Kan-Kab*).

¹² See Article 39 of the 2001 Land Law.

¹³ Neither the 1992 nor 2001 Land Laws address the issue of whether a person or household could claim the right of ownership to land they possessed in excess of the size limits permitted under Circular 003 SNN of 1989.

ground land's surface.¹⁴

Article 139, Civil Code. (Scope of ownership of land)

Ownership of land extends to the areas above and below the surface of the land to the extent that the owner derives benefit there from, subject to applicable laws and regulations.

Compare the scope of land ownership under the Civil Code with the Article 90 of the 2001 Land Law, which provided that the ownership of the land's surface included the underground and anything that could be exploited (in accordance with law) from the underground, which was determined in a vertical line of the land boundary. And, Article 91 of the 2001 Land Law provided that ownership extended to the area directly above the land, except that the owner could not prohibit aircraft from flying over the owner's land.

Historically, people believed (supported by many courts and legal scholars) that ownership of land included the area above the land all the way to the heavens, and the area below the land to the center of the earth. However, this idea of the scope of land ownership has proven unworkable in modern times, for example, when the airplane was invented and air travel became common. Similarly, problems have developed with the concept of land ownership to the center of the earth for different reasons – many dealing with environmental issues about deep subsurface drilling.

A more contemporary view, one adopted in Cambodia's Civil Code, is that an owner owns the area above and below the land's surface to the extent [or distance] that the owner derives benefits from the space.

Ownership of
artifacts and
minerals in the
ground

Although this rule seems to give owners rights to the subsurface of their land, there are some important restrictions on ownership of artifacts and minerals:

¹⁴ See comparable provisions under Articles 90 and 91 of the 2001 Land Law. Compare Article 139 of the Civil Code with Article 25 of 1992 Land Law.

Article 141, Civil Code. (Discovery of cultural artifact or minerals in the ground)

(1) A landowner cannot assert the ownership over any type of statue, bas-relief, antiquity or other cultural artifact discovered in the ground. Such items comprise assets of the state, and the owner of the land is obligated to return them to the Ministry of Culture and Fine Arts.

(2) A landowner cannot assert ownership over minerals in the ground, which are governed by a separate law. Such minerals comprise assets of the state, and the right to mine and acquire them shall be owned by the person to whom mining rights have been granted by the state.

This restriction on the right of ownership of minerals in the ground is similar to the laws of many jurisdictions, and is consistent with Article 58 of the 1993 Constitution, which reserves mineral resources as state properties:

Constitution, Article 58

The State properties shall include, but not be limited to, land, mineral resources, mountains, sea, bottom of the sea, beneath the bottom of the sea, coastlines, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense, and other facilities determined to be State properties.

The control, use, and management of the State properties shall be determined by law.

Other laws
restricting
rights to
minerals found
under ground

An example of a “separate law” governing minerals in the ground, referred to in Article 139 of the Civil Code, is the 2001 Law on Mineral Resources Management and Exploitation.



Land owners own the airspace above their land and all that is below the surface to the extent they can derive benefits from the space, and with some important restrictions related to artifacts and minerals in the ground!

So we can say that, except things specifically prohibited by existing laws and regulations, the owner of land in Cambodia owns all that is below the land and all that is above it – to the distance that the owner

derives benefits from the space. Thus, the right of an owner to restrict someone entering the owner's property would not apply to aircraft flying at a normal height because the owner cannot derive any benefit from the airspace at normal flying height. An owner cannot claim ownership of mineral resources or cultural artifacts found below their land (although what constitutes a cultural artifact is not determined in the Civil Code or Land Law). And typically, countries have laws that allow public utilities (water, sewer and electricity) to pass over or under the surface of private land.

Study Question 22: Encroachments under and above land

Consider the following scenarios and try to determine what the legal situation would be concerning each:

- 1. Mr. Sok grows mango trees on his property. One day, he notices his neighbor collecting the mangoes from branches that are overhanging into his neighbor's property. Mr. Sok complains to his neighbor that she is stealing his fruit. The next day Mr. Sok finds that his neighbor has cut the branches of the trees that overhang his property. What are the legal rights of Mr. Sok and his neighbor?*
- 2. Mr. Sok lives in a village far way from the city. One day the government builds a new airport right near his house. The planes that take off and land have to pass over and very closely to the roof of his house. He wants them to stop passing over his house. What are his legal rights?*
- 3. Mr. Sok's neighbor is very rich and owns a helicopter. Each day when he takes off and lands the helicopter he flies very low over Mr. Sok's land. So low in fact that the wind affects Mr. Sok's mango trees. He wants the authorities to order his neighbor to stop flying so low over his property.*
- 4. Digging on his land one day Mr. Sok strikes a vein of gold and realizes that there are gold deposits under this land. He wants to establish a mine and dig up the deposits.*
- 5. Mr. Sok likes flying kites on his property. Naturally the kites veer over his neighbors' properties. One of the neighbors objects and says that he doesn't want the kites to fly over his property. Mr. Sok points out to the neighbor that the kites fly so high that they do not affect anything on the*

neighbor’s property. The neighbor doesn’t care, and she just simply does not want to see the kites in the airspace above her land.

What other situations do you think may arise in Cambodia with regard to someone encroaching on another’s property or ownership? Do the provisions in Articles 139 – 142 of the Civil Code adequately deal with such situations?

Restrictions on ownership rights

Ownership
rights restricted
by laws and
regulations

Although we describe ownership as the “exclusive” right to “freely” enter and use the property, etc., this does not mean the owner is free to use the land in any way the owner wishes. In fact, there are many restrictions on the way that owners can use their land. Some common examples relate to zoning, construction, environmental protection, and land use plans. Zoning laws may dictate that properties in certain areas can only be used for certain purposes, such as for residential use only. Owners in those ‘residential’ areas could not build or operate a factory, or carry out other non-residential activities on their property. So although they are owners with the full set of property rights listed above, they are limited by the laws and regulations as to how they can use their property.

Relationships
with
neighboring
properties

Other common restrictions on ownership rights can be found in laws governing an owner’s relationship with neighboring property owners. One such example, in Articles 139(2) and 140 of the Civil Code, prevents an owner of land from using the land in such a way that causes harm or a nuisance to others. These nuisance provisions are among a series of provisions concerning relationships with neighboring properties in Articles 143-152 in the Civil Code.

Trees that
overhang land
boundaries

One of the very common problems in relationships with neighboring properties concerns trees and plants owned by one person that overhang the neighboring property. The Civil Code also has a rule about an owner’s rights with respect to trees growing across land boundaries:

Article 142, Civil Code. (Right to cut trees growing across boundary)
Where a branch of a tree grows across the boundary from adjacent

land, or when the roots of a bamboo or tree grow across the boundary from adjacent land, the landowner may receive the fruits there from or eliminate such branch or roots.

Things Permanently Attached to the Land

In addition to the issue of ownership of what is above and below land, and relationships with neighboring properties, there is also an issue of ownership of what is *attached* to the land. As we know from our look at property general principles, anything that is attached permanently to the land belongs to the owner of the land. For example, if someone takes a lease on a property and builds a house on the property then based on general principles of property the house will belong not to the lessee but to the owner of the land. The lessees will merely be the occupiers of the house until the expiration of the lease. This is a very common occurrence with long term, or perpetual leases, as we shall see below.

Ownership
rights to things
attached to land
(improvements)

Consider the following situations:

Study Question 23: Ownership rights to improvements on the land

1. *Mr. Sok and Mr. Ran are in disagreement over who has the true legal rights to a particular piece of land. Mr. Sok has been living there for a year. He claims that he moved on only after Mr. Ran had abandoned the land. Mr. Ran says that this is not true and claims that he only allowed Mr. Sok to live on it while he moved away to help care for his dying father in their home village for a year. He allowed Mr. Sok to use the land to grow vegetables while he was away. Before this dispute could be settled, Mr. Sok built a house on the land to assert his claim to the land. Ultimately the competent officials decide in Mr. Ran's favor and ask that Mr. Sok vacate the property. Mr. Sok now wants Mr. Ran to reimburse him for the cost of building the house.*
2. *Mr. Chen notices that someone is erecting a new building on the edge of a parcel of land that he owns. He is very surprised by this and then realizes what is occurring. The builder has mistakenly misidentified where the border of his client's land ends and is mistakenly erecting the building on Mr. Chen's side of the border instead of his client's side. Mr. Chen lets the builder continue without telling him of his mistake.*

When the building is finished he will claim ownership of it on the basis that it is on his land. This way, he believes, he will get a free building.

3. *Mr. Nou and Mr. Yeng are neighbors. Mr. Nou is a dominant personality and Mr. Yeng is a gentle person. Taking advantage of Mr. Yeng, Mr. Nou decides to use some of Mr. Yeng's land to plant some valuable crops. Mr. Nou complains to Mr. Yeng, but Mr. Yeng ignores the complaints. One day a relative of Mr. Yeng comes to visit and advises Mr. Yeng that the plants belong to Mr. Yeng because they are on his land. Mr. Yeng decides to get the authorities to intervene to enforce his right against Mr. Nou.*
4. *Mr. Touch moved onto a vacant piece of property 3 years ago. He did not realize that part of the land was owned by a Ms. Tom. She had bought it from the previous owner but then had to move away as she had been transferred overseas with her job. She intended to develop the land when she returned. Not knowing of Ms. Tom's interest in the land Mr. Touch builds a house that is right on the part of the land that belongs to Ms. Tom. Ms. Tom returns, sees the house and wants it.*
5. *Mr. Leng hires Mr. K'ny to establish a mango plantation on his property. Mr. K'ny plants many mango trees and sets up an irrigation system. When it is complete Mr. Leng refuses to pay Mr. K'ny for the work done. Mr. K'ny wants to take back what he has done by removing all the trees and the irrigation pipes and then sue Mr. Leng for damages and breach of contract.*

All the hypothetical situations above concern the issue of *accretion*. Accretion is the legal term for things that add value to a property through labor or additional materials.

Things added to
the land
(improvements
by people
and
improvements
to the land by
nature

Another way that improvements may be added to land is through *accession*, which is the gradual increase of in land mass through natural processes, such as the gradual expansion of a riverside piece of land by the build up of river silt that is left behind by the natural flow of the river.

The 2001 Land Law had specific general rules to deal with accretion and accession, as follows:

- Accretion by human acts – Articles 96-98
- Accretion by nature [accession] – Articles 99-104

The Civil Code provisions that now apply to these situations do not use the terms accretion and accession, but for the most part, the results are similar to the results in the 2001 Land Law, as explained in the following sections.

Keep in mind that unlike the 2001 Land Law, which applies to immovable property, the Civil Code covers a much broader area. The Civil Code sets for “general principles governing legal relations in civil matters,” and applies to both property-related and family-related matters (Civil Code Article 1). The Civil Code covers both movable and immovable properties. Some of the general property rules apply to both movable and immovable properties, and at other times, the rules are different for the different types of property.

You will see examples of these rules in the discussion about ownership of things attached to the land.

Ownership of improvements made by people

The general rule is that any works done on a parcel of land (including construction and plantation work) belong to the owner of the land.

Article 122, Civil Code. (Component of a land; principle rule)

Owner owns
things attached
to the land

Things attached to land or comprising a part thereof, particularly buildings or structures immovably constructed on land, or seeds planted in the ground, crops in the fields or timber growing on the land, are components of the land unless they are severed from the land, and may not, except as otherwise provided by law, be the subject of rights separate from those applicable to the land.

Thus the owner of the land has all rights to these improvements/additions. (Compare this with Article 96, 2001 Land Law).

At the termination of a long term, or perpetual lease,¹⁵ improvements made by the lessor belong to the owner of the land, and the landowner generally cannot make the lessor remove the improvements. Of course, the parties may make a different agreement, but if they do not, these general rules apply.

Ownership of
improvements
made by
perpetual
lessee

Article 254, Civil Code. (Termination of perpetual lease)

(1) Upon termination of a perpetual lease, the perpetual lessor cannot demand that the perpetual lessee restore the immovable to its original condition unless the perpetual lessee has destroyed the immovable or fundamentally changed its nature.

(2) Upon termination of a perpetual lease, the lessor shall acquire the ownership over any improvements and any structures installed on the immovable by the perpetual lessee without having to pay compensation to the perpetual lessee.

However, what about other situations not involving perpetual leases, where the evidence shows that the work was carried out by someone else with their own materials?

Ownership
rights of
improvements
made by person
other than the
owner

Article 158, Civil Code. (Possessor's right to demand reimbursement of expenditures)

(3) Where a possessor is to return land to the owner, if there exist buildings, unharvested crops or unharvested timbers that a good faith possessor constructed or planted thereon, the owner shall provide compensation, at the owner's election, for the expenditures made by the possessor for these buildings, crops or timbers, or the increase in value in these buildings, crops or timbers attributable to such expenditures, to the extent that the increase in value continues to exist. . . . [W]here the possessor is a possessor in bad faith, the owner may elect to either remove the constructed buildings, planted but unharvested crops or unharvested timber, or assume the ownership thereof. Where the landowner chooses removal, the possessor must remove the buildings, crops or timber without receiving compensation. Where the owner elects to assume the ownership of the buildings, crops or timber, the owner must compensate the possessor for expenditures made by the possessor or for the increase in the value of the buildings, crops or timbers

¹⁵ A long term, or perpetual lease is a lease of more than 15 years, and constitutes a real right, which we will discuss in Chapter 9.

that include the original value of these things and shall be calculated without considering the added value to the land. In this case, the court may grant the owner a grace period of a reasonable length to make such compensation.

We see from this paragraph that there are different rules when the possessor acts in “good faith” and when the possessor acts in “bad faith.” (Compare this paragraph with Articles 96 and 97 of 2001 Land Law.)

In order to analyze the examples in the study question above, we first need to determine if the possessors acted in good faith, which is a general legal concept recognized in most civil and common law jurisdictions. Article 5 of Cambodia’s Civil Code specifically mandates that “rights shall be exercised and duties performed in good faith.” As you read through the Civil Code, you will see that requirement of “good faith” applies in many different situations – especially in obligations (contracts).

Good faith
versus
bad faith

There is no specific definition of good and bad faith that meets all our examples, but for guidance, we can look at how the terms good and bad faith are defined in the context of “flawed possession.”¹⁶

Article 233, Civil Code. (Flawed possession)

(1) Possession that is acquired with knowledge that one has no right of possession to it is referred to as “possession in bad faith” and possession acquired without knowledge that one has no right of possession to it as “possession in good faith”. If the lack of knowledge results from negligence, the possession is referred to as “negligent possession”.

From this article, we can come up with some general ideas about good and bad faith.

1. Did the person have knowledge about his or her right or not?

¹⁶ Also, look at Article 38 of the 2001 Land Law, which defines “good” faith for the purposes of being a lawful possessor; that is, the “possessor was not aware of any possible rights of third parties over the property.”

2. If the person did not have knowledge, was the person negligent in not trying to find out? People have an obligation to make reasonable efforts to know their rights and duties.¹⁷

Thus, by ‘good faith’ we mean that someone made improvements or additions to a property (1) under the mistaken belief that he or she owned the property, or that the owner had agreed to the improvements; and (2) the person had made reasonable efforts to find out about his or her rights.

By ‘bad faith’ we mean those situations where a person makes improvements with knowledge that the land belongs to another person, or was negligent by not making reasonable efforts to avoid the mistaken belief.

Below we will take a look at how the Cambodian law deals with improvements made in ‘bad faith’ and improvements made in ‘good faith.’

Study Question 241: “Good Faith” and “Bad Faith”

Think about the concepts of ‘bad faith’ and ‘good faith’ explained above. Can you think of some examples of situations that may arise in Cambodia that the drafters of the law may have had in mind when they decided to make provisions for this in the law?

What would be an example of someone making improvements or additions in ‘bad faith’?

What would be an example of someone making improvements or additions in ‘good faith’?

¹⁷ There are numerous examples in the Civil Code that require “good faith without negligence” in order for a person to make a claim based on good faith. Some examples include: Article 162 (Prescriptive acquisition of ownership over immovable); Article 193 (Bona fide acquisition of ownership of movable); Article 195. (Prescriptive acquisition of ownership over movable); and Articles 346 – 349 (related to contracts).

Improvements made in ‘bad faith’

In the event that the work was done by someone who is not the land owner and the work was done ‘in bad faith’ (i.e. against the will of the owner, or without the land owners permission or acquiescence) then the owner has two options:

Two options for improvements made in bad faith

- Demand removal of the buildings, crops or timber added by the possessor, which the possessor must remove without receiving compensation.
- Assume ownership of the buildings, crops, timber added by the possessor. In this case, the owner compensates the possessor for the “expenditures made by the possessor” for the things added without considering the added value to the land.

(Compare these Civil Code provisions with Article 98 of the 2001 Land Law.)

Table 1: Owners’ rights and options with regard to improvements made in bad faith

Options	Owner’s Right?	Liability for Costs	Costs to be Paid	Increase or Decrease in Land Value
Keep the improvements	YES	Land Owner	The amount of expenditures made by the possessor on the things added. Reasonable period of time to pay compensation	Not considered
Demand removal of improvements	YES	Bad faith possessor	Cost of removing the things added to the land	Not an issue

Improvements made in ‘good faith’

If the possessor acts in “good faith,” the owner has two choices, either:

Two options for improvements made in good faith

1. compensate the possessor for the expenditures made on the improvements, or
2. compensate the possessor for the increase in value attributable to improvements, to the extent the increase in value continues to exist..

Table 2: Owners’ rights and options with regard improvements made in good faith

Options	Owner’s right?	Liability for Costs	Costs to be Paid	Increase or Decrease in Land Value
Keep the improvements	YES	Land Owner	The amount of expenditures made by the possessor for the things added. OR Cost of increase in land value – to the extent the value continues to exist	Important issue as the owner gets to choose.
Demand removal of improvements	NO	Land owner	Cost of removing the things added to the land	Not an issue

Accretion by nature – Alluvial deposits

Land added to or removed from a property by running water currents

Accretion by nature is only relevant to land situated alongside rivers and other moving waterways. Where the accretion issue arises is when moving water carries mud, silt and sand deposits it along the bank of the waterway, usually where the water slows down. These deposits – called alluvial deposits – can gradually increase the size of one or more land parcels, while decreasing the size of others.

Articles 179-180 of the Civil Code address this issue.

Article 179, Civil Code. (Ownership of alluvial deposit)

Navigable and non-navigable waterways

An alluvial deposit that forms gradually and naturally along a riverbank belongs to the owner of the riverbank along which it forms, regardless of whether the river is navigable by boats or rafts. The owner of the riverbank of a river navigable by boats or rafts is responsible for maintaining a way to pull such boats in compliance with the laws and regulations.

Article 180. Civil Code. (Ownership of alluvial deposit)

With regard to an enlargement of land on a riverbank due to

gradual and natural conveyance of an alluvial deposit from the opposite riverbank caused by natural water flow, the owner of a parcel of land on the enlarged riverbank shall receive benefits from the conveyed alluvial deposit. The owner of a land on the opposite riverbank may not demand the restoration of the land lost.

(Compare this with Article 99 of the 2001 Land Law).

So, if your land is situated on a part of a river (usually a bend) that results in alluvial soil being deposited there by the river then you become the owner of that additional soil.

Land owners
own any soil
that is
deposited on
their land by the
river

This is even the case if the soil that is deposited came from a bank abutting someone else’s land (usually the land parcel on the other side of the river). In such a situation, the other land parcel owner has no right to claim back the lost soil.

Avulsion – Losing a portion of land

However where the loss of land is more significant than merely losing deposits of soil then Article 181 of the Civil Code allows the owner of the land parcel that lost the land to claim it back. This would be the case where a “clearly recognizable portion” of land breaks away from one land parcel (due to a some kind of sudden water force) and ends up on another person’s property (usually downstream or on the other side of the waterway). In such a case the original owner of the removed portion of land has one year to claim it back (or longer if the land has not yet been ‘possessed’)

Losing a portion
of land
“avulsion”

A piece of land breaking away from one land parcel and attaching to another land parcel is a phenomenon commonly referred to as ‘avulsion’ in many legal systems. A common definition of ‘avulsion’ is “a sudden cutting off of land by flood, currents, or change in course of a body of water [especially] one that separates a portion from one person’s property and joins it to that of another.” Article 181 of the Civil Code is substantially identical to Article 101 of the 2001 Land Law, which is based on Article 31 of the 1992 Land Law, which was substantively copied from Article 657 of the old Civil Code. It would seem that this

provision of Cambodian law is based on Article 559 of the French Civil Code.

Study Question 25: Rights to soil added to a land parcel by a navigable river

With regard to accretion in non-navigable waterways, the provisions of the law in the above mentioned articles seem to pose no problem. However, do you think that there are any conflicts between these articles as they apply to accretion in navigable waterways, and the provisions in Article 15 of the 2001 land law? Article 15 reads in part as follows:

“The following property falls within the public property of the State and public legal entities:

...banks of navigable or floatable rivers....”

Banks of navigable or floatable rivers constitute state public land. The state public land area is defined as the floodplain, or the area adjacent to the waterway that is liable to flood. Typically, the owner of land adjacent to the riverbank is entitled to use the riverbank land, but cannot build on it.

Newly formed land masses in the middle of waterways

Another phenomenon that occurs in waterways (rather than along the banks) is the creation of new land masses by alluvial deposits.

Cambodian law addresses this issue by distinguishing between land masses formed in navigable waterways and land masses formed in non-navigable waterways.

Islands formed in navigable waterways

According to Article 182 of the Civil Code, any “islands or alluvial bed” that forms in the middle of a navigable waterway belongs to the State.¹⁸ An example of this would be any land masses that form in the Mekong River or Tonle Sap (both clearly navigable water ways). Any newly formed islands would automatically become property of the

Islands formed in
navigable rivers
– property of the
state

¹⁸ Compare this to Article 102 of the 2001 Land Law).

state. No private individuals would have any right to lay claim to such land masses (unless a right was granted by the State).

Islands formed in non-navigable waterways

Article 183 of the Civil Code has a different rule when an island forms in a *non-navigable* waterway. Where a new land mass is created in a non-navigable waterway the new island belongs to whoever owns the property on the side of the river where the island formed. Where the island is more or less in the center line of the river then it belongs to the owners of the properties on both riverbanks, using the center of the river as the dividing line.

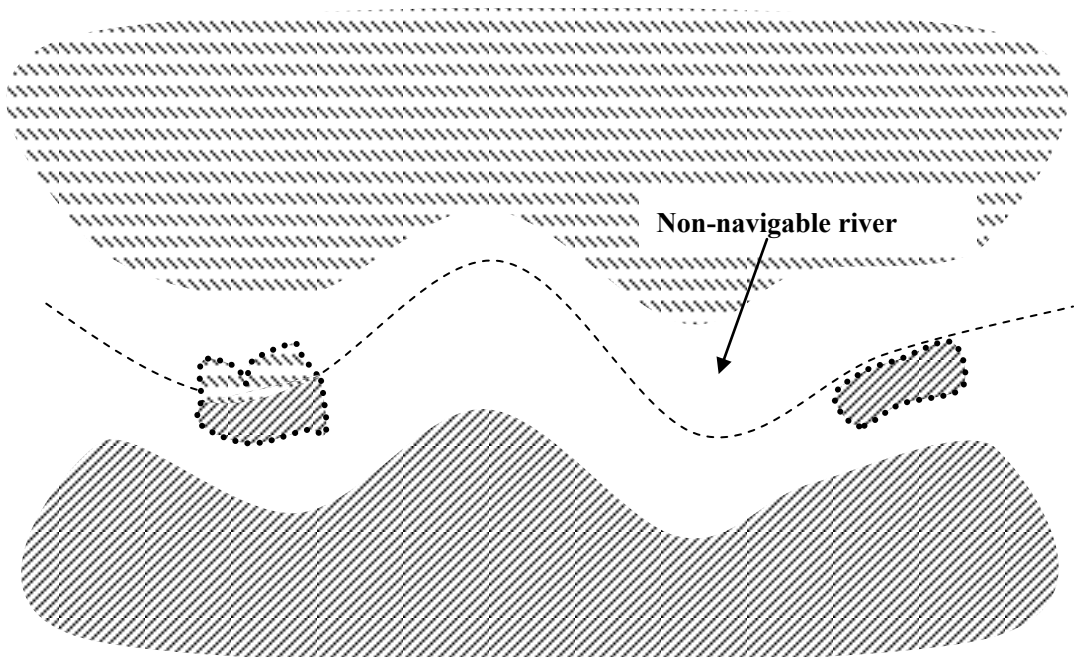
Islands formed in non-navigable rivers – property of neighboring property owners

(Compare Article 183 of the Civil Code with Article 33 of the 1992 Land Law and Article 103 of the 2001 Land Law.)

See the illustration below:

Figure 1: Illustration of rights to newly formed land masses in non-navigable rivers

OWNERSHIP RIGHTS TO NEWLY FORMED LAND MASSES IN NON-NAVIGABLE WATERWAYS



However, if the new island is created because of the river ‘cutting’ through someone’s property and causing a section of their land to form an island within the river, then the new island will belong to the original owner of that land despite the fact that it is now an island in a *navigable* river/waterway

Islands formed
by river cutting
through
someone’s
property

Article 184, Civil Code. (Ownership of island)

Where a river forms a new branch and cuts off land belonging to a riverbank owner, thereby creating an island, the owner of the riverbank does not lose ownership of such land, even where the island is formed in the middle of a river navigable by boats or rafts.

(Compare Article 184 of the Civil Code with Article 34 of the 1992 Land Law and Article 104 of the 2001 Land Law.)¹⁹.

Dry river beds

When a river dries out for any reason, (usually by virtue of changing course) then who acquires ownership of the land in the dry river bed? Article 185 of the Civil Code provides that the riverbank owners may acquire ownership of the old riverbed up to a line running along the center of the dried up waterway.

When a river
dries out and
becomes land –
who is the
owner?

However, if the riverbank owners exercise this right, they have to pay for this newly acquired land determined by an expert appraiser, who has been appointed by the court upon request of the provincial/municipal authorities or an interested party (presumably the riverbank land owners).

If the adjacent land owners do not want to buy the land at the price determined by the court-appointed expert appraiser, then it will be put out to public auction.

¹⁹ Also, compare Article 184 of the Civil Code with Sub-decree 53, dated June 27, 1995, on Declaration as State Properties (under which all land masses previously or newly formed as an island in the sea, rivers, streams, canals, and lakes, with no mention on how an island emerges, have been declared as state properties, and private persons are prohibited from claiming ownership to such land).

The monies paid to acquire the dried up land will be distributed among any land owners who lost land because of the change in course of the river.²⁰

Conclusion

In this chapter, we have focused on what is generally meant by ownership of immovable property. Ownership is the most substantial of all property rights, and includes the right to freely use, receive income and benefits from and dispose of the immovable property. Cambodians can own any type of land (except state land), and may use the land in any way the owner chooses so long as the use is not restricted by law or regulation.

Immovable property ownership is indivisible – there is only one “owner” of a particular parcel of land. However, this does not mean that an owner is always an individual or legal person. Ownership can take different forms, which we will discuss in the next chapter.

²⁰ Compare Article 185 of the Civil Code with Article 105 of the 2001 Land Law, and Article 35 of the 1992 Land Law.

CHAPTER 6

FORMS OF OWNERSHIP

Topics Covered
in this Chapter

Undivided Joint Ownership [Kam'sitt ark-vi-pheak]
Indivisible Joint Ownership [Et-tha-sitt-pheap]
Co-ownership [Sak-hak-kam'sitt]

Summary of
previous
chapters

In the previous chapters, we learned some general rules about ownership, particularly related to immovable property (land and anything permanently attached to the land):

- Ownership [*kam'sitt*] is the most substantial of all property rights. It is the right of an owner to freely use, receive income and benefits from, and dispose of the thing owned.
- Immovable property ownership is indivisible – there is only one “owner” of a particular parcel of land.
- Ownership over immovable property can be acquired either by grant from the state or by acquiring it from another owner by way of contract, inheritance or other cause provided in the Civil Code.

Article 8 of the 2001 Land Law (consistent with the 1993 Constitution) provides that “only natural persons or legal entities of Khmer nationality have the right to ownership of land” in Cambodia. Book 2 of the Civil Code defines the terms “natural person” and “juristic (or legal) person” and establishes the rights and capacity of natural and juristic (legal) persons.¹

In this chapter, we focus on what is meant when we say (as we said in Chapter 2, Basic Concepts of Property) that ownership of immovable property is “exclusive and indivisible,” and that there can be only one “owner” at one time. As noted in Chapter 2, exceptions to this basic

¹ See Civil Code, Articles 6-45 regarding “natural person,” and Articles 46-118 for “juristic persons.”

rule have been necessary to meet the demands of modern society, with the result that more than one person can share ownership of a particular immovable property. In Chapter 4, we discussed the exceptions for collective (monastery) and communal (indigenous minority community) ownership. Which are types of “private” joint ownership, these forms of ownership are only available to defined groups of people, and are not generally relevant to the discussion in this chapter.

In this chapter, we will discuss non-collective joint ownership [*kam'sitt roam*].

Cambodian law recognizes three forms of private joint ownership as provided in the 2007 Civil Code and the 2001 Land Law:

1. Undivided joint ownership [*kam'sitt ark-vi-pheak*]
2. Indivisible joint ownership [*et-tha-sitt-pheap*]
3. Co-ownership [*sar-hak-kam'sitt*]

Three types of
joint ownership
recognized
under
Cambodian law

The first two forms – “undivided joint ownership” and “indivisible joint ownership” – are the same two forms recognized in the 1992 Land Law (which were substantially identical to Articles 665-674 of the 1967 Civil Code) and continued to be recognized in the 2001 Land Law. As a result of the application of the 2007 Civil Code, the provisions on undivided joint ownership and indivisible joint ownership have been deleted from the 2001 Land Law. The Civil Code now governs these two forms of private joint ownership.

The third form – “co-ownership” – is a special type of property ownership that was created by Chapter 10 of the 2001 Land Law. The Civil Code did not change Chapter 10 of the 2001 Land Law.



Translation Notes:

1. “Undivided joint ownership” [*kam'sitt ark-vi-pheak*]. The tentative English translation of Article 202 – 214 of the Civil Code translates *kam'sitt ark-vi-pheak* as “co-ownership,” which is confusing, as “co-ownership” refers to a different form of ownership created pursuant to Chapter 10 of the 2001 Land Law (see #3 below). In this book, we use the English term “undivided joint ownership” for the Khmer term *kam'sitt ark-vi-pheak*, consistent with the English translation of this term in the 1992 and 2001 Land Laws.
2. The tentative English translation of Articles 215-226 of the Civil Code uses the term “indivisible joint ownership” for the Khmer term *et-tha-sitt-pheap*, which was also used in the 1967 Civil Code and the 1992 and 2001 Land Laws. Therefore in this book we refer to *et-tha-sitt-pheap* as “indivisible joint ownership” for this limited ownership right.
3. The English term “co-ownership” is used to refer to the Khmer term [*sak-hak-kam'sitt*] used in Chapter 10, Articles 175 – 185 of the 2001 Land Law. This is a form of mixed individual ownership and undivided joint ownership.

Before we begin discussing each form, consider the questions below:

Study Question 16: Jointly owned properties

1. *What are some of the common situations in Cambodia where more than one person will have a right of ownership in the same property as someone else? Give examples.*
2. *What sorts of properties are commonly owned by more than one person?*
3. *In Cambodia what do you think happens when two people own the same property and one wants to sell but not the other?*
4. *What problems do you think might arise in managing jointly owned properties?*

Undivided Joint Ownership [Kam'sitt ark-vi-pheak]

Undivided joint ownership [*kam'sitt ark-vi-pheak*] is described in Articles 202 – 214 of the Civil Code.

Definition of
undivided joint
ownership

Article 202, Civil Code. (Definition of undivided joint ownership)

Ownership of a single thing by multiple persons wherein the size of each owner's ownership interest is limited to such owner's share of

the thing is termed undivided joint ownership.

As you will see, the various articles of the Civil Code related to undivided joint ownership refer to ownership of “things,” which can be immovable or movable property. Since this book is only concerned with immovable property, our discussions will relate to land and other immovable property.

The main significant feature of undivided joint ownership is that each of the undivided joint owners is entitled to use the property in accordance with the owner’s share, and not just a specific part of it. In other words, all the undivided joint owners have a common interest in the whole of the property rather than individual interests in separate specific parts of the property.

Undivided joint owners do not own separate parts of the property individually

The term “undivided” means that the ownership is not currently divided, but it is capable of being divided. If the undivided joint owners decide to divide – or apportion – the property among themselves according to their individual shares, they become individual owners of their respective portions of the divided property.

One way to think about the concept of undivided joint ownership is by making an analogy with shareholders in a business. Imagine that Mr. Sok and Ms Ran agree to purchase a restaurant business together. In doing so they have a share in the whole of the business (in proportion to the amount of money each invested) and have both rights and obligations concerning that business. Any decision on the use and operation of the business would have to be jointly made (or if there were more than two shareholders, by majority decision). Furthermore, either of the shareholders could sell their share and the buyer of that share would then acquire the rights and obligations of a shareholder including the right to share in the profit and make decisions about the running of the business.

Analogy to shareholders in a business

Example of undivided joint properties

Now think of two or more people buying a parcel of land in the countryside with a house and plantation on it. They do not intend to own separate parts of the property, but rather they want to own and

manage the whole of the property among themselves. They will be responsible for the upkeep, taxes and administrative costs of the property and will use it equally. This is the sort of situation covered by the undivided joint property provisions in Articles 202-214 of the Civil Code.

Rights and Duties of Undivided Joint Owners

Each undivided joint owner's rights to the property and degree of liability are proportional to the percentage of the owner's share. The share would usually be determined by each undivided joint owner's investment in the property compared to the other owners (for example, what percentage of the purchase price each undivided joint owner paid). If the agreement between the owners says nothing about what share each undivided joint owner has, then the law will presume that they have equal shares.

Each undivided joint owner has rights and duties proportional to the size of the owner's share

If one undivided joint owner makes expenditures beyond the owner's share for the preservation or administration of the property, that undivided joint owner is entitled to compensation from the other owners in accordance with their shares. (Article 209, Civil Code).

According to the Civil Code,² each undivided joint owner has the following rights and duties toward the undivided joint property that can be exercised without the consent of the other owners:

- The right to jointly administer the ownership of the property, unless otherwise agreed by majority of the undivided joint owners (Article 208, Civil Code).
- The duty to take care of and the right to individually perform acts to preserve the property (Article 206, Civil Code).
- The duty to contribute to the expenses, taxes and other charges imposed on or incurred by the property (Article 209, Civil Code).
- Right to use the property together with the other undivided joint

Rights and duties of each undivided joint owner

² In the following discussions, citations are given to the relevant articles of the Civil Code. For the purpose of comparison, refer generally to Articles 168-174 of the 2001 Land Law, which have been deleted by Article 80 of the Law on the Application of the Civil Code. Also see related provisions at Articles 36-44 of the 1992 Land Law.

owners in accordance with the owner's share (Article 205, Civil Code).

- Right to transfer or provide his or her share as security (the creditor can attach the share of the debtor undivided joint owner, but not the shares of the other undivided joint owners) (Article 204, Civil Code).

Agreements related to administration of the property

General rule: majority agreement
As a general rule, and unless the owners otherwise agree, matters related to the general administration of the undivided joint property are made by an agreement of the undivided joint owners with majority shares (Article 208, Civil Code).

One owner can act to preserve the property
As noted above, each undivided joint owner has the right to take actions to preserve the property, and can seek compensation from the other owners to pay for those actions (Articles 207 and 209, Civil Code). This rule allows each undivided joint owner to take actions to protect his or her own investment in the property in the event that other owners are unable or unwilling to act in a timely manner.

Actions requiring consent of all undivided joint owners
There are two situations, set out in Article 207 of the Civil Code, that require the agreement of all the owners:

- To dispose of the undivided joint property
- To significantly alter the undivided joint property

Study Question 27: Short-term Leases on undivided joint property

Re-read the provisions on rights and duties of undivided joint owners. Now, consider short term leases. Could an undivided joint owner grant a short term lease over the property or would this also require the consent of a majority of the owners?

Right to transfer share and use share as security on a loan or obligation
Right to transfer share of undivided joint property
Just like shares in a company, each undivided owner can actually transfer her/his share in the property. This is because an owner's share in the property is a form of property itself and being the owner of this property, the undivided joint owner, has the full set of rights of an

individual owner (as discussed in the beginning of this book). This includes the right to transfer the undivided joint owner's share in the land, and even give it as security for a loan.

Article 204, Civil Code. (Disposal of Shares of Undivided Joint Ownership)

Each undivided joint owner [m'chas kam'sitt ark-vi-pheak] can transfer or provide his share as security. A creditor of an undivided joint owner can attach the undivided joint owner's share.

(Compare Article 204 of the Civil Code with Article 169 of the 2001 Land Law and Article 37 of the 1992 Land Law.)

Rights of person buying share in undivided joint property

If an undivided joint owner sells his or her share in an undivided joint property, then the purchaser takes precisely the rights (and obligations) that the previous owner had.

Purchaser
acquires same
rights and
duties as the
seller of share
in an undivided
joint property

This means that someone who has a 50% share in undivided joint property, upon sale of that share, is not selling half of the property itself. The person is selling his or her undivided joint ownership rights to the purchaser (as set out above).

Upon purchase of the property, the new undivided owner would own 50% of the undivided joint property.

Partitioning (dividing) undivided joint ownership

Undivided joint
ownership can
be divided

An undivided joint owner always has the right to sell his or her share in the property, but what if an undivided joint owner wants to divide property and either use it as an individual owner or sell it as a separate parcel? Some of the other undivided joint owners may not want to end this arrangement and would not agree to division of the ownership. This then brings us to a very important issue of how and under what conditions can the undivided joint ownership be partitioned (divided).³

³ The tentative English translation of the Civil Code uses the verb "partition" in the sense of the verb "divide" undivided joint ownership. Do not confuse partitioning undivided joint ownership

Article 211, Civil Code. (Demand for partition of undivided jointly owned thing)

Demand to
divide undivided
joint property

(1) Each undivided joint owner may demand at any time a partition of the jointly owned thing, but the joint owners may agree to prohibit partition for a period of time not to exceed five years.

(2) The non-partition agreement described in paragraph (1) can be renewed, but the duration of the renewed agreement cannot exceed five years.

If the undivided joint owners cannot agree on the way to divide their undivided joint ownership, Article 212 of the Civil Code will apply:

Article 212, Civil Code. (Method of partition of undivided jointly owned thing)

Method to
divide undivided
joint ownership

Where undivided joint owners cannot reach agreement regarding the partition of an undivided jointly owned thing, an undivided joint owner may file an action for partition. In this case, the court may order the partition of the physical thing or where there is a danger that partition of the physical thing will cause a significant loss in the value thereof, or where proper grounds exist, the court may order that the thing be sold by compulsory sale and the proceeds be allocated to the undivided joint owners in accordance with their respective share, or may order that one or more undivided joint owners transfer their shares to the other undivided joint owners in exchange for payment of compensation.

Compare this provision with Articles 173 – 174 of the 2001 Land Law.

Once the property has been sold, the undivided ownership arrangement ends. This may either happen by the owners selling the property to a third party and distributing the proceeds of the sale amongst themselves or by one of the undivided joint owners buying the share of the other undivided joint owner(s).

Agreements to prohibit partition of undivided joint ownership

Attempt to answer the questions below based on the provisions of

with the third form of joint ownership, indivisible joint ownership, to “joint partitions,” discussed below.

Article 211 of the Civil Code regarding agreements by undivided owners to prohibit division of the undivided joint property.

Study Question 28: Agreements to prohibit division of undivided joint property

Why do you think the law allows undivided owners to agree to prohibit division of undivided joint property?

Why do you think there is a limit of 5 years on such agreements?

How many times and how long do you think these agreements can be renewed – assuming all the undivided joint owners agree?

Does this mean that an agreement to buy a property and manage it in an undivided joint ownership arrangement for 12 years is not enforceable because of the rule that such agreements cannot exceed 5 years? Is such a contract void or only enforceable for 5 years?

The basic idea behind this rule about dividing undivided joint property is that some undivided joint owners may want to maintain their undivided joint ownership for various reasons, and other owners have their own reasons to get out of the relationship. The decision to divide or not divide undivided joint property likely will be based on personal as well as financial or business reasons. For example, dividing the immovable property may substantially increase or decrease its value. This rule balances the interests among the undivided joint owners, at least for the duration of the agreements.

Renunciation of undivided joint ownership

Renunciation or death of undivided joint owner without an heir

As a general rule, property owners have the right to renounce ownership or other private rights. For example, if you are the single owner of a parcel of land, you may decide to abandon it, and other laws would determine what happens to it. Another person may take over that land through prescriptive possession (which we will discuss in the next chapter), or it would revert to the state. Also, an owner has certain rights to decide who should inherit the owner's property upon the owner's death. If the owner has no statutory or testamentary heirs, the

property goes to the state.

But if an undivided joint owner renounces his or her ownership or dies without an heir, this could have adverse effects on the other undivided joint owners. To prevent adverse effects in these situations, the Civil Code provides that the undivided joint owner's share goes to the other undivided joint owners:

Article 210, Civil Code. (Renunciation, etc. of [undivided] joint ownership)

Where a joint owner renounces his share or dies without an heir, the share shall devolve to the other [undivided] joint owners.

Renunciation of
ownership right

The Civil Code does not specify how a person renounces undivided joint ownership, but we can look at other laws to get an idea about how this might be done. The most obvious answer would be that the right would be renounced in the same way that it was created. And, in the case of immovable property ownership, this would involve following the requirements for written authentic documents signed by a competent authority (Article 244 of the 2001 Land Law⁴ and other registration requirements under Title VI of the 2001 Land Law, Articles 226 – 245).

Agreements among undivided joint owners

Undivided joint
ownership is
created and
rights
determined by
agreement.

Undivided joint ownership is always based on an agreement between the parties. The parties are free to specify certain rights and duties of the owners with regard to the use and management of the property. However, if the agreement does not address certain specific issues then the Civil Code provisions will apply.

Specifically these issues are:

Filling gaps in
written
undivided joint
ownership
agreement

- **The share each party owns:** If the agreement says nothing then the law will assume that each person has an equal share (Civil Code, Article 203).
- **Rights of each party:** If the agreement says nothing then the law will assume that each owner has a joint right to manage the property (Civil Code, Articles 207 - 208).

⁴ As amended by Article 80 of the Law on the Application of the Civil Code.

- **Administration:** Unless the agreement states otherwise, administrative decisions require agreement of a majority of the share holders (i.e. votes of those who together represent more than 50% of the ownership). This means that in the event that there are 2 shareholders but in unequal shares, the one who owns more than 50% will get to make all of the major decisions (Civil Code, Article 208). If the two owners have equal shares (50% vs. 50%), then they would both have to agree.
- **Right to dispose or significantly alter the property:** Unless the agreement states otherwise, the right to dispose of or significantly change the property will require the consent of *all* the shareholders (not just the majority). Contrast this with the right to make administrative decisions. (Civil Code, Article 207).
- **Taxes, costs and charges on the property:** Unless the agreement states otherwise each party shall be liable for all costs associated with the property in proportion to the percentage of their shares (Civil Code, Article 209).

Undivided joint ownership rules apply to shared property rights other than ownership

In this chapter, we have only discussed the situation where multiple persons share the right of “ownership” of real property. In the following chapters, we will discuss other property rights, specifically the real rights of (1) possession, (2) usufructuary real rights and (3) security rights.

The Civil Code at Article 214 states that, unless otherwise provided by special law or regulation, the provisions on undivided joint ownership shall also be equally applicable to the situations where multiple persons hold these property rights other than the ownership.

Registration of undivided joint ownership

When undivided joint property (land) ownership is registered, the names of all the undivided joint owners are recorded in the Land Register and listed in the Land Ownership Certificate. The form of ownership is also specified in these official documents.

Registration of
undivided joint
ownership

Undivided joint ownership is different from the situation where a legal entity (with multiple shareholders) is the single property owner. In the case of a legal entity, the immovable property is registered in the name of the legal entity only and names of shareholders are not recorded in the cadastral documents.

Indivisible Joint Ownership [Et-tha-sitt-pheap]

In this section, we refer to the second form of joint ownership as “indivisible joint ownership” to “joint partitions” and based on the direct translation of the Khmer term is, “*et-tha-sitt-pheap*.” The distinguishing characteristics of this form of joint ownership are (1) it relates only to walls or other physical partitions that distinguish the boundaries between two adjacent immovable properties, and (2) it is not capable of being divided (apportioned).

Consider the following hypothetical situations:

Study Question 29: Indivisible Joint ownership

- *Owner 1 and owner 2 live in adjoining apartments. They share a common wall that separates the apartments. Owner 1 wants to drill a hole in the wall so as to install a wall fan.*
- *On the land at the back of the properties there is a 2 meter of wall that separates the properties. Owner 2 wants to knock down the wall. Owner 1 in fact wants to increase the height of the wall to 3 meters.*
- *A fence separates properties 3 and 4. It falls into disrepair. It will cost \$200 to fix. Owner 3 does not want to pay for the repair.*
- *A dike separates properties 6 and 7. It falls into disrepair. It will cost \$50 to fix. Owner 6 does not want to pay for the repair.*
- *Mr. 8 builds a wall on his property right up against the border with the property of Mr. 9, although the wall is built solely on Mr. 8's property. Mr. 9 wants to drill a hole into the wall so that he can insert a hook in order to hang plants and a wire to use to hang his washing. Mr. 8 objects on the basis that it is his wall and not Mr. 9's.*

How do you think the above situations should be resolved?

The above situations are typical indivisible joint ownership (joint partition) scenarios. Articles 215 – 226 of the Civil Code deals with these situations and others like it.

Indivisible joint ownership (*et-tha-sitt-pheap*) is defined in Article 215 of the Civil Code, as follows:

Article 215, Civil Code. (Definition of indivisible Joint ownership) (et-tha-sitt-pheap)

A situation in which persons who own adjacent parcels of land have indivisible joint ownership [kam'sitt-rourm doiy-mean-pheap-ark-vi-pheak] to wall or ramparts such as a moat, dike or fence, located on the boundary of the land or building constructed on the land is termed indivisible joint ownership [et-tha-sitt-pheap].

Definition of
indivisible joint
ownership

When you go around the country, you will see many examples of joint partitions, which may be called by different names. The exact name does not really matter; what matters is whether the partition distinguishes the boundaries of two adjacent properties. For example, in English, different terms could be used for some of the terms used in the tentative English translation of the Civil Code: moat = ditch or trench; bank = dike, embankment or rampart; and hedge = hedgerow or a fence formed by closing growing bushes.

As with common areas in co-owned properties (discussed below), issues arise with regard to the rights of use and responsibilities for the maintenance of joint partitions.

Unlike co-owned properties however, the rights and duties to certain joint partitions such as joint-walls and joint-ramparts are determined not by agreement but by the Civil Code. We will discuss the rules in Articles 215-226 of the Civil Code and then revisit the situations in the hypothetical above and see if you can determine what the outcome of each situation would be based on the law.

Responsibility for maintenance

According to Article 217 of the Civil Code, each joint partition owner has the responsibility to repair and maintain joint walls in proportion to

each owner's respective use interest on the joint partition.

Although the law doesn't state this directly, it is reasonable to assume that neighbors generally would have equal ownership to a joint-wall that divides their properties. There are some specific situations where the owner's use interests may not be equal.

Responsibility
for maintenance
is proportional
to degree of
interest

- If the joint partition is a joint wall that separates adjoining buildings of different heights, the partition wall is presumed to be jointly owned up to the height of the shorter building (Article 216, Civil Code).
- If one of the owners of joint partition actually extends the height of the joint wall at his own expense, the extending owner will have the "*full rights and responsibility to that extension*" (Article 221, Civil Code)
- If, in order to increase the height of a joint wall, the wall has to be rebuilt or the thickness of the wall has to be increased, the owner who modifies the wall will have full responsibility and rights to the modified section (and the section intended for modification will be taken entirely from the modifying owner's land) (Article 222(1), Civil Code).
- The non-participating neighbor in the previous example can acquire indivisible joint ownership of the increased sections by compensating the building owner (Article 222(2), Civil Code).

The responsibility for repair and improvement of joint partitions is shared by the two owners of the adjacent properties. The only way for an indivisible joint owner to avoid this responsibility is by renouncing his or her indivisible joint ownership, giving full ownership of the joint partition to the owner of the adjacent property (Article 217 and Article 225, Civil Code).⁵

Renunciation of
indivisible joint
ownership

An indivisible joint owner may not renounce indivisible joint ownership in the following two situations:

- the joint partition is a joint wall that constitutes part of a building

⁵ See the discussion of renunciation under the discussion of undivided ownership, above.

(Article 217, Civil Code)

- the joint partition is a moat in which water flows (Article 224(3), Civil Code).

Rights of use to joint-walls

Equal rights to use joint-wall so long as use does not cause damage

Each of the indivisible joint owners has the right to use the joint-wall (at least on their respective sides of the wall). If one of the indivisible joint owners wants to build a structure using the joint-wall, the owner may place a beam or girder into a joint-wall up to half of the total depth of the wall (Article 218, Civil Code). The general rule is that no owner can do anything to the joint-wall such as attach a structure or make deep holes that may cause damage to the wall unless there is an agreement with the other owner (Article 219, Civil Code). If one of an indivisible joint owner unreasonably withholds consent for the other owner to make use of the joint-wall, the requesting owner can seek a court judgment as a substitute for the agreement, with the requesting owner providing reasonable security for the refusing owner, as provided in Article 219(2) and (3) of the Civil Code.

A neighbor can always convert a dividing wall into a joint-wall

In situations where a dividing wall is wholly owned by one party, the other property owner has the right to convert the wall into a joint-wall. However, to do so, the owner would have to pay for half the cost of the wall and half the cost of the ground upon which the wall stands (Article 220, Civil Code). As discussed earlier, the same principle of forced indivisible joint ownership applies where a neighbor has increased the height of a joint-wall. The neighbor may legally demand indivisible joint ownership but must pay for half of the cost of the extension (Article 222(2), Civil Code).

The rules that apply to dividing walls also apply to joint-ditches, dikes and fences

The same rules that apply to joint walls also apply to joint ramparts such as joint dikes, joint-ditches and joint fences that divide neighboring properties. The indivisible joint owners are jointly liable for their maintenance, unless one party abandons ownership to the joint ramparts in favor of the other party. However, if the joint ditch is one that contains flowing waters, the indivisible joint owners cannot renounce their ownership (Article 224(3), Civil Code).

Study Question 30: Renunciation of Rights to Joint partitions

As we know, with regard to joint walls the neighboring owners cannot renounce their indivisible joint ownership in order to avoid responsibility for the maintenance of the partition. Why do you think that law makes this same rule apply to indivisible ditches that carry flowing water (but does not apply to ditches that do not carry flowing water)?

What would occur if both parties wanted to renounce the indivisible joint-ownership, or if one party wanted to renounce but the other party does not agree (because the other owner does not want to be fully responsible for the maintenance)?

There is one situation where ramparts are treated differently from walls, and that is as follows: where a rampart (fence, dike or ditch) is not a joint partition the non owning neighbor CANNOT force the rampart to come under indivisible joint ownership.

Study Question 31: Demanding Indivisible Joint Ownership

Why do you think that the law allows neighboring properties to force indivisible joint ownership of walls but not of ramparts?

Co-ownership [Sak-hak-kam'sitt]

Co-ownership [*sak-hak-kam'sitt*] is a form of shared ownership where two or more people each owns a private part (or unit) an immovable property and owns shares in the common areas of the property. This form of ownership is sometimes known as “condominium ownership.” It is also sometimes called “divided co-ownership,” because it has some aspects of undivided joint ownership and divided (individual) ownership.

Chapter 10 of the 2001 Land Law governs the right of co-ownership described in this section. However, the general rules of the Civil Code relating to private rights (rights of ownership, real rights, contracts, succession, etc.) also apply.

Condominiums
are the most
common
examples of co-
ownership

The most common form of co-ownership (particularly in cities) is the condominium apartment building. In a condominium building, a number of different people have undivided joint ownership rights in the apartment building, and each of those co-owners has individual ownership rights in one of the private units in the building.

Co-owned
properties have
two distinct
features:
common areas
and private
units

The 2001 Land Law refers to all the owners as *co-owners* and the property as a *co-owned* property. This is because, although each owner owns a private part (or unit) of the property, they all have rights and duties over the whole of the property (as will be explained further below).

A number of issues arise with regard to co-owned properties that do not arise in undivided joint properties. To get an idea of some of these issues try answering some of the questions below based on your own current knowledge:

Study Question 32: Co-owned properties

- *Who owns the stairwells and walkways in the co-owned building?*
- *Who is responsible to maintain the water pipes and electricity lines that bring water and electricity to the co-owned building?*
- *Does anyone have the right to build another level onto the co-owned building, and if so, who?*
- *If a co-owned building burns down, who has rights to the land?*
- *If one of the co-owners of the co-owned building wants to tear it down and rebuild his or her private unit, is that allowed?*
- *If one owner wants to paint or repair an access way or other part of the property commonly used by all the co-owners and the others do not, what would happen?*

These issues largely bear upon the fact that each co-owned property has two major parts: the individually owned private units and the common areas (areas used by all the co-owners such as stairwells, walkways and the grounds belonging to the premises).

Article 175 of the 2001 Land Law defines co-owned property as follows:

Article 175, 2001 Land Law

Co-ownership is the ownership of immovable property belonging to several persons divided by lots, of which each person has one part that is a private part and another part that is a share of common property.

Definition of co-owned properties under Cambodian law

This is consistent with the definition in Article 10 (3) of the law which reads:

Article 10 (3), 2001 Land Law

Ownership by several persons exercising exclusive rights over certain parts of the property, and [where] the other parts, named common parts, are subject to legal rules or contractual agreement, is co-ownership.

As you can see, the 2001 Land Law makes it clear that each co-owner has ownership to the *individual private part of the co-owned property*. Those rights are the same of ownership rights a person would have if they owned a free-standing property. According to Article 177 of the 2001 Land Law these rights include:

Co-owners have full rights to individual private parts of the co-owned property

- Right to alienate or dispose (sell, donate, transfer or destroy)
- Right to lease
- Right to establish a usufruct
- Right to grant use and stay rights
- Right to grant hypothec or other forms of surety over the property.

The Civil Code governs the exercise of these rights by individual co-owners.

Co-owners cannot grant easements

However, unlike ownership of individually owned properties, co-owners are not allowed to grant easements by contract over their private units of the property (Article 177, 2001 Land Law).

Study Question 33: Co-ownership

Why do you think the law prohibits each co-owner from granting an easement by contract over the co-owner's private unit of a co-owned property?

Limits on use of
property by
co-owners

Article 177 of the 2001 Land Law further confirms that a co-owner can use his or her individual private unit in any way he or she likes so long as he or she does not use the property in such a way that will cause a nuisance to the other co-owners. Furthermore, in their use of the property co-owners cannot encroach on the common areas or impede on other's use of the common areas. Again, these ownership rights are governed by the Civil Code (and discussed in Chapter 4).

Study Question 34: Limits on use of property by co-owners

Think of some examples of use of a co-owned property that would amount to a breach of Article 177 of the 2001 Land Law.

Regulation of
common areas

Chapter 10 of the 2001 Land Law prescribes regulations to deal with the issue of common areas and the rights and responsibility of each other co-owners with regard to these areas of the property.

Common areas of co-owned properties are defined in Article 179 of the 2001 Land Law. In brief, common areas are those parts of "the buildings or lands allocated for use or for benefit of all the co-owners."

Specifically Article 179 of the Land Law lists the following as common property:

What
constitutes
common
property

- the grounds, courtyards, parks gardens and access ways
- walls, main structure of the buildings, common facilities, including water, electrical and gas pipelines which can cross private parts
- flues and stacks of chimneys
- common service areas

The following accessory (secondary) rights are also deemed to be common property:

Accessory
rights deemed
common
property

- the right to excavate existing substances under the ground,
- the right to erect new buildings on courtyards, parks or gardens constituting common parts,
- the right to excavate courtyards, parks or gardens,
- the right of joint ownership relating to common parts.

- the right to build on top of a building allocated for common use or containing several premises that constitute various private parts. In no case is the owner of the top floor of the co-owned building permitted to build on top of his private unit for himself only or to sell such right to build.
- these provisions are in the public order

Meaning of
“public order”

The effect of the last phrase above – “these provisions are in the public order” – means that they are mandatory, and the co-owners are not free to deviate from the legal requirements. The term “public order” is often used in the laws and codes of civil law jurisdictions. States designate certain provisions as “public order” rules to protect fundamental values of their societies. Often in Cambodia’s Civil Code, the term “public order” is used together with “good customs” or “good morals.” See, for example, Civil Code, Article 354, Contract in violation of laws or public order and good customs; and Article 357, Contract for Nullity. A similar concept applies in common law jurisdictions, for example, where courts will not enforce contract or other obligations that contravene “public policy.”

Common
property rights
can only be
exercised with
the agreement
of the other co-
owners

As you can see, the common areas include both tangible and intangible things. The property includes the parks, gardens, access ways etc. Each of the co-owners has the right to use these areas. In addition there are certain rights that are also classified as common property and each co-owner has a shared right with respect to the exercise of that right. These rights include the right to dig up any minerals [*vath-thouk-thead*] that may be below the surface of the property,⁶ the right to erect buildings on any part of the common property, and the right to excavate the common gardens. Given that these are common rights (not individual rights), then they must be exercised only in agreement with the other co-owners (see below for more on this).

Because these are not individual rights they cannot be exercised individually (i.e. without the consent of others and for the sole benefit of an individual owner). For example, the owner of a unit on the top floor

⁶ In accordance the Law on Mineral Resources Management and Exploitation.

does not have the right to build on top of the building or to transfer the right to the top of the building, as this is common property.

Rights to the common areas

Responsibilities and rights over the common property determined by agreement

According to Article 176 of the 2001 Land Law, the co-owners can make their own agreement regulating the common areas in which they may stipulate who has what rights and responsibilities with regard to the maintenance and general use of the common areas (and exercise of common rights).

Study Question 35: Regulation of common areas

Imagine that you live in a co-owned property and you and the other owners get together to write an agreement on how the common areas will be used. What are some of the issues you would address and rules you would make concerning use of the common areas?

In the event that there is no agreement between the property owners then Articles 180 to 185 of the 2001 Land Law provide such rules.

Rules regulating common areas

According to Article 180 of the 2001 Land Law, no one co-owner can change any part of the common areas, or make private use of them. Particularly no one can sell any of the common areas.

Individual co-owners may not make changes to the common areas or exclude others

In the event that a co-owner does make changes to the common areas, the co-owner is legally obligated to restore the area to its original condition.

In other words, if any owner tries to use (or dispose of) the common area as if it were the co-owner's private property, the co-owner would be in breach of the law.

Co-owners may be fined for infringing on common areas

Any infringement of the common area as referred to above, may result in a fine being imposed on the infringer. Article 257 of the 2001 Land Law sets out the penalties.

Article 257, 2001 Land Law

A co-owner of undivided property who infringes on the commonly owned part of immovable property as stated in article 180 of this law, shall be fined from one million five hundred thousand (1,500,000) Riel to nine million (9,000,000) Riel. In case of repeated offenses, the infringing co-owner shall be subject to double fines.

Technically, it is difficult to envisage how any one could sell common areas once the registration system is properly functioning. This is because no title would be given over common areas and you cannot sell what you don't have (i.e. you could not transfer title to these areas).

No co-owner
can sell (or give
rights over)
common areas

However, just to ensure that no one does try to effect a sale of the common areas (in complicity with officers of the land titling offices for example), Article 180 of the 2001 Land Law sets out some very specific rules pertaining to this and covering not just the co-owners but also third parties and officers of the land titling authorities.

Article 180, 2001 Land Law

Any person other than the co-owners who takes possession of a common part for himself shall be forced to return the premises wrongfully occupied and to restore it to its original state.

Competent
authorities may
not issue title
certificate to the
common areas

In no case may the competent authorities issue a title [certificate] recognizing the rights of such a person. If they do so, they shall be considered as accomplices and shall also be held jointly liable. The authorities have the mission to ensure that such illegal occupant is evicted.

So it is clear that not only co-owners who infringe on the common areas will be liable under this provision, but so will third parties who take possession of common areas of co-owned properties, as well as government officials who assist in the illegal selling or transferring or rights to common areas.

The last paragraph of Article 180 of the 2001 Land Law attempts to make retroactive the penalty provisions. That is, it will make a guilty party liable for these penalties even if the illegal act *occurred before this*

law came into effect.

Penalty
provisions are
retroactive

Article 180 (last paragraph), 2001 Land Law

These provisions also intend to impose penalties on those who directly and fundamentally disregard ownership and requirements of public order and are applicable to infringements that occurred prior to the promulgation of this law.

The effect of this provision is that a person cannot claim that they are not liable for, or guilty of, infringing Article 180 because the violations occurred before the effective date of the 2001 Land Law (August 31, 2001).

Study Question 36: Retroactivity of Article 180

This article raises an interesting legal issue – that of retroactivity of laws. Retroactivity means making a law apply to acts that took place before the creation of the law. There is a general principle of law that you cannot be guilty of a crime or of breaching a law if what you did was not a crime or against the law at the time you committed the act (i.e. the law you are accused of breaching did not exist at that time).

For example, imagine that the government passed a law on 1 May, prohibiting the consumption of alcohol. This in effect would make it illegal from that day forward to drink alcohol. Imagine that someone was drinking alcohol on the 25th April. Could that person be charged with drinking illegally? The answer would be no as at the time that he committed the act (drank alcohol) it was not illegal to do so.

Consider the last paragraph of Article 180 again and compare it to the above-mentioned principle. Now imagine that someone infringed on common areas of co-owned property in June 2001. Should the person be liable to punishment under a law made after they committed the act?

Responsibility for the common areas

According to Article 181 of the 2001 Land Law, common areas are undivided joint ownership (*kam'sitt ark-vi-pheak*) of the co-owners. As such, the rules that apply to undivided joint ownership, discussed above,

apply to common areas. This means the same duties of care and maintenance that apply to an undivided joint owner would also apply to a co-owner with regard to the common areas.

The rules that apply to undivided property apply to common areas

Consequently, if the common area needed repairing then each co-owner would be liable to contribute to the repair *in proportion to the size of each co-owner's share of the private units*.

The effect of this provision is that all co-owners have sole responsibility for their own private part of the property and share responsibility for the common areas.

How the responsibilities are enforced

An important issue with co-owned properties is fairly enforcing each co-owner's responsibilities with regard to the maintenance of the common areas. As a general rule, co-owners are responsible for the common areas of co-owned property to the extent of their share of ownership of the co-owned property. Read the following hypothetical and consider how you would deal with the situations that occur.

Study Question 37: Responsibilities of co-owners

There is an apartment building with 10 separate apartments each owned by a different co-owner. We will call the co-owners 'co-owner 1', 'co-owner 2', 'co-owner 3', and so on. One day, co-owner 1 notices that the stairway at his end of the building has a broken railing and cracked stairs and is dangerous to use. He wants to fix the stairwell but it will cost \$2000 to do so. He thinks that everyone should share equally in the cost and asks each owner for \$200. Co-owner 10, who lives on the ground floor at the opposite end of the building and does not use the stairs, says he will not pay.

In addition co-owner 9 wants to sell her apartment. She notices that the outside of the building is in need of repainting as do all the common areas. If these areas looked nice it would be easier for her to sell her apartment. It will cost \$3000 to repaint the entire block. She wants each co-owner to pay \$300. Many of the co-owners object. They say they do not care if the paint does not look nice. They are happy with it just the way it is. If co-owner 9 wants to

paint the building to improve her chances of sale (and the value of her apartment) then they say she should pay for it herself.

Co-owner 5 has children. He wants to put up a basketball hoop in the common area yard in the back of the apartment block. He is willing to pay for it. Co-owner 4 says he does not want a basketball hoop put up and will take it down if it is erected.

The water pipes bringing water into the building burst one day and need urgent repair. The cost is \$5000. Owners 6 and 7 say they do not have enough to pay and refuse to pay their shares.

How do you think the above situations should be dealt with?

As mentioned above, Article 176 of the 2001 Land Law states that the co-owners can establish their own regulations concerning use and management of the common areas. Such regulations could dictate what is to occur in situations such as those set out above. Each co-owner would thus be bound by the regulations (Articles 184 and 185, 2001 Land Law).

How to make a
co-owners
agreement

A question arises as to how these regulations get decided upon in the first place or what happens if the co-owners do not establish regulations.

Management Board for Co-owned Building

Choose
Management
Board

Pursuant to Article 184 of the 2001 Land Law, the co-owners may establish a *management board*. This board, just like a board that runs a company or a school, will have the power to make the rules and management decisions with regard to all the co-owned property as a whole. This means in effect that the board can make the rules and decisions that affect the common areas of the building (as the individual co-owners have the power to make the decisions with regard to their own private units).

Board makes binding decisions related to common areas

The members of the management board shall be selected at a meeting of

Management Board makes rules relating to common areas

all the co-owners. Each co-owner will get a vote ‘*according to the proportional necessity [sar-rak-sam-kan] of their respective lots*’ (Article 184, 2001 Land Law), although, the law does not define how the necessity [sar-rak-sam-kan] of a lot is to be measured. Once selected, all decisions of the management board are to be made by majority vote which presumably means 50% + 1 (for this reason it would be wise that management boards always consist of an odd number of members).

Once a management board has been established then the board would decide any disputes concerning the use and maintenance of the common areas. Furthermore, the board could make its own decisions concerning the common areas (Article 184, 2001 Land Law).

Once the board makes a decision then, according to Article 184 of the 2001 Land Law, all the co-owners are legally bound to comply with the decision:

Article 184, 2001 Land Law

Any co-owner who refuses to comply with the decisions of the general meeting, and who refuses to fulfill his obligations resulting there from, may be sued to be forced to fulfill his obligations.

Penalty for non compliance with management board decisions

According to Article 185 of the 2001 Land Law, any co-owner who does not comply with his responsibilities may be subject to punishment in accordance with Article 258 of the Land Law. The responsibilities referred to may be those decided by the management board or as decreed by the government authorities to ensure proper maintenance of the property.

Article 258, 2001 Land Law

A co-owner who refuses to fulfill his obligation related to the maintenance of the common parts of co-owned property or who does not respect the public order restrictions as stated in article 185 of this law shall be fined from five hundred thousand (500,000) Riel to three million (3,000,000) Riel.

Managing without a management Board

Where there is no management board established, all decisions

What happens if there is no management board?

concerning the common areas need to be made directly by all the co-owners in a *unanimous* decision. If no unanimous decision can be reached and the property falls into disrepair a co-owner may file a petition to the court to appoint an administrator. To make such a petition, a co-owner needs the consent of all the other owners. The Land Law does not say what happens if the property falls into disrepair and no petition is made to appoint an administrator. However, Article 185 of the 2001 Land Law states that “competent authorities may impose on co-owners any measures to ensure the proper maintenance of common parts.”

Although the Land Law is silent as to the role of the administrator it is assumed that the administrator will play the role of the management board. The costs of the administrator shall be borne by all the co-owners (Article 185, 2001 Land Law).

Study Question 38: Destruction of co-owned property

What happens if the building burns down? Does the law adequately address this possibility?

Conclusion

This ends our look at the forms of ownership of immovable property under Cambodian law. Up to this point, we have learned the basic concepts of immovable property and the different types of real rights that are attached to immovable property and that ownership is the most substantial of all the real rights. We have learned that ownership is indivisible and except for certain forms of multiple ownerships, there can be only one owner of immovable property.

In the next chapter we will begin to look at the other real rights, and how an owner can grant those rights to other people, if the owner chooses.

CHAPTER 7

REAL RIGHTS – POSSESSION

Topics Covered
in this Chapter

REVIEW OF REAL RIGHTS

POSSESSION (SITT-KAN-KAB)

ACQUISITIVE POSSESSION (POKEAK)

PRESCRIPTIVE POSSESSION (SITT KAN-KAB TAM-ARCH-NHAR-YUK-KARL)

Summary on
Real Rights

Review of Real Rights

Before discussing the various real rights recognized by Cambodian law, it is helpful to review a few major points about “real rights” discussed in previous chapters.

- A “real right” is right that is attached to a specific movable or immovable thing. Since we are only concerned about immovable property (land and things attached to the land), we are only going to discuss real rights attached to immovable property.
- Real rights are statutory (created by law) and in many cases they can be bought and sold, or otherwise transferred by the persons who hold them.
- Ownership is the strongest and most complete of all the real rights and includes the rights to freely use, receive income and benefits from and dispose of the thing owned.
- The owner of immovable property can, and often does, transfer some of the owner’s real rights to another person for a period of time, thus limiting the owner’s rights – but the owner still remains the owner.
- The real rights that the owner can separate and transfer for a period of time (and still retain ownership) are:
 1. Possession (sitt-kan-kab)
 2. Usufructuary real rights (use and enjoyment rights)

3. Security rights (sitt-pra-tekpok)

- People who hold separated real rights are not “owners” but their rights have real effect in that they are attached to the immovable property itself. If the owner of the immovable property sells his or her ownership, the separated real rights remain attached to the immovable property, and the holder of the separated real right can assert it against the new owner (or any other person who interferes with the separated real rights holder’s right to the immovable property).
- In some cases, the holders of separated real rights from the owner transfer the separated real rights to another person.

In this and the next chapter, we will study the various real rights attached to immovable property that an owner can separate and transfer to other persons for a period of time, while retaining ownership to the property. First, consider the following study questions about separation of real rights.

Study Question 19: Separation of Real Rights by Owner

Mr. Rin is the owner of a 10 ha parcel of land about 30 km south of Phnom Penh where he and his family lived for many years. Mr. Rin decides to move to Phnom Penh. He enters into a 20 year perpetual lease of 9.5 ha of his land to the ABC Company for ABC’s mango plantation. Mr. Rin’s elderly mother does not want to leave the family home, so Mr. Rin grants a usufruct to his elderly mother over 5000 square meters that includes the house and a garden so she can live in the house until she dies. Both the lease and the usufruct were created and registered according to all legal requirements.

After 10 years, Mr. Rin’s elderly mother is not able to stay in the house alone, so she moves to a nearby district to live with her daughter (Mr. Rin’s sister). Mr. Rin’s mother leases the house for 3 years to someone from her village, and uses the money for her own living expenses.

1. *Who is entitled to get the rental income from the house when Mr. Rin’s mother goes to live with her daughter?*

A few years later, Mr. Rin decides that he wants to buy a large shop in Phnom Penh and he needs to sell the land and the house. He tried to get ABC Company to buy the property, but the company did not have the money. Finally, Mr. Rin sells the entire 500 ha (including the house and garden) to the JKL Company.

2. *Who is entitled to the rental income from the house (subject to the usufruct) after the JKL Company buys the property?*
3. *Who is entitled to the money from ABC's lease payments after JKL purchases the property?*
4. *Can JKL unilaterally terminate ABC's perpetual lease?*
5. *Can JKL unilaterally terminate the usufructuary right of Mr. Rin's mother?*

After one year, the ABC company decides to sell their business to Mr. Peou. ABC Company assigns its perpetual lease to Mr. Peou.

Around the same time, Mr. Rin's elderly mother dies.

6. *What happens to the rights of perpetual lease and usufruct?*

Separation and Merger of Real Rights

In Chapter 1, Concepts of Immovable Property, we discussed the civil law concept of immovable property, and used an example comparing immovable property ownership with a box, with the word “Ownership” on it. Inside the box are certain rights called real rights that are attached to the immovable property – possession, usufructuary real rights, and security rights. Whoever has that box is the owner of the immovable property.

Owner can separate and transfer real rights to other persons for a period of time

The owner can keep all the rights in the box, or the owner can open the box and separate one or more of those rights to other persons. But as long as the owner keeps the box, the owner still has ownership, even if the box is empty. In the study question above, Mr. Rin separated out the right of a 20-year perpetual lease to ABC Company, and a usufruct right to his mother to live in the family home. Mr. Rin remained the owner,

although he had limited rights to “freely use, receive income and benefits” from his property. His ownership was *permanent* – the only reason Mr. Rin’s ownership terminated was because he transferred it to the JKL Company.

Separation of rights

Mr. Rin’s transfer of the real rights of perpetual lease and usufruct were only *temporary*. The perpetual lease would terminate after 20 years. The usufruct right transferred to Mr. Rin’s mother would last only until her death. But as long as these separated rights existed, they remained attached to the property, even after Mr. Rin sold the property to the JKL Company. In other words, the JKL Company bought Mr. Rin’s partially empty ownership box. The ABC Company and Mr. Rin’s mother retained their real rights and could assert those rights against the JKL Company.

Separations of rights are not permanent

Generally, a perpetual lease can be assigned, so ABC Company would be able to assign the perpetual lease when ABC sold the company to Mr. Peou. Thus, Mr. Peou took over ABC Company’s perpetual lease and could continue to enjoy the rights of a leaseholder until the lease expires (or terminates earlier because of the default of one of the parties). Mr. Rin’s mother had a usufruct right to the use and fruits of the house and garden until her death. Under certain conditions, a person with a usufruct right has the right to lease out property that is subject to usufruct, thus, Mr. Rin’s mother was entitled to the rent from the house. But the usufruct ended when Mr. Rin’s mother died.

A person who holds a separated real right sometimes can transfer the right to another person

Transfer of ownership does not terminate existing separated real rights

Transfer of ownership does not terminate the separated real right

Generally, an owner can transfer ownership of the immovable property to another owner, even though other people are holding separated real rights attached to the property – in our example, a usufruct and a perpetual lease. But the owner can only sell what the owner has – so if the ownership box is empty, the new owner acquires the property subject to the rights of the other rights holders.

In our example, Mr. Rin had a 20 year perpetual lease on part of his land, and his mother held a lifetime usufruct right on another part of the land. When JKL Company bought the property from Mr. Rin, JKL Company became the owner. As the owner, JKL Company was entitled to receive lease payments from ABC Company, and later from Mr. Peou after ABC Company assigned the lease to Mr. Peou.

New owner
takes ownership
subject to real
rights held by
other people

The new owner, JKL Company, was not entitled to any of the lease payments related to the house. This is because Mr. Rin’s mother had the rights to the use and fruits of the property as long as she was alive. While her rights to lease the property were limited (as we shall see in a later chapter), Mr. Rin’s mother still had the right to lease the property and to enjoy the fruits – in this case, money – from the property.

Merger of rights

In our example, when JKL Company bought the property from Mr. Rin, JKL Company’s ownership box was only partially full. It did not become a complete box of ownership and all the other real rights until two things happened: (1) Mr. Peou’s perpetual lease (which had been assigned to him by ABC Company) terminated; and (2) Mr. Rin’s mother died and her usufruct ended. When those two events happened, all the real rights became vested in JKL Company, and the perpetual lease and usufruct were extinguished.

Merger is when
ownership and
separated real
rights vest in
one person

Article 136, Civil Code. Merger of rights

(1) Where the ownership and other real rights created over one and the same thing have become vested in a single person, such other real rights shall be extinguished. However, this shall not apply if the thing or the other real right constitutes the object of a right of a third party.

*(2) If a real right other than ownership and other rights created over that real right have become vested in a single person, such other rights shall be extinguished. The second sentence of paragraph (1) shall apply *mutatis mutandis*¹ to this case.*

¹ The term “*mutatis mutandis*” is used frequently in the English translation of the Civil Code. This is a Latin term that means literally “with necessary changes,” and it is used to indicate that one rule of the code that applies to one situation, applies to another situation, with necessary

(3) The provisions of paragraphs (1) and (2) shall not apply to a right of possession.

In this and the following chapters we will discuss the real rights recognized by Cambodian law. Keep in mind the summary points discussed above in mind as we discuss each real right, beginning with possession (*sitt-kan-kab*).

Possession (*Sitt-kan-kab*)

Possession is a legal status, which is defined in the Civil Code, as follows:

Article 227, Civil Code. (Definition of possession)

(1) “Possession” refers to the holding of a thing.

(2) “Holding” means the state of controlling a thing as a matter of fact, whether directly or indirectly.

Cambodian law recognizes two broad types of possession (*sitt-kan-kap*): (1) possession with the intent to acquire ownership; and (2) possession with no intent or possibility to acquire ownership.² Each type of possession may be held directly or indirectly through another person.

Two broad
types of
possession
under the
Civil Code

Within the first type of possession – possession with the intent to acquire ownership – there are two sub categories: (i) acquisitive possession (*sitt-kan-kab-chea pokeak*) under conditions set forth in the Land Law, and (ii) prescriptive possession (*sitt-kan-kap tam-arch-nhar-yuk-karl*),³ which is recognized for the first time in Cambodia in the 2007 Civil Code.

In the remainder of this chapter, we are going to discuss the two types of possession that can lead to ownership, focusing on the following points about each type:

- how a possessor can acquire a lawful possession

modifications to fit the second situation. The Khmer Civil Code uses the phrase “to the same effect.”

² See Articles 227, 228, 232, 234 and 235, 2007 Civil Code.

³ In some jurisdictions, this type of possession may be referred to as “adverse possession.”

- classification of land that can be lawfully possessed
- how a possessor can acquire ownership

Terminology is very important as there is a lot of confusion about possession under Cambodian law.

- Acquisitive possession (*sitt kan-kab-chea pokeak*), which can lead to ownership to state private land
- Prescriptive possession (*sitt kan-kab tam-arch-nhar-yuk-karl*), which can lead to ownership to registered private ownership land
- Occupation and use (*sitt kan-kab ning breu-brahs*), which cannot lead to ownership to any type of land

Acquisitive Possession (Pokeak)

As outlined in Chapter 2 of this book, the 1992 Land law marked the return – after more than 10 years – of private ownership to immovable property under Cambodian law. The 1992 Land Law set in motion a process by which people could obtain land ownership through acquisitive possession (*pokeak*) – a concept that has existed in Cambodian law since 1920 (except for the period of 1975-1989).

The basic concept was originally considered as a means to reintroduce private land ownership rights after nearly two decades of all land being state owned and under full control of the state. There were rules about which land could be distributed, how the land could be used (for agricultural and residential purposes) and the amount of land that could be acquired by families under this scheme. Most Cambodians who obtained land from the state after 1989 got the land through the process of acquisitive possession under Articles 61–76 of the 1992 Land Law.

Acquisitive Possession under the 1992 Land Law used to redistribute land to private ownership

This concept continues to be an important right under the 2001 Land Law, which prohibits new acquisitive possessions after the effective date of the 2001 Land Law, but more importantly, recognizes existing lawful acquisitive possession as a real right that can be converted to ownership in accordance with the 2001 Land Law. Further, the 2007 Civil Code recognizes and protects acquisitive possessions under the

2001 Land Law as a means of acquiring ownership.

Thus to fully understand the current law, the subject of acquisitive possession must begin with a discussion of the 1992 Land Law.

Obtaining Acquisitive Possession Under 1992 Land Law

There were 2 basic ways for a person to obtain acquisitive possession in the first place. A possessor could either (1) request the land from a local or competent authority prior to entering into actual occupation of the land, or (2) first clear or enter into occupation of the land and then declare land possession to the local authority.

In order to obtain ownership, the possessor had to hold acquisitive possession for a period of at least 5 years, and the possessor was required to, among other requirements:

Requirements
to obtain
ownership
under 1992
Land Law

- make a possession declaration to Commune or Sangkat chief, and
- regularly pay applicable land taxes or rental fees.⁴

Land
Possession
Declaration
required to
establish
acquisitive
possession

The purpose of the possession declaration (request for land occupation and use) was to express the possessor's specific intention to become the owner of a concerned property, and it had to be filed with the competent authority through the territorial commune chief. Without the express intention to acquire ownership through the declaration process a land possessor may only have "occupation and use" right or temporary occupation right, which could not lead to ownership.

Acquisitive possession began from the *date of the declaration*. Assuming all the other conditions for lawful acquisitive possession were met, the acquisitive possessor had the right to claim ownership at the end of 5 years from the declaration.

The 1992 Land Law was premised on the existing government work

⁴ Article 65, 1992 Land Law. See the discussion below about how Article 42 of the 2001 Land Law treats the failure to comply with the declaration requirement. However, the 2001 Land Law does not address the failure to comply with the taxation requirements under Article 62 of the 1992 Land Law.

under the 1989 Policy on Management and Use of Land and the circular to implement this policy.⁵ Under the circular, the government established a procedure for sporadic registration of land (old sporadic procedure) in response to the specific request from a land possessor.

Several factors affected the lawful possessor's right to convert acquisitive possession to ownership under the 1992 Land Law and the old sporadic procedure. First, possession certificates were rarely issued, and no land ownership certificate was issued under the old sporadic procedure, due to the lack of technical, financial and human resources to carry out proper cadastral survey. In addition, the voluntary or involuntary relocation or repatriation of numerous individuals and households, and the inaccessibility of certain areas of the country affected the government's ability to implement the 1992 Land Law.

Problems with
acquisitive
possession
under the 1992
Land Law

As a result, people simply took possession of the land, most likely with some knowledge on the part of the local authority, but without requesting land registration through a formal land registration procedure. However, during the nation-wide declaration campaign period initiated by the government between the late 1980s and early 1990s, nearly 100% of the land occupants declared the immovable property under their possession, particularly acquisitive possession land, to the Khum or Sangkat where the land was located.⁶

Secondly, it was difficult to make everyone aware of their legal obligation to register the land under their possession and regularly pay land taxes or rental fees. And if the people were not aware of these requirements and therefore did not comply, legally they could not claim ownership of land based on their possession.⁷

⁵ Circular 03 on Implementation of the Policy on Management and Use of Land (1989)

⁶ Approximately 5 million receipts were issued to people when they filed their land declarations with the Khum or Sangkat.

⁷ Article 18 of the 1992 Land Law provided that if the possessor of an immovable property failed to register the land within 5 years from the effective date of the law or if the owner of a registered property fails to pay taxes or fees to the State for 5 consecutive years, the property would revert to the State as State private property.

The 2001 Land Law sought to address these and other problems associated with the implementation of the 1992 Land Law, including the problem of illegal occupation of state land by people claiming the right of acquisitive possession. The 2001 Land Law, while recognizing existing *lawful* acquisitive possession, prohibited the creation of new acquisitive possessions, and established a framework for a new sporadic procedure and for systematic registration of land ownership for those who had lawful acquisitive possession.⁸

Legal Requirements for Acquisitive Possession

In order for acquisitive possession of land to be valid (and therefore lead to the right to acquire ownership) certain conditions must be met, as set out in Article 38 of the 2001 Land Law:⁹

Article 38, 2001 Land Law

In order to transform into ownership of immovable property, the possession shall be unambiguous, non-violent, notorious to the public, continuous and in good faith.

*The possessor shall **occupy the land unambiguously** means that, whether it is exercised by himself or by somebody else on his behalf, the possessor has to possess in his capacity as exclusive possessor acting on purpose for himself but not on the basis of some other rights. If the real possessor remains hidden behind an ostensible possessor, he cannot claim a title of possession allowing acquisition of ownership. His possession is null and void.*

*The possessor shall **occupy the land non-violently** means that any possession originated through violence is not considered to conform to the law. However, if violence is used against third parties that try to get the immovable property without right to do it, such violence does not interfere on the possession initially peacefully acquired.*

*The possessor shall **occupy the land notoriously to the public** means that the possessor has to possess without hiding himself to those who could want to contest his rights on the immovable property and are not able to see him or to determinate who he was.*

Requirements
for acquisitive
possession:

unambiguous,
non-violent,
notorious to the
public,
continuous and
in good faith

⁸ Land registration procedures are discussed in Chapter 10 of this book.

⁹ The conditions in the 2001 Land Law are substantially similar to the conditions set in the old Civil Code (Articles 709-718) and the 1992 Land Law (Articles 62-71), although these earlier laws were more detailed.

*The possessor shall **occupy the land continuously** means that the possessor has to act in a normal expected regular way during the required time to claim acquisition of ownership. The fact that occupation is interrupted for short periods of time or that the land is left uncultivated to recover fertility does not constitute an obstacle to acquisition of ownership.¹⁰*

*The possessor shall **occupy the land in good faith** means that the possessor is not aware of any possible rights of third parties over the property that the possessor has been possessing.*

Type of Land Subject to Acquisitive Possession

The only land subject to acquisitive possession was *state private property*.¹¹ There is widespread misunderstanding about this point, as people often do not realize that the 1992 Land Law specifically provided in Article 5 that certain properties could not be privately owned. These included forests, rivers, seas, roads, public buildings and other properties within the “state public property” category. Article 43 of the 2001 Land Law restates this rule clearly: acquisitive possession status is only recognized over state private property and never over state public property.

Article 43, 2001 Land Law

In no case can the public property of the State be the subject of acquisition of ownership.

Acquisitive
Possession is
not allowed on
state public
property

The situation of an occupant of State public property remains precarious and illegal if such occupation was not authorized in the manner determined by this law.

An illegal occupant shall be forced to vacate the premises immediately and shall be punished in accordance with Article 259 of this law.

An illegal occupant is not entitled to any indemnity for any works and improvements carried out on the immovable property.

¹⁰ The land could be under continuous possession even if it was not being used. It could fall under the category of “unused” land, but not “abandoned” land. Abandoned land is where a possessor fails to possess the land for more than 3 consecutive years without a reasonable excuse, in which case, the land reverts to the state.

¹¹ Not all state private land was subject to acquisitive possession because the state reserved some of the state private land for other development purposes.

Indemnity not allowed for improvements by unlawful possessors of state public property

The effect of this Article is that if a land falls under the classification of state public property (as described in Article 15 of the 2001 Land Law and as determined by other laws and regulations) the person is an unlawful possessor and is not entitled to convert the possession to ownership and in fact would have to leave the property. Furthermore, an unlawful possessor will not be compensated for any improvements made to the property, nor will any indemnity be paid to the unlawful possessor for the loss of use of the property. In essence, any improvements made by an unlawful possessor become the property of the state in the same way that improvements made by a tenant on rented property become the property of the land owner (see the section on leases, below).¹²

Study Question 40: Possession of State Public Property

Take a look at Articles 5 and 217 of the 1992 Land Law (reprinted below) which describe state public property for the purposes of that law. Compare this with Article 15 of the 2001 Land Law. Can you think of any properties that would not be covered by Article 5 or Article 217 of the 1992 Land Law but which would be covered by Article 15 of the 2001 Land Law? If so, what would be the situation of any person who was in possession of such land at the time that the 2001 Land Law came into effect?

Article 5, 1992 Land Law

Private right is not given in forestry reserve, fishery reserve, water reservoir for mining purposes, cultural and historical patrimonies, monasteries, deep forests, schools, parks, public hills, old public buildings, land reserved for roads construction and road maintenance, rail-road, rivers and seas.

Article 217, 1992 Land Law

*Roads (plov thnorl), rural dirt roads (plov lum), paved roads (plov chheat), public sites, rivers (tonle), river affluent (dai tonle), streams (steung), canals (prek), ditches (oh), trenches (pro-lay), navigable or not navigable to rafts, trenches to irrigate the water out or in, can never be considered as a land parcel, but are all **classified** as public property.*

¹² See full discussion on state public properties in Chapter 4 of this book.

Privately Owned Property cannot be a subject of Acquisitive Possession

Acquisitive
possession of
registered
private land is
not allowed

What happens if a land under actual occupation and use of someone for many years is in fact registered as being lawfully possessed or owned by another private person? That is, it is not state private land, but rather *private* land. This raises the question of whether it is possible to claim acquisitive possession status over private land.

Article 74 of the 1992 Land Law specifically addresses this issue and clearly states that privately owned land – land recorded in the Immatriculation Register (Ownership Register) – cannot be a subject of acquisitive possession.

Article 74, 1992 Land Law

[I]f any acquisitive possessor . . . occupied land for 5 consecutive years and the land is free with no record in the Immatriculation Register¹³ and does not belong to anybody, the acquisitive possessor shall become a legitimate owner of that land.

Differences between Acquisitive Possession and Ownership

The state remains the owner of the *immovable* property that is the subject of acquisitive possession until the possessor (*pokee*) converts the possession to ownership *through an “ownership” land registration*. However, the possessor (*pokee*) has a real right to the *immovable* property, which attaches to the state private property as provided in the 2001 Land Law and the Civil Code.

In this section, we will discuss the differences between acquisitive possession and ownership, and look more closely at the rights of an acquisitive possessor before actually converting to ownership.

¹³ Immatriculation is a French term used to refer to an official register of ownership, whether to movable (for example, cars) or immovable property (land). It is not clear whether this reference in Article 74 is to the “Ownership Register” or the “Possession Register” under the 1992 Land Law. However the current Cadastral Administration interprets Article 74 as applying also to registered possession and economic concession land, and not limited to registered ownership land.

Let's begin with two major differences between acquisitive possession and ownership:

1. Acquisitive possession is a temporary right while ownership is permanent.
2. Acquisitive possession requires continuous actual use and occupation to avoid losing the right to the land. Ownership does not require continuous actual use and occupation to maintain the right.

Acquisitive Possession is temporary; Ownership is permanent

The temporary nature of acquisitive possession versus the permanent nature of ownership can be seen in the way the terms “ownership” and “acquisitive possession” are used in the 1992 and 2001 Land Laws.

Article 19 (1), 1992 Land Law

Proprietorship [ownership] is the right to manage absolutely and solely any property, provided that it is not prohibited by law.

Article 85, 2001 Land Law

The owner of immovable property has the exclusive and extensive right to use, enjoy and dispose of his property, except in a manner that is prohibited by the law.

Ownership

Lexicon, 2001 Land Law¹⁴

Ownership: Full rights as the owner to a property. These rights include the right to use, right to enjoy fruits of and right to alienate the property.

Article 61, 1992 Land Law

Acquisitive possession is a state of affairs which means the act of having exclusive possession [holding] of any property and completing all actions toward that property as an owner would.

Acquisitive
Possession

Lexicon, 2001 Land Law

Acquisitive Possession: Rights that a person has acquired temporarily and not yet in a form of definite property of that person. “Possession” is opposite to the term ownership which is full rights

¹⁴ This Lexicon was prepared by the drafters of the 2001 Land Law, and while it was not specifically enacted by the National Assembly, it does have value as legislative history of the law.

of a person to a property. Example: land with cadastral index map is an ownership land, while land without cadastral index map is a possession land.

Acquisitive possessor must maintain continuous use and occupation

The second major difference between acquisitive possession and ownership is that an acquisitive possessor must maintain continuous occupation and use of the property. Where this creates a problem is in the case of a possessor who does not actually live or work on the property. Owners of land can move away from their land and still retain the status of owner. That is, owners do not have to occupy the land they own. They can leave it unused, rent it to someone else, etc and still remain the legal owner.¹⁵

Acquisitive
possessor must
maintain
continuous use
and occupation

However, because acquisitive possession is temporary, the possessor must maintain the status until the acquisitive possession is converted to ownership. If a possessor leaves the land vacant for more than 3 consecutive years the possessor runs the risk that his actions would amount to abandonment. In such a case, the possessor would lose his status of lawful acquisitive possessor – particularly in the case of an unregistered acquisitive possession – and the land would revert to the private property of the state.

If the abandonment of unregistered possession land occurred prior to 2001, the vacant land may have been given to another possessor who remained on the land as an acquisitive possessor. This situation occurred frequently and remains a problem today when the previous possessor returns to claim the land being held by another possessor.¹⁶

¹⁵ However, as discussed below, under the Civil Code, registered owners run the risk of losing their land through prescriptive possession, a right that was not recognized under the 2001 and 1992 Land Laws.

¹⁶ Abandonment is a question of fact that may be raised by another person claiming the land. For example, see Articles 40(4) and 47 of the 2001 Land Law, and the discussion under “Abandoned Land,” below.

The Rights of an Acquisitive Possessor

The 1992 Land Law provides that an acquisitive possessor holds the property and can complete all actions toward that property as the owner would. The 2001 Land Law specifically addresses which rights an acquisitive possessor can exercise with respect to the land.

Acquisitive Possessors can become owners

The first and perhaps most important right of an acquisitive possessor (*pokee*) is the right to convert the “possession” into “ownership.” Aside from this right, the acquisitive possessor has many other rights that owners also have. Such rights are:

Right to use and stay on land

- The right to use and stay on the property within the limits of the law (in the same manner which pertains to owners, as discussed in the ownership rights section above).
- The right to sell or transfer the property to others:

Article 39, 2001 Land Law

While waiting for the possession to be transformed into full ownership, acquisitive possession in compliance with this law constitutes a right in rem [real right] over the immovable property. Such property may be the subject of exchange, transfers of rights and transactions.

Right to sell the property

So, even before becoming the owner the acquisitive possessor can make the property the subject of an exchange, transfer any rights in the property (such as rights of use and stay – as in a lease or easement arrangement), or even allow the property to be the subject of a transaction (presumably transactions such as ‘sale’).

Succession rights of acquisitive possessors

- It is also possible to pass on the ‘acquisitive possession’ rights of the property to others by way of succession:

Article 71, 2001 Land Law

A transfer may be made by way of intestate succession or by inheritance by will or by bequest, for the following immovable properties:

- *immovable property the ownership title of which has been*

definitely established in accordance with the provisions of this law,

- *any acquisitive possession in compliance with the law, evidenced by a title, by a legal document or other kinds of evidence,*
- *any limited proprietary right and any right in rem [real right] over immovable property*

This right to pass on acquisitive possession status to someone after the death of the acquisitive possessor is valid even where the deceased acquisitive possessor did not actually have a certificate of acquisitive possession issued by a competent authority. This is because there may be other kinds of evidence that prove the deceased had valid possession, which might include such things as a receipt of land occupation and use application, a letter certifying land use and occupation from local authorities, or witness statements.

Acquisitive Possession is a real right' that can be transferred by succession

So, it is clear that an acquisitive possessor of immovable property has the right to use the possessed property exclusively in the same manner as an owner and to transfer the possession to another in the same way that an owner of land has the right to transfer ownership (such as by way of sale, exchange or even succession). However, the buyer, transferee or successor of possession land gets what the acquisitive possessor has – which is acquisitive possession, and not ownership.

Study Question 41: Acquisitive Possession Rights

It would seem that the rights of an acquisitive possessor in practice are almost indistinguishable from the rights of an owner. However, is there anything you can think of that an owner of land could do that a possessor could not? Does the owner have any rights that an acquisitive possessor does not have?

Converting Acquisitive Possession to Ownership

Right to convert possession to ownership continues under the 2001 Land Law

Probably the most important right of an acquisitive possessor is the right to convert possession into ownership. As noted above, the purpose of acquisitive possession in the 1992 Land Law was to reestablish private land ownership, an objective that was not fully achieved. The 2001

Land Law continued to recognize lawful acquisitive possessions under the 1992 Law and clearly establishes the rights of acquisitive possessors to convert their possession to ownership.

Article 30, 2001 Land Law

Any person who, for no less than five years prior to the promulgation of this law, enjoyed peaceful, uncontested acquisitive possession of immovable property that can lawfully be privately possessed, has the right to request a definitive certificate of ownership.

In case the granting of a definitive certificate to ownership is subject to an objection, the claimant has to prove that he himself fulfills the conditions of peaceful, uncontested possession for no less than five years over the contested immovable property or to prove that he purchased the immovable property from the original acquisitive possessor or his/her legal beneficiary or from the person to whom the ownership was transferred, or from their successors.

Article 31, 2001 Land Law

Any person who had been enjoying acquisitive possession [pokeak] before this law came into force may be authorized by the competent authority, if such person fulfils all requirements to become an owner of the property, to extend his acquisitive possession until he attains the legal period of five years, after which he will obtain a definitive certificate of ownership. The authorization to extend for the sufficient period of time cannot be denied by the competent authority if the acquisitive possession is peaceful and uncontested.

A competent authority that improperly refuses an authorization to extend the time is personally liable.

The improper recognition by competent authority of an acquisitive possession that is not in accordance with the legal requirements is considered null and void. The authority that has given the abusive recognition shall be personally liable before the law.

Under Article 18 of the 1992 Land Law, to be classified as an acquisitive possessor of land, the acquisitive possessor had to file an application for land occupation and use, called an immovable property possession declaration, with the territorial Commune chief. The declaration had to have been lodged BEFORE acquisitive possession

commenced, but not necessarily before actual land use or occupation.¹⁷ The acquisitive possession declaration was required as a basis for initiating, either by the State or the possessor, the property acquisitive possession or ownership registration process. If a possessor failed to register a property within 5 years of the effective date of the 1992 Land Law, regardless of whether the land was being cultivated or not, the property would revert to the State as State private property.¹⁸ In reality few people, if any, knew of this property registration requirement.

Failure to register acquisitive possession under 1992 Land Law does not deprive possessor's right to claim ownership

Very few acquisitive possessors ever applied for land registration, and thus, technically, most people were not legally valid acquisitive possessors of the land under their possession for the purposes of the 1992 Land Law. Consequently, even if all the other requirements of valid acquisitive possession were met (no fraud, peaceful, good faith, notorious to the public and continuous possession for more than 5 years, etc.) failure to meet property declaration or registration requirements technically would deprive most acquisitive possessors of the right to convert their acquisitive possession to ownership. This was the case even though the acquisitive possessor may not have been at fault.

It was observed that in the 1990s and early 2000s, the state lacked the human and financial resources and technical capacity to carry out the process for property registration throughout the country. With this knowledge, Article 42 the 2001 Land Law included a provision to addresses the registration requirement and provides that an acquisitive possessor who never registered his or her possession will not be deprived of the status and the real rights over the immovable property that the acquisitive possessor possesses.

Article 42, 2001 Land Law

Notwithstanding the foregoing, any person who, due to ignorance or negligence, failed to register his or her lawful [acquisitive] possession has the right to the protections of Article 29, Article 30, and Article 31 of this law.

¹⁷ See Article 66 of the 1992 Land Law.

¹⁸ See Article 18 of the 1992 Land Law.

Evidence of
lawful
possession still
required

Clearly this provision removes the acquisitive possession registration requirement. However, it does not remove the other condition for lawful possession – the requirement to make a property declaration to the chief of the commune where the land is located. This interpretation reflects the practice of current land registration procedures under which the Cadastral Administration requires a land possessor to submit evidence of lawful land possession. The common forms of evidence include the receipt of land use and occupation application, the commune chief's letter certifying that the possessor has been in possession of the land since before the effective date of 2001 Land Law, contract of land sale or transfer certified by local authorities, or certificate of land use and occupation.¹⁹

To more fully understand the government's intended policy with regard to acquisitive possession of private state land, it is helpful to look at the protection of special possessors of immovable properties, under Articles 242-243 of the Civil Code as well as Article 14 of the Law on Application of the Civil Code.

To summarize this issue of converting acquisitive possession to ownership, we have created the tables below listing the key terms and providing a brief explanation of the terms.

¹⁹ These items are only evidence of lawful possession, and can be disputed by other evidence.

Table 1: Definitions and Elements for Acquisitive Possession

Definition/ Element	Explanation	Articles 2001 Land Law	Articles 1992 Land Law
Acquisitive Possession	A state of affairs which means the act of having exclusive possession [holding] of any property and completing all actions toward that property as an owner would.	-	61
Non-violent possession	The occupier must have moved onto the property without using violence (and without abuse of power of the authorities). However, if the occupier had to use violence to remain in possession (for example, prevent others from taking land after possession commenced) then this violence does not render the occupier non compliant with this requirement.	38 (¶ 3), 33	63
Taking possession in good faith	The occupier must not have been aware of any other interest in the property by any other party when the occupier entered into possession. For example, the occupier must not have known that someone in fact owns the land or is renting the land but has moved away for a while.	38 (¶ 6)	64
Unambiguous possession	It must be clear at all times who the real possessor is. The applicant for ownership must be the person who actually possesses the property and must not be hiding behind someone else who appears to be the possessor.	38 (¶ 2), 32	71
Notorious to the public	It must at all times be clear to the public that the property is in someone's possession. The acquisitive possessor cannot hide the fact that the land is occupied.	38 (¶ 4)	65-67
Continuous possession	Occupation of the land must be unceasing or non-stop. The occupier cannot leave the land for a long period of time, then come back and claim continuous occupation beginning with the first time of entry into land occupation. However, it is allowable for an acquisitive possessor to leave the property unused for a while (such as for a holiday, or to leave the land fallow) for no longer than 3 consecutive years. ²⁰ But an acquisitive possessor should not leave the property without leaving some signs of continuous possession (such as land clearing, fencing, planted trees or taking action against known encroacher or abuser).	38 (¶ 5)	68-70, 76

²⁰ This time limit was longer (5 years) under the old Civil Code, Article 725.

Table 2: Other Conditions to Acquire Lawful Acquisitive Possession or Owner Status

Conditions	Explanation	Articles 2001 Land Law	Articles 1992 Land Law
Beginning of possession	The possession must have begun prior to August 31, 2001	7, 17(3), 18(4), 29(2), 34, 268	1
Restricted property	An acquisitive possessor cannot acquire ownership to a state public property no matter how long and in what manner the possession is	43, 44, 15, 16	4, 5, 217
Lawful Status	- Actual possession is presumed lawful possession. - General conditions to become an owner ²¹	30, 31	72, 74
Registration of Possession	Condition for maintaining lawful possession by registration	42	18

Abandoned Land

Under the 1992 Land Law, there were two situations where people could lose their land and it would revert to the private property of the state: (1) The registered owner or user failed to pay taxes or rents for 5 consecutive years; and (2) a person reports relinquishment of their property:

Abandoned land and property where the owner failed to pay tax reverted to the state under the 1992 Land Law

Article 18, 1992 Land Law

The registered real properties whose owners failed to pay the property tax, the estate tax or the rent in time and at the rate determined by the state within a period of five consecutive years, and, the property that anyone declares that they relinquish, shall belong to the private property of the state.

Under 1992 Land Law abandoned land could be possessed by new possessor

In this part, we are concerned with the second category of land – the land that is relinquished or abandoned. Abandoned private land (whether it is held by registered owners or acquisitive possessors) can be a big problem for development in the country. People who do not

²¹ Taken from Article 723 of the old Civil Code.

have enough land for their own needs could put abandoned land to productive use. Also, abandoned can lead to problems for nearby land owners, particularly since the land often is not taken care of properly.

The 1992 Land Law attempted to address the problems of abandoned private property by making it revert to the private property of the state.²² It is not clear under Article 18 what steps a person would take to affirmatively declare the relinquishment of acquisitive possession land, whether it is registered or not. However, other provisions of the law provide that acquisitive possession land could be abandoned by failing to occupy the land for specific periods of time.

Study Question 42: Possession of abandoned land

1. *Imagine that Mr. Sok's uncle transferred a piece of acquisitive possession land to Mr. Sok in 1993 when Mr. Sok turned 18 years of age. Mr. Sok then moved to Hong Kong and still lives there. He forgot about the land and does not intend to return to Cambodia to live. What is the status of the land?*
2. *In 1995, Ms. Run and her family moved onto the land because they thought it was vacant and built a house on it. No one told her that it in fact belonged to someone else and she claims that she took the land in good faith. In 2003 she applied to convert her 'acquisitive possession' status to ownership status in accordance with chapter 4 of the 2001 Land Law. While processing the application it was discovered that the land is in fact registered as acquisitive possession land under the name of Mr. Sok. Should the authorities approve Ms. Run's application for land ownership and allow the land to be registered under her name? Give reasons for your answers based on the land law.*
3. *What is the situation under the 2001 Land Law with regard to abandoned land?*

²² It appears that Article 18 may apply to both registered ownership land and acquisitive possession land. For this discussion, we are only concerned with the abandonment of acquisitive possession land.

Possession that does not comply with the Land Law requirements

If a person takes possession of land in violation of any of the requirements set out in Article 38 of the 2001 Land Law (for example the land was entered onto through the use of violence, or was not possessed notoriously or openly) then the possession status will not be recognized and the land will revert to the state to become part of the state private property. Thereafter new occupant cannot become the legal possessor of that land (Articles 32 and 33 of the 2001 Land Law).

A person who was wrongfully dispossessed can reclaim the property within 3 years

In cases where someone occupies land through the use of force or abuse of power by the authorities, the person that was displaced has the right to reclaim his right to possession. Such a claim, however, must take place within 3 years *after the violent possessor or abusive authority has been dispossessed of the land by the state*. According to Article 33 of the Land Law, a proclamation of dispossession is issued by the state when it is determined that the possessor obtained land violently or through abuse of power by the authorities. If the original non-violent possessor then makes no claim for repossession of the land within 3 years of the dispossession proclamation being issued, the property will revert to the state.²³

Study Question 43: Invalid possessions

For each of the examples below, determine what would happen to land at the time that an application for ownership was assessed by the competent authorities (i.e. would it revert to the state or would some other status be accorded to the land?):

1. *The land was taken violently by another private person*
2. *The land was taken violently or abusively by authorities*
3. *The possessor after entering into possession of the land became aware*

²³ This provision on time limitation for reclaiming possession is consistent with the provision on time limitation for land abandonment under Article 76 of the 1992 Land Law.

that someone else had possession or ownership rights to the land

4. *The possessor did not occupy the land notoriously to the public (that is, he did not file a request for land occupation and use) to the territorial commune chief*
5. *The possessor occupied the land ambiguously through another person and other people or authorities cannot identify the real possessor*
6. *The possessor did not occupy the land continuously (e.g. he began his occupation more than 15 years ago, but had 2 gaps in that time period. The first gap was 3 years from 2000-2003 and the last gap was 2 year from 2009 to 2011s. He returned to the land again at the end of 2011).*

Taking into account what we have learned so far concerning the issue of extraordinary acquisitive possession, try answering the questions below. These questions address certain issues that could arise when possessors try to convert their status to that of owner under the provisions of Chapter 4 of the 2001 Land Law.

Study Question 44: Issues that may arise when transferring possession rights

1. *Since 2000, Ms. Nita has been in possession of the small piece of land that she lives on. She is old now and wants to move to the city to live with her daughter and son-in-law. She decides to ‘sell’ her house and land to a neighbor and does not want to wait until next year when the systematic land registration project would arrive to her village. She sells her land to Mr. Bora for US\$5000 and moves to the city. The following year Mr. Bora goes to the authorities to transfer his ‘possession’ status to ownership through participation in the systematic land registration project.*
2. *Mom had possessed his land since before August 31, 2001. Recently he died after contracting malaria while on a trip to the mountains. His wife had died some years ago and he had never remarried. His only remaining relative was his daughter, Vantha, and his estate passed to her on his death. His daughter moved onto the property and worked the land with her husband and their children. Next year Vantha intends to apply for ownership of the property under the 5 year rule of acquisitive*

possession.

3. *Samneang has just inherited a property from her father. Her father had been in possession of the property since 1990. Samneang already has a house in city and does not want to live in her father's house so she rents it out for \$100 a month. Next year she intends to apply for ownership of the house and land.*
4. *Vuth has possessed his house and land for 4 years, but the possession commenced after 2001. He sells it to Mony because he desperately needs the money. Mony buys it and secures a land sale agreement certified by village and commune chiefs, but does not intend to live in it. He buys it because it is located near a main road and he believes that although it is not worth much today it will be worth a lot when the road is fixed and there is an increase in the traffic using the road. For the time being he rents the property to Kim on a 5 year contract. After a year Mony goes to the competent authorities to claim land ownership based on the 5 year rule of acquisitive possession.*

In the above situations, are the new possessors (successor or buyer) entitled to ownership of the property when they apply?

Does the transferee of possession get the benefit of the transferor's accumulated time on the property?

One of the issues raised by the above situations is whether (when applying for ownership) the person to whom possession is transferred also gets the benefit of the time that was accumulated by the transferor. In other words, does the new possessor have to spend another 5 years on the property in order to apply for ownership or merely the amount of time the previous possessor had outstanding?

Does the possessor have to actually occupy the property?

A second issue raised by the above situations is whether the transferee possessor has to actually occupy the land to be entitled to ownership (remember in situations 3 and 4 above, the new possessor rented the property to someone else and did not actually occupy the land before applying for ownership).

A third issue raised by the last case, is whether a buyer who purchased

land from a person whose possession commenced after 2001 but with sale agreement certified by local authorities can claim ownership or any right to the land under the 2001 Land Law.

Study Question 45: Difference between acquisitive possession and ownership

Now that we have studied the issue of acquisitive possession, review the study questions at the beginning of the chapter (reprinted below). Does your answer change?

In practice, the rights of an acquisitive possessor are almost indistinguishable from the rights of an owner. However, can you think of any reasons that an acquisitive possessor of registered land might feel uncertain about his or her rights compared to an owner of registered ownership land? Does the owner have any right that an acquisitive possessor does not have?

Prescriptive Possession (Sitt kan-kab Tam-arch-nhar-yuk-karl)

The second type of possession with the intention of ownership over an immovable,²⁴ called “prescriptive possession” (*sitt kan-kab tam-arch-nhar-yuk-karl*), was created by the 2007 Civil Code, Articles 162-178.

Article 162, Civil Code. (Prescriptive acquisition of ownership over immovable)

(1) A person who peacefully and openly possesses an immovable for a period of 20 years with the intention of ownership shall acquire ownership thereof.

(2) A person who peacefully and openly possesses an immovable for a period of 10 years with the intention of ownership shall acquire ownership thereof if the possession commenced in good faith and without negligence.

(3) Neither Paragraph (1) nor (2) shall apply to any immovable property belonging to the state, regardless of its kind.

²⁴ A person may acquire ownership of movable property by prescriptive possession; see Articles 195-197 of the Civil Code. Although the rules related to movable and immovable property are very similar, in this section, we are concerned only with acquisition of ownership over immovable property by prescriptive possession.

The right to acquire ownership of immovable property by prescriptive acquisition as provided in Article 162 of the 2007 Civil Code is the first time such a right has been definitively recognized under Cambodian law.²⁵ For this reason, there is no experience in how such a right will be interpreted by Cambodian ministries and courts.

However, many other civil and common law jurisdictions have similar rights.²⁶ We will look at some of the common themes in these other laws to help understand prescriptive possession, especially as compared to acquisitive possession, discussed above.

Public policy issues supporting prescriptive possession

Study Question 46: Acquisition of ownership by prescriptive possession

Mr. Pich is 25 years old. For as long as he can remember, his father farmed a piece of land near his village. When his father died a few years ago, Mr. Pich carried on farming the family land. Mr. Pich's family has worked the land almost every day, and has planted and harvested crops every year. Mr. Pich built and maintained a simple fence around the land and has always claimed that the land belonged to him.

A week ago, Mr. Samnang came to the land and tried to evict Mr. Pich, saying the land belong to Mr. Samnang's father, who died 30 years ago while living in another country. Mr. Samnang has not been back to Cambodia since before

²⁵ This is the case at least since 1989, when the state reinstated private ownership of land. Although Article 29 of the 2001 Land Law references the “general rules of prescription,” there were no other references to these general rules of prescription in the 2001 Land Law. It appears that acquisitive possession, as described above, was the only type of possession under the 2001 Land Law that could lead to ownership. However, prescriptive easements (discussed in Chapter 8) were recognized by the 2001 Land Law.

²⁶ In France, for example, prescriptive possession is known as acquisitive possession, and in common law jurisdictions, the term is adverse possession. For a concise comparison of laws in 11 civil and common law jurisdictions (Hungary, Poland, Germany, Netherlands, Spain, Sweden, France, Australia, New Zealand, United States and Canada), see British Institute of International and Comparative Law, *Adverse Possession*, (Report by the British Institute of International and Comparative Law for Her Majesty's Court Service, September 2006) http://www.biicl.org/adverse_possession/ (after this, “BIICL Report”).

his father died. Some of the older people in the village remember Mr. Samnang's father and some remember that he farmed the land before Mr. Pich's father began farming it.

Mr. Pich and Mr. Samnang go to the village chief to resolve their dispute.

For this question, consider only the facts presented, and imagine that there is no land law and no civil code to help you decide this dispute.

If you were the village chief, how would you decide this dispute? What reasons would you give for your decision

Possession is based on fact – it refers to holding, or controlling the thing as a *matter of fact* (Civil Code, Article 227). Possession may be evidence of ownership, but in many cases, the possessor actually holding or controlling the property is not the owner. So, why would a state have a law that permits a long time possessor of property to become the owner of property that belongs to another person?

The right for a possessor to claim ownership of land following long time possession of the land has been recognized since Roman times, and serves some very practical purposes. Article 168 of the Civil Code, like similar provisions in the laws of other countries, is based on the concept that a property owner needs to be vigilant about his or her property and to bring an action, in a timely manner, to repossess the property from unlawful possessors. Under Article 168, if the owner does not bring an action to repossess his or her land within the time periods established by law, the owner loses the right to do so.²⁷ The law serves a public policy interest in the timely resolution of disputes about ownership, especially in areas where land records are not complete and boundaries are not clearly marked. After a long period of time, evidence may be lost, making it difficult to decide the issue. Thus, the law places the responsibility on the owner of the property to take care

²⁷ There are other examples where the Civil Code establishes time periods for the exercise of rights. Article 547, Period for exercise of rights in the context of sales of goods, is one of many such provisions in the Civil Code.

of his or her property and to object to any illegal possession in a timely manner.

Claiming prescriptive possession

Article 162 of the Civil Code sets out the basic requirements for prescriptive possession, and more detailed rules concerning Possessory Rights are found in Articles 227 - 243 of the Civil Code.

Let's begin with the two basic requirements about the methods of obtaining possession. The possession must be –

1. Peaceful and open, and
2. With the intention of ownership

First, the prescriptive possession must be peaceful and open. The meanings of these terms are set forth in Article 233:

Article 233, Civil Code. (Flawed possession)

1. Peaceful and open possession

2. *“Peaceful possession” refers to possession acquired and maintained without violence; provided that it will still be peaceful possession if a person who has initially acquired possession peacefully uses violence to protect such possession against unlawful infringement by a third party.*

3. *“Open (“kozen”) possession” refers to possession without concealment, so that persons having rights over the possessed thing can know or see the fact of such possession.*

Second, the prescriptive possessor must have the intention to become the owner. As Article 232 of the Civil Code explains, intention is based on the facts (objective nature) surrounding the acquisition of possession.

2. Intention to become owner

Article 232, Civil Code. (Possession with or without intention of ownership)

(1) *In some cases of possession the possessor has the intention to become the owner of the thing possessed and in other cases the possessor does not have such intention. Whether such intention exists or not will be determined on the basis of the objective nature of the ground of acquisition of the possession.*

(2) *If on the basis of the objective nature of the acquisition of*

possession, the possessor does not have the intention to become the owner of the thing, the nature of possession shall not be altered into that involving an intention to become the owner unless the possessor declares to the person who put him into possession that he intends to become the owner, or unless he commences possession [anew] on the basis of a new ground of acquisition of possession with the intention of becoming the owner.

As noted in paragraph (2) above, the intention to become the owner must exist from the beginning of the possession. If the possessor did not have this intention at the beginning, the possessor cannot alter his intention during the possession without declaring this changed intention to the person who put the possessor in possession in the first place. The possessor then must start a new prescription period. In this way, the possession meets the “open” requirement – “*persons having rights over the possessed thing can know or see the fact of such possession.*” Civil Code, Article 233, paragraph 3.

Time period for owner to challenge prescriptive possession

Article 164 provides two different time periods that for a possessor to acquire ownership by prescriptive possession, depending on whether the possessor acted in good faith and without negligence. These are:

- Time period 10 or 20 years depending on good faith
1. 20 years, without regard to whether the possessor acted in good faith or not, and
 2. 10 years, if the possessor acted in good faith and without negligence.

After the applicable time period runs, the “original” owner no longer has the right to bring an action to repossess his property, and the acquisitive possessor becomes the owner.

There are some situations that will interrupt or suspend the running of the time periods, which are explained Articles 172 to 177 of the Civil Code. One example of a suspension of the time period is where the original owner is a minor or an adult under guardianship:

Suspension of prescriptive period

Article 174, Civil Code. (Suspension of period for prescriptive acquisition against minor or adult in guardianship)

Where the original owner is a minor or adult in guardianship, and has no legal representative within six months prior to the

completion of the prescription period for prescriptive acquisition, such period shall not be deemed to have been completed until six months after the minor or adult in guardianship attains capacity or obtains a legal representative.

This rule provides protection for minors and adults under guardianship and without legal representation, as neither of these owners would have the capacity to bring an action to repossess their property. Another example of suspension is where an original owner cannot bring an action to interrupt prescription due to natural disaster or *force majeure* (Article 177 Civil Code).

Effect of good faith by prescriptive possessor

Good faith is not a requirement to acquire ownership by prescriptive easement; in fact, ownership can be obtained where there has been bad faith. However, the time period for acquiring ownership is shorter where there is good faith (10 years) than in the absence of good faith (20 years).

This terms “good faith” and “without negligence” are discussed at Article 233 of the Civil Code.

Article 233, Civil Code. (Flawed Possession)

Possession that is acquired with knowledge that one has no right of possession to it is referred to as “possession in bad faith” and possession acquired without knowledge that one has no right of possession to it as “possession in good faith”. If the lack of knowledge results from negligence, the possession is referred to as “negligent possession.”

In a typical case, a good faith possessor mistakenly believes that he or she is the owner of the land in question, often basing this belief on a defective or fraudulent document relating to the rights of the person from whom the possessor obtained the property. Then the question is whether the possessor was without negligence in making this mistaken belief.

The concepts of good faith and without negligence are common throughout different legal systems. These terms are not objective, nor

are they precise, and their interpretation often depends not only on cultural norms, but on the specific circumstances of a particular case. Thus the standards of good faith without negligence may be very different for a lawyer than for a poorly-educated person.

Study Question 47: Proving intention and good faith

So far, we have learned that to acquire immovable property by prescriptive possession, the possessor must hold the land (1) with the intention of ownership, and (2) for a specified period of time, which is shorter if the possession is in good faith without negligence.

Review the facts about Mr. Pich's situation in the study question above.

What are the specific ways that Mr. Pich can prove that he meets the requirements for intention and good faith without negligence?

Would Mr. Pich have to prove all of them? What if he could only prove one of them? More than half?

What if Mr. Pich were a lawyer rather than a farmer? Would you have different rules for him?

Mr. Pich will have to establish the critical precise requirements for prescriptive possession, namely, that he occupied the concerned land peacefully and openly for the prescription period, and that the land is not the property of the state. But as this study question illustrates, it is more complicated to prove affirmatively prove that he meets imprecise requirements, such as intention and good faith without negligence (if he is the shorter prescription period).

Classification of land subject to prescriptive possession

The third paragraph of Article 162 makes it very clear that a person cannot claim a right of prescriptive possession over immovable property of the state, regardless of the type of property. Some jurisdictions allow the acquisitive of state land by prescriptive possession, others permit it only for certain types of land, and others

follow the same rule as Cambodia and prohibit it altogether.²⁸

Study Question 48: Type of land subject to prescriptive possession

In contrast to Civil Code Article 162(3), and as noted in discussion on acquisitive possession, the only type of land that can be subject to acquisitive possession is state private land.

Why do you think there is a difference?

Acquisition of registered land through prescriptive possession

Jurisdictions vary in whether they allow a possessor to acquire ownership by prescriptive possession of land that has been registered. For example, in Australia, which has a land registration system similar to Cambodia's, some states allow prescriptive possession of registered land while others do not.²⁹

There are valid considerations for both points of view. A comprehensive comparative study of prescription in civil and common law jurisdictions noted that:

Where land is registered, some states have abolished the capacity to acquire land by prescription (Canada) while retaining the right in respect of unregistered land. This difference reflects the policy that the uncertainty of ascertaining ownership is eliminated by a system of registration so that the rationale for the doctrine of adverse possession is thereby weakened.³⁰

But most countries continue to recognize the right of prescription in respect of registered land, and “courts [in those countries] continue to recognize the public policy value of extinguishing title to registered property after a certain period.”³¹

²⁸ See BIICL Report discussion for the various countries.

²⁹ See BIICL Report, which discusses this specific point for each country studied.

³⁰ BIICL Report, page 6.

³¹ Ibid, and see the discussion for each country.

It remains to be seen how this prescriptive possession will be implemented in Cambodia with respect to registered land. Article 162 of the Civil Code has not been in effect long enough for anyone to have a right to claim ownership through prescriptive possession.

Presumptions of certain facts

Rather than requiring the prescriptive possessor to prove some of these imprecise conditions, the Civil Code provides that certain facts are to be presumed true. This does not mean that they are true; it simply means that they are taken to be true unless they are challenged. The person challenging the presumed fact must prove that the presumed facts are not true.

Article 234, Civil Code. (Presumptions)

- (1) Possessors are presumed to be in possession with the intention of becoming the owners of the thing.*
- (2) Possessors are presumed to be in possession in good faith, peacefully and openly.*
- (3) If there is proof of possession at two different times, possession is presumed to have been continuous throughout the intermediate time.*
- (4) The possessor is presumed to hold lawfully a right to possess the relevant thing.*

As defined by the French Civil Code, presumptions are consequences drawn by the law or judge from a known to an unknown fact.³² At first glance, these presumptions in Article 234 may seem to give Mr. Pich an unfair advantage, but remember, Mr. Pich has to show that he has been in possession of the property for a long time (10 to 20) years, the property is not the property of the state, and during that time, his possession has not been challenged. Under these circumstances, it seems reasonable that he would have some claim to the property. The presumptions in effect, fill in the gaps between the known and the

³² French Civil Code, Article 1349. There are many examples of presumptions in Cambodia's Civil Code, for example, Article 137, presumptions regarding immovable property registered in the immovables register; Article 988, presumption of paternity for a child conceived by the wife in a marriage is the child of the husband; and Article 45, presumption of simultaneous death in certain circumstances.

unknown facts, and will stand unless challenged and proven not to be true.

Conclusion

This concludes our study of the two types of possessory real rights: acquisitive possession and prescriptive possession, both of which can lead to ownership.

Review the table below for a comparison of these two possessory real rights before we turn to look at the other real rights in the following chapter.

Table 3. Comparison of Acquisitive and Prescriptive Possession

	Acquisitive Possession (<i>Pokeak</i>) (2001 Land Law)	Prescriptive Possession (<i>sitt kan-kab tam-arch-nhar-yuk-karl</i>) (2007 Civil Code)
Formalities	Land possession declaration required to show intent to become owner	None
Elements of lawful possession	<ol style="list-style-type: none"> 1. Unambiguous 2. Non-violent 3. Notorious to the public 4. Continuous 5. Good faith 	<ol style="list-style-type: none"> 1. Peaceful and open possession 2. With the intention to become owner
Type of Land	<ul style="list-style-type: none"> • State Private Land Only • Not allowed on privately owned property registered in the Immatriculation Register 	<ul style="list-style-type: none"> • Not allowed on state land of any type
Rights of Possessor	Can complete all actions toward the property as an owner would	Same as owner
Convert to Ownership	Request registration	Not specified
Time Period	5 years, which must have begun prior to August 31, 2001	<ul style="list-style-type: none"> • 10 years with good faith without negligence • 20 years without regard to good faith
Presumptions	Actual possession is presumed lawful possession	<ol style="list-style-type: none"> 1. Possession with intention of becoming owner 2. Possession in good faith, peacefully and openly. 3. Proof of possession at two different times, presumed to be continuous throughout the intermediate time. 4. Possessor presumed to hold lawful possession

CHAPTER 8

USUFRUCTUARY REAL RIGHTS

Topics Covered
in this Chapter

REVIEW OF REAL RIGHTS

TYPES OF USUFRUCTUARY REAL RIGHTS

PERPETUAL LEASE

USUFRUCT

RIGHTS OF USE AND STAY

EASEMENTS

Review of Real Rights

Articles 131 and 132 of the Civil Code list the four specific real rights recognized under Cambodian law. Of the four real rights, ownership is the strongest and most complete and includes the rights to freely use, receive income and benefits from and dispose of the thing owned.

The owner of immovable property can, and often does, transfer some of the owner's real rights to another person for a period of time, thus limiting the owner's rights. In the previous chapter, we discussed the separation and merger of these real rights, and learned that although separated, the real rights remain attached to the immovable property, and the holder of the real right can assert it against the new owner (or any other person).

Real rights that
can be
separated

There are three general types of real rights that can be separated and transferred to another person, while the owner retains ownership. These are:

1. Possession (*sitt-kan-kab*)
2. Usufructuary real rights (use and enjoyment rights)
3. Security real rights (*sitt-pra-tekpok protiak*)

In the previous chapter, we discussed the real right of possession,

specifically possession with the intent to acquire ownership, either by (i) acquisitive possession (*sitt-kan-kab-chea pokeak*) under conditions set forth in the Land Law, or (ii) prescriptive possession (*sitt-kan-kap tam-arch-nhar-yuk-karl*) which is recognized for the first time in Cambodia in the 2007 Civil Code.

In this chapter we are going to discuss the second category of real rights that can be separated – usufructuary real rights, also known as the right to use and enjoy.

Types of Usufructuary Real Rights

One of the important aspects of immovable property law in a free market system is the ability of the owner of immovable property to use the property as a means of earning income. One of the ways to make money from immovable property is by selling it at a much higher price than the owner paid for it. This is not always a good idea, particularly for rural Cambodians whose only asset is their land. It is often much more profitable over the long term for people to keep their land and use it to make money by letting other people use it for rental and other fees. Usufructuary real rights provide some ways for owners to separate real rights to earn income from their land (as well as to provide other options or using land) without giving up ownership. Usufructuary real rights also protect the rights of people who hold those separated real rights.

Some
characteristics
of usufructuary
real rights

Article 132 of the Civil Code lists four general types of usufructuary real rights:

1. Perpetual lease
2. Usufruct
3. Right of use and right of stay
4. Easement (servitude)

What these usufructuary real rights have in common is that the right to use and enjoy the immovable property belongs to a person other than the owner. As we shall see, sometimes the owner may have very limited right to possess and use the property

Other common characteristics of usufructuary real rights usually (but not always) include the following:

- The rights are temporary and last for a specified period of time or until they are extinguished by some other event.
- To be valid against a third party, the right has to be in writing and registered.
- The right does not result in ownership being transferred to the usufructuary rights holder.

Perpetual Lease

The ability of an owner to lease his or her immovable property is a very significant aspect of land ownership because it can be a very profitable way for the owner to use the property to earn money. This right was not included in the 1992 Land Law but was included in the 2001 Land Law. Leases are now governed by Civil Code, particularly in Book V, Chapter 5, Articles 596-921.

Basically, leases are specific types of contracts, and unless otherwise indicated, leases are also governed by the general contract provisions of Book V, Chapter 2 of the Civil Code, beginning at Article 336.

General
definition of
immovable
property 'lease

An immovable property lease is a contract by which an immovable property owner or other real rights holder (lessor) conveys the right to use and occupy that property to another person (the lessee) for a period of time in exchange for some form of compensation (usually money in the form of rent).

Leases are defined in the Civil Code, as follows:

Article 596, Civil Code (Definition of Lease)

Definition of a
lease in the
Civil Code

(1) A lease is a contract whereby one party allows another party to use and profit from a certain thing for consideration.

(2) Things comprising the subject matter of a lease may be movables or immovables.

A lease is formed based on the will of the two parties – the property

owner, or other real rights holder (the lessor) and the person who wants to rent the property and acquire occupation and use rights to the property (the lessee).

Article 597, Civil Code (Creation of Lease)

A lease comes into effect when one party promises to allow the other party to use and take profit from a certain thing, and the other party promises to pay rent in exchange.

As noted in paragraph 2 of Article 596 above, both movable and immovable property can be the subject matter of a lease. There are many common examples where people (especially businesses) lease movable property. For example, companies often lease cars and other vehicles used by the company. Companies often lease equipment, such as large generators, or other large equipment rather than have the responsibility of taking care of it themselves.

Since our focus is on immovable property, in this section we will focus only on leases of immovable property, and more specifically on “perpetual leases” (also known as long term leases as provided in the 2001 Land Law).¹

Definite and Indefinite Term Leases

The Civil Code distinguishes leases on the bases of whether the lease “stipulates” a time period or not; or whether the lease has a “fixed term” or not. In the English version of this book, we will use the term “indefinite” to refer to a lease without a fixed term, and “definite” to refer to a lease with a fixed term.

Characteristics
of definite and
indefinite term
leases

Here are some of the characteristics of these types of leases, as found in Articles 599, 613 and 614 of the Civil Code:

- A definite term lease is for a specific time period, which must be specified in a written lease agreement.
- Any lease, whether in writing or not, that does not specify a

¹ See Article 38 of the Law on the Application of the Civil Code, which provides that a long term lease under the 2001 Land Law is a perpetual lease under the Civil Code.

time period is an indefinite term lease.

- Any lease that is not in writing is an indefinite term lease, no matter what the parties agreed to orally.
- An indefinite lease continues in force until one of the parties terminates the lease.
- At the end of a definite term lease, the definite term lease becomes an indefinite term lease unless (1) the lessor gives prior notice of intention not to renew the lease, in which case the lease will terminate; or (2) the parties extend the lease in writing for a specified time period.

Only one type of lease, a perpetual lease, can be recognized as a real right under Article 132 of the Civil Code. In addition to the specific requirements for forming perpetual leases, there are two basic requirements for a lease to be considered a perpetual lease, and thus a real right:

- the lease must be in writing for a definite term of at least 15 years, and
- the written lease must be registered in the appropriate land register.

If a lease does not fit these two basic criteria, then it is not a perpetual lease, but a mere contract between the parties. Only perpetual leases can be recognized as real rights under the Civil Code and the 2001 Land Law.²

Registration of perpetual lease not required to be valid, but is required to be a real right

Only one type of lease – a perpetual lease – can be registered. There is no requirement for registration of perpetual leases in order for them to be valid or enforceable between the parties. However, to be recognized as a real right and to have legal effect against a third party claim, registration is required under the Civil Code.

² Perpetual leases under the Civil Code are the same as long term leases under the 2001 Land Law, which referred to long and short term leases. The characteristics of long term leases under Article 106-109 of the 2001 Land Law are substantially identical to the requirements for perpetual leases under the Civil Code.

Article 246, Civil Code (Assertion Conditions of Perpetual Lease)

(1) *Unless the perpetual lessee registers the perpetual lease, it cannot be held up against third parties.*

(2) *If the ownership of the immovable that is the subject of a perpetual lease is assigned, a registered perpetual lease may be held up against the transferee.*

(3) *The provisions of Article 598 shall apply to the perpetual lease without register up to 15 years.*

Articles 229 of the 2001 Land Law requires the Cadastral Administration to register long term leases, and Chapter 17 of the Land Law requires the creation of a Cadastral Land Register that will, among other things, register all encumbrances on a land ownership certificate including long term or perpetual leases. The Cadastral Administration is responsible for issuing information as to the status of a property concerning whether a long term lease encumbers the title.

Look at the study questions below to help understand the legal implications of holding a perpetual lease (which is a real right) rather than an ordinary lease (which is a contract between the parties).

Study Question 49: Only a perpetual lease can be a real right

Ms. Bopha owns two houses on separate parcels of land, right next to each other. Five years ago, she leased the house on Parcel A to a private school under a 25-year perpetual lease agreement that was created and registered according to law. After five years, the school wanted to expand and asked to lease the house and Parcel B for 10 years. Ms. Bopha knew that she wanted to sell the land, so she agreed to give the school only a 3-year renewable lease. After the 3 year lease expired, the school continued to occupy the house and Parcel B, but without a written contract.

Last month, Ms. Bopha sold both parcels of land to Mr. Thy. Mr. Thy subsequently sent the school a notice that he was terminating both leases and told the school director that the school had to move out within 1 month.

Only a perpetual lease can be recognized as a real right

*What rights does the school have with respect to the Parcel A and Parcel B?
Are the school's rights the same or different for the two parcels?*

Real right
attaches to the
land
Contract is a
personal right

Because the school has a perpetual lease for Parcel A, the school has a real right that attaches to the land itself. No matter who becomes the owner of the land, the new owner will take the land subject to the real right of the perpetual lessee.

In contrast, the school only has an ordinary lease on Parcel B, which is a personal right between the school and Ms. Bopha. Unlike the real right on Parcel A, the personal right on Parcel B is only enforceable as a contract between the parties who made the agreement.

This is not to say that the school has no enforceable rights with respect to Parcel B. For example, in order to cancel the lease over Parcel B, the new owner must comply with the notice of lease cancellation requirements in Article 615 of the Civil Code or condition under 3rd paragraph of Article 246 of the Civil Code. And in some cases, the rights of the school will be the same for Parcel A and B, particularly in the case of a third party.

You can read more about the rights and responsibilities of the parties to a lease agreement in Book V, Chapter 5 of the Civil Code.

Rights and
responsibilities
of lessee

Read the following articles of the Civil Code, which address some of the rights and responsibilities of a lessee with respect to third parties.

Article 598, Civil Code (Conditions for perfection of lease of immovable)

(1) A lease of an immovable may be held up against a subsequent acquirer of any real right over the immovable by virtue of the fact that the lessee has occupied, and continuously used and profited from the leased immovable.

(2) A lessee actually occupying a leased property may exercise the same rights as the owner to demand return [of a dispossessed thing], for removal of disturbance and/or for prevention of disturbance, against an infringement of the lease rights.

Article 611, Civil Code (Lessee's duty to report)

If repairs are required to the leased property or a third party asserts

any rights over it, the lessee shall report without delay to the lessor, except where the lessor is already aware of such fact.

Consider the following study question:

Study Question 50: Rights and responsibilities of lessee

Mr. Sokunthea owns a large parcel of land (Parcel C) situated across the back of Parcel A and Parcel B, which are leased to the school (in the study question above). One Monday morning, the school director saw that Mr. Sokunthea was constructing a new fence more than 1 meter inside the boundary of Parcels A and B. The school director immediately goes to the local authority to complain about Mr. Sokunthea's encroaching onto the parcels leased by the school.

Mr. Sokunthea tells the local authority that only Ms. Bopha can make a complaint about the encroachment – which he claims is not an encroachment at all.

Who is correct, the school director or Mr. Sokunthea?

What is the school director's responsibility to Ms. Bopha in this situation?

As you can see from these two study questions, the school has significantly stronger rights for Parcel A than for Parcel B when it comes to the new owner trying to terminate the lease agreements. However, in the case of the third party, when Mr. Sokunthea encroaches on the leased property, the rights of the lessee (the school) are the same for both parcels.

Duration of Perpetual Leases

As noted above, a perpetual lease must be at least 15 years in length to be considered a real right. The 2001 Land Law did not put any limit on how long the leases could be. However, the Civil Code limited the duration of a perpetual lease to a maximum of 50 years:

Duration of
perpetual lease
is 50 years

Article 247, Civil Code(Term of perpetual lease)

(1) The term of a perpetual lease may not exceed 50 years. If a perpetual lease is established with a term exceeding 50 years, it

shall be shortened to 50 years.

(2) A perpetual lease may be renewed; provided that the renewed term may not exceed 50 years counting from the date of renewal.

In the time between the effective date of the 2001 Land Law and the application date of the Civil Code in 2007, numerous people, particularly investors, had entered into leases longer than 50 years, some reportedly for 99 years or even longer. This created a potential problem because the parties to the long term leases had already negotiated their contracts according to law in effect at the time and some of them stood to lose substantially if the contracts were cut short.

Duration of long
term leases
negotiated
before
application of
the Civil Code

The Law on Application of the Civil Code addressed this problem through a transitional provision dealing with existing long-term leases with a specified term exceeding the limit of 50 years.

Article 41, Law on Application of the Civil Code

For a long-term lease created prior to the date of application based on the Land Law of 2001, the duration of which remains more than 50 years on the date of application, notwithstanding the provision of Article 247 (Term of perpetual lease) of the Civil Code, such right shall exist for the period specified in the agreement. However, for any long-term lease with remaining term exceeding 99 years, the period of existence of such right shall be limited to 99 years from the date of application.

Assignment or Sublease of Perpetual Lease

As a general rule, a lessee is not permitted to assign an ordinary lease or to sublease the property to another person without permission of the lessor.

Perpetual lease
can be
assigned,
subleased or
inherited

Article 608, Civil Code(Transfer of lease rights and sublease)

(1) Except in the case of a perpetual lease, the lessee is not permitted to transfer his lease rights, or to sublease the leased property, without the permission of the lessor.

(2) If contrary to paragraph (1) the lessee allows a third party to use or profit from the leased property, the lessor may terminate the lease contract.

However, as indicated in paragraph (1) of the above article, the legal situation is different for perpetual leases – perpetual leases can be assigned, subleased, and even inherited:

Article 252, Civil Code (Assignment, etc. of perpetual leases)

(1) Perpetual leases may be assigned with or without consideration, or otherwise disposed.

(2) The perpetual lessee may sublease the subject of the perpetual lease.

(3) A perpetual lease may be inherited.

The reasons for different rules for ordinary and perpetual leases reflect the nature of the relationship of the parties. Ordinary leases are ordinary contracts, and only give the lessee the right to use and profit from the property until the lease expires. However, the holder of a perpetual lease that has been registered can exercise some of the rights of the owner – and in fact, restrict the rights of the owner to come onto the property. Of course, these rights exist only for the duration of the perpetual lease.

The Civil Code provides rules for sub-lease or assignment, and for direct obligation of the sub-lessee to the lessor as well as for the right of the lessor to claim damages against the lessee. It also provides legal grounds for the lessor or lessee to terminate the lease in case of any violation of by either party (see Articles 601, 603, 606-609 of the Civil Code).

Alterations to leased property by perpetual lessee

Perpetual leases are for long periods of time – at least 15 years, and up to 50 years. Perpetual leases are typically used for business purposes, and businesses have very different needs than a person who wants to lease a house for residential purposes, for example. A company that enters into a perpetual lease likely will need to alter existing buildings or build new buildings and make other alterations to the property to serve the company's business needs. Both the 2001 Land Law and the Civil Code establish specific rules that recognize that lessees under perpetual

Ownership of buildings built and plants planted by lessee belong to lessor

leases often need to make alterations, different from the needs of lessees under ordinary leases.

Under prior law, Article 108 of the 2001 Land Law, the lessee under a long term (perpetual) lease could make alterations to the property as long the lessee did not destroy or fundamentally change the nature of the property. Upon expiration of the perpetual lease, (1) the lessee did not have to restore the property to its original condition (unless the lessee destroyed the property or changed its fundamental nature); and (2) any construction made to the leased property by the lessee became the property of the lessor without the need to compensate the lessee for cost of the constructing the building.

The Civil Code contains similar provisions (as the 2001 Land Law) with respect to perpetual leases:

Article 254, Civil Code (Termination of perpetual lease)

(1) Upon termination of a perpetual lease, the perpetual lessor cannot demand that the perpetual lessee restore the immovable to its original condition unless the perpetual lessee has destroyed the immovable or fundamentally changed its nature.

(2) Upon termination of a perpetual lease, the lessor shall acquire the ownership over any improvements and any structures installed on the immovable by the perpetual lessee without having to pay compensation to the perpetual lessee.

(3) A special agreement may be made at variance with paragraphs (1) and (2); provided that such special agreement cannot be held up against third parties unless it is registered.

Paragraph 3 of Article 254 above, is new, and provides that the parties to a perpetual lease are free to make different rules regarding alterations to leased properties; however, these different rules cannot be held up against third parties unless the perpetual lease, including the special agreement, is registered.

Study Question 51: Alterations to property under perpetual lease

Ms. Bopha is the owner of a flower shop in Phnom Penh. Ms. Bopha entered

into a 15 year written lease with Mr. Vuthy to rent a house and farm on one hectare of land outside of Phnom Penh, where she could grow flowers and plants for her shop. Under the written lease, Ms. Bopha was specifically permitted to move the existing wooden house to a corner of the property, and to take out some of the trees, and to install an underground irrigation system for her plants. The lease stated that Ms. Bopha would not have to restore the property to its original condition upon termination of the lease at the end of the lease period.

Ten years after entering into this lease, Mr. Vuthy sold the property to Mr. Heang. At the end of the 15 year lease period, Mr. Heang would not agree to extend the lease any longer, and informed Ms. Bopha that she has to restore the property to its original condition.

Ms. Bopha replied that she is not required to restore the property to its original condition because of the written lease that she had with Mr. Vuthy.

Who is right if the lease had been registered?

Who is right if the lease had not been registered?

Why do you think the law requires the lease to be registered in situations like the one in this study question?

Lessee's Real Right under a Perpetual Lease

As discussed previously, under Article 130 of the Civil Code, a real right is the right to directly control a thing:

Article 130, Civil Code(Definition of real right)

A real right is the right to directly control a thing, and may be asserted against all persons.

In the context of a perpetual lease of immovable property, the lessee has the right to directly control the leased property, and to fundamentally exercise all the rights of the owner, except the right to sell or transfer ownership.

Article 253, Civil Code(Perpetual lessee's real right of claim)

A perpetual lessee may exercise the same rights to demand return, to remove disturbance and to prevent disturbance vis-à-vis an infringement of the perpetual lease as the owner.

Lessee's right of use and profit of lease property

Specifically, a lessee (perpetual or ordinary) has the right to use and profit from the lease in a manner that is consistent with the contract or nature of the property, and the lessor shall not interfere with this right.

Article 600, Civil Code, (Right and obligation of lessee to use and profit based on lessee's way of use)

(1) The lessee shall have the right and obligation to use and profit from the leased property in a manner that is consistent with the contract or the nature of the property.

(2) If the lessee infringes the obligation described in paragraph (1), the lessor may terminate the contract.

(3) The lessor shall not interfere with the use and taking of profits by lessee in the normal manner. [lessee's way of use]

A lessee's right under Article 600(3) of the Civil Code is substantially similar to the right of lessees under prior law, Article 112 of the 2001 Land Law:

Article 112, 2001 Land Law

The lessor must refrain from any conduct contrary to the lease that may impede or suspend the quiet enjoyment of the lessee.

Real right of perpetual lessee is stronger than ordinary lessee

Article 600 of the Civil Code applies to all leases, and in the case of perpetual leases, must be read together with Articles 130 and 253 of the Civil Code, which relate specifically to the real right of a perpetual lessee. It is clear that the real right of a perpetual lessee is stronger than the rights of an ordinary lessee. The right of use and profit of a perpetual lessee includes the right to control the immovable property, and to assert the right against any other person, including the owner.

Repairs and Maintenance of Leased Property

Lessor responsible for

However, the right of control is not absolute, and the owner has the right

repairs required
for use and
profit of leased
property

to enter the property to make repairs and maintenance of the leased property. Under Article 111 of the 2001 Land Law the lessee was responsible for minor repairs and the lessor for major and structural repairs. The Civil Code does not distinguish between minor and major repairs. Rather, the lessor must carry out repairs “required for the use and profit of the leased property”:

Article 602, Civil Code (Lessor’s responsibilities for repairs)

The lessor has a duty to carry out repairs required for the use and profit from the leased property.

Article 603, Civil Code (Lessor’s Maintenance Activities)

(1) The lessee shall not obstruct any action by the lessor that is required to preserve [maintain] the leased property.

(2) If the lessor proposes to take action to preserve [maintain] the leased property against the wishes of the lessee, and as a result of such action it would become impossible for the lessee to achieve the objectives for which he entered into the lease, the lessee may demand a reduction of the rental or may terminate the contract.

The Civil Code only places on the lessee the duties to carefully manage the leased property in good faith in the name of the lessor, while property maintenance and necessary repairs duties generally remains with the lessor, unless otherwise provided in the lease agreement (see Articles 600-603, Civil Code). If the lessee makes necessary repairs that are part of the lessor’s duties, the lessee can immediately claim compensation from the lessor (Article 604, Civil Code).

Property Inspection

Lessee has to
inspect the
property before
entering into
possession

The Civil Code provides for the lessee to inspect and get awareness of the present condition of the leased property or that if the lessee fails to do so, the law assumes that the property was in the condition as specified in the lease agreement. However, in any situation, the lessee can demand that the lessor repair any hidden defects to the property. (See Article 605 of the Civil Code).

Study Question 52: Repair and maintenance under perpetual lease

Ms. Sreynou leased a building from Mr. Chhang to operate a restaurant. The

lease was for 15 years and it was registered. Ms. Sreynou inspected the building and did not observe any noticeable defects. The lease does not specify who would be responsible for repairs.

A few months later, at the beginning of the rainy season, Ms. Sreynou noticed that the roof was leaking and water was damaging the ceiling and walls of the restaurant. She informed Mr. Chhang, who looked at the building, but did nothing. With the next heavy rain, the ceiling in one of the restaurant private rooms fell down, damaging some of the restaurant furniture, and forcing Ms. Sreynou to close one of the rooms.

What rights, if any, does Ms. Sreynou have to get the ceiling repaired and her furniture replaced?

Lease of state properties and transfer of lease rights

The general concepts related to creating a lease and the discussion of rights and duties of parties to a lease are, except otherwise provided by law or regulation, relevant to both private and state properties. The Civil Code provides rules and procedure pertaining to lease formation or transfer of lease rights for private property. Leases for state properties are usually subject to special rules and regulations dealing lease terms for different types of state properties, granting state approval to lease, executing the lease contract, and monitoring and review of the contract performance.

The most important substantive rules for leasing state properties are those provided in Article 17(2) and Article 16 (3 &4) of the 2001 Land Law:

State private
land can be
leased under
perpetual lease

Article 17 (paragraph 2), 2001 Land Law

Such property [referring to private property of the State and of public legal entities] may be leased out and it may be the subject of any contract made properly according to the law.

State public
land cannot be
leased under
perpetual lease

Article 16 (paragraphs 3 &4), 2001 Land Law

State public property may, however, be the subject of authorizations to occupy or use that are temporary, precarious and revocable in the

case the various fee/tax obligations are not complied with except as permitted in Chapter 3 of this law. Such authorizations cannot be transformed into ownership or rights in rem for the benefit of the holder.

When State public properties lose their public interest use, they can be listed as private properties of the State by law on transferring of state public property to state private property.

Article 17 (paragraph 2) above makes it clear that state private properties can be leased under an ordinary or perpetual lease. However, the same is not true in the case of state public property. Article 16 (paragraph 3) does not specifically authorize “leases” of state public property, but does specify that “authorizations to occupy or use” state private properties are “temporary, precarious and revocable,” and cannot be transformed into “rights of rem for the benefit of the holder.” Article 17 (paragraph 2) does not rule out ordinary leases of state public land, but it clearly does prohibit perpetual leases of state public properties.

The ambiguity in Article 17 (paragraph 2) of the 2001 Land Law was clarified by Article 18 of Sub decree 129 (2006) on Rules and Procedure for Reclassifying Public Property of the State and of Public Legal Entities, which provides that state public properties can be subjects of short-term leases of up to 15 years. Sub decree 129 also requires that detailed property use terms are to be set in a “burden book,” which is also used to record land concession agreements.

Other sources on leases of state properties (in addition to the Civil Code, the 2001 Land Law, and Sub decree 129 (2006) include:

- Law on Public Financial System of 2008 (Chapter 2, Article 17, on management of all kind of state properties) is the fundamental institutional framework for management of state properties
- Sub decree 114 (2007) on Hypothec and Transfer of Long Term Lease or Economic Land Concession Rights
- Sub-decree 118 (2005) on State Land Management
- Executive Order 30 of 1997 on Management of State Properties
- Executive Order 2 of 2005 on Strengthening State Property Management

Usufruct

The term “usufruct” comes from two Latin words: *usus*, meaning use, and *fructus*, meaning fruits. Usufruct is a right to use and enjoy the natural and legal fruits of the property of another person for a time not to exceed the life of the usufruct holder.³

Article 256, Civil Code (Definition of Usufruct)

(1) “Usufruct” refers to the rights to use and enjoy the profits [fruits] of the immovable property of another person, for a period that may not exceed the life of the usufruct holder.

(2) The usufruct holder has the right to use the immovable property that is the subject of the usufruct for its intended purposes, and to enjoy the natural fruits and the legal fruits arising from the immovable property.

Usufruct is a right to the use and fruits of the property, not to exceed the life of the usufruct holder

A usufruct may be created by operation of law or by agreement, which can be either in writing or orally. Although the Civil Code does not include any specific examples of usufructs created by law, examples can be found in laws from other jurisdictions: the surviving spouse has a usufruct by law to the common property inherited by the descendants of the deceased spouse. Another example may be the usufruct right of parents of a minor child who inherits immovable property.

Usufructs by agreement or by will are typically are created by the owner to ensure that family members or other persons are provided with security during their lifetimes or other periods specified in the instrument creating the usufruct. If no time is specified, the usufruct ends upon the death of the usufruct holder.

³ The English translation of the Civil Code uses the term “usufructuary” as a noun and an adjective. In Article 256, usufructuary is used as a noun to refer to the person who holds the right of usufruct holder. The title of this chapter uses usufructuary as an adjective, and refers to the four real rights to use and profit from the property of the owner: perpetual lease, usufruct, right of use and stay and easement. To avoid confusion, we use usufruct holder when referring to the person holding a right of usufruct.

Under Cambodia law, the rules pertaining to usufruct are contained in Articles 256-273 of the Civil Code.⁴

A usufruct is similar in many respects to a perpetual lease. For purposes of discussion, let's take the example of Rithy, who granted a usufruct to his younger sister, Sophea, to a condominium in Phnom Penh, which is owned by Rithy. The term of the usufruct is for the life of Sophea. The usufruct was in writing and properly registered in the Land Register.

The following are some of the key similarities and differences between Sophea's usufruct and a perpetual lease for the same property:

- **Real right:** As is the case with a perpetual lease, if the usufruct is registered it constitutes a real right. The usufruct holder cannot hold the right against third parties unless it is registered in the Land Register. (See Articles 257-259 of the Civil Code).

Differences
between
usufruct and
perpetual lease

Article 265, Civil Code (Usufruct holder's real right of claim)

A usufruct holder may exercise the same rights to demand return, to remove disturbance and to prevent disturbance vis-à-vis an infringement of the usufruct as the owner.

- **Assignment:** As is the case of a perpetual lease, the usufruct holder can assign or dispose of the usufruct. So, for example, if Sophea decides to get married and go live with her husband, she assign the usufruct or dispose it for money or other consideration. However, the person who buys the usufruct has the only the rights that Sophea had, so if Sophea dies or the property owner terminates the usufruct as provided by law, the usufruct terminated, along with any assignment or transfer made by Sophea.
- **Lease:** The holder of a perpetual lease can sublease the property to another person for the remaining term of the lease, as the perpetual lease has a specific time period. The rules are different for usufructs because they often do not have specific time periods, but are for the

⁴ The 2001 Land Law dealt with usufructs in Chapter 8 Part 1 (Articles 119 – 137). The 1992 Land Law also included provisions on usufruct in Articles 78-105. These provisions were substantially similar to the old Civil Code, Articles 729-754.

life of the usufruct holder. Thus, Sophea can lease the property that is the subject of the usufruct, but for a term not to exceed 3 years. If the usufruct terminates (for example, if Sophea dies) the lessee cannot hold the lease against the property owner. (Civil Code Article 264).

- Fees: Lease payments are a key component of the lease arrangement, although there is no set amount. Usufructs are usually granted without cost to the usufruct holder, but the owner can impose fees if the owner wants to. See Article 273 of the Civil Code.
- Inheritance: A perpetual lease can be inherited, but a usufruct cannot be. This is because the maximum duration of a usufruct is the life of the usufruct holder (or shorter term as provided in the agreement). When the usufruct holder dies, the usufruct terminates – there is nothing left to inherit.
- Ownership of improvements: The rules for ownership of improvements at the end of usufruct are similar to those of a perpetual lease arrangement. See Article 269, Civil Code.
- Maintenance and repairs: The rules for maintenance and repair of property subject to a usufruct are similar to the rules for perpetual leases. See Article 271, Civil Code.

Rights of Use and Stay

The rights of use and stay are two separate rights. As their names imply, they refer, respectively, to the rights (1) to receive fruits of the property of another person, and (2) to dwell on the property of another. These rights can be exercised separately or jointly depending on the type of property involved:

Right to receive
fruits or dwell
on the property
of another

Article 274, Civil Code (Definition of Use Right and Stay Right)

(1) “Right of use” refers to the right to collect the fruits of immovable property, to the extent of the needs of the right holder and his or her family.

(2) “Right of stay” refers to the right to occupy part of the building(s), to the extent required for residence by the right holder and his/her family.

Rights of use and stay are similar to usufructs, but as we shall see, are much more limited. Typically, rights of use and stay are granted by a family member to ensure that another family member has a secure place to live, or use to meet their basic needs, or both, depending on the situation.

Created by
operation of law
or agreement

Like usufruct, rights of use and stay can be created by operation of law or by agreement. Agreements creating use and stay rights may be made orally or in writing. The rights expire either on the date set in the agreement or, if no expiration date is provided in the agreement, upon the death of the holder of the rights. As with a usufruct, the rights of use and stay cannot extend beyond the life of the right holder. (See Articles 274, 275, 278 and 283 of the Civil Code).⁵

Purpose of Use and Stay Rights

The major difference between use and stay rights and a usufruct pertains to the purpose of the rights of use and stay. That is, the holder of a right to use or stay may exploit the subject property only to the extent of the needs of the holder and his or her family. In contrast, a usufruct holder has full rights to use the property and to exploit the natural and legal fruits of the property, without limitation.

Use and stay
rights are
limited to the
needs of the
right holder and
his or her family

The rights of use and stay are not affected by changes in the size of the household by marriage or childbirth:

Article 279, Civil Code (Increase of Household Members)

A right of use or right of stay shall remain in effect, notwithstanding the expansion of the family [increase of household members] on account of marriage or childbirth after the creation of such right.

The following are some of the key similarities and differences between a right of use or stay and other real rights discussed in this chapter. As we look at these similarities and differences, keep in mind that the rights of use and stay are limited to the needs of the rights holder and his or her family.

⁵ For comparison, see Articles 138 and 140 of the 2001 Land Law; and Articles 106 and 107 of the 1992 Land Law.

- **Real right:** A right of use or stay is a statutory real right. However, unlike the other real rights discussed above, the rights of use and stay do not have to be registered to be held up to third parties.

Holder of right of use or stay must actually use the right to hold it up against third parties

In order to hold up these rights against third parties, the holder must actually reside in or use the property:

Article 277, Civil Code (Requirements for perfection of rights of use and rights of residence)

(1) Unless the holder of a right of use or right of residence actually uses his/her right, it cannot be held up against third parties.

(2) Even though the ownership of the immovable that is the subject of a right of use or right of residence is assigned, the right may be held up against the transferee if it is actually used or resided.

- **Assignment and Lease:** The use or stay rights holder may not assign these rights or lease out the concerned property. Unlike the usufruct holder, the use and stay rights holder has only the rights to the “fruits” of the property for the basic needs of his or her family, and not the natural and legal fruits enjoyed by a usufruct holder.

Use and stay rights holder may not assign or lease the property

Article 280, Civil Code (Assignment of Use Right and Stay Right)

(1) Holders of rights of use or rights of stay are not permitted to assign or otherwise dispose such rights.

(2) Holders of rights of use or rights of stay are not permitted to lease out the immovable property that is the subject of such rights.

- **Fees:** The Civil Code is silent on the question of whether the owner can charge the holder fees for the rights of use and stay. If the right is created by operation of law, the law creating the right would also have to be consulted. Because these rights are often granted for the support the rights holder, (such as the study question below) charging fees for a right of use and stay may be inconsistent with the purpose of granting the right in the first place.
- **Inheritance:** Rights of use and stay may not be inherited because, like usufruct, the right terminates when the rights holder dies (or earlier as provided in the agreement creating the right).

Use or stay rights holder liable for upkeep costs on a pro rata basis

- Maintenance and repairs: Although the use or stay rights holder is entitled only to directly exploit the property to the extent necessary for the needs the holder's family, the rights holder is still liable to contribute to the cost of maintaining the property or cultivation of the fruits of the land taken "pro rata in accordance with the portion enjoyed" as in the case of an usufruct holder. (See Article 284 of the Civil Code.⁶)

Study Question 53: Rights of Use and Stay - 1

Ms. Sophy owns a large house on a large parcel of land. Her elderly uncle from another village lost his land and had no place to live, so Ms. Sophy built a small house on one side of her land parcel and told him he could live there. Some years after the uncle had lived in Ms. Sophy's small house, Ms. Sophy decided to sell her land. She found a buyer, but the uncle refused to move.

*Does the Uncle have a right to remain in the small house?
If your answer is yes, how long does this right last?*

Let's change the facts a little. After some years, the uncle was lonely, so he decided to go stay with his cousin back in the village. A year later, Ms. Sophy sells her land. She tells her uncle to come move his furniture out of the small house, and he refuses, saying he has a right to remain in the small house.

Does he have a right to remain in Ms. Sophy's house?

Let's change the facts again. After some years, the uncle was lonely, so he remarried a younger woman with 2 small children. They move into Sophy's small house with the uncle. Do the uncle and his new wife and her children have a right to stay in Ms. Sophy's house? If yes, how long?

Study Question 54: Rights of Use and Stay - 2

Statutory Right
of Use and Stay

Mr. Thol owns two houses, one in Kampot town and another one in the village where his wife, Ms. Theory, lives. When Mr. Thol and Ms. Theory got married,

⁶ For comparison see Article 141 of the 2001 Land Law; and Article 108 of the 1992 Land Law.

Mr. Thol provided his village house as the matrimonial residence. A few years later, Mr. Thol moved to Phnom Penh, where he started another family. Ms. Theory continued to reside in the matrimonial residence. Mr. Thol sold the village house without the knowledge or consent of Ms. Theory, and the new owner, Mr. Sophal, told Ms. Theory that she had to move out of the house.

Ms. Theory told Mr. Sophal that she had a right to continue living in the house until she died, or decided to move out on her own. Read Article 977 of the Civil Code reprinted below. Do you agree with Ms. Theory?

Article 977, Civil Code (Staying on Separate Property)

(1) A spouse may reside in the separate property of the other spouse if such property has been provided as the matrimonial residence.

(2) In cases described in paragraph (1), even if the separate property of one spouse that has been provided as the matrimonial residence is disposed of without the consent of the other spouse, the other spouse may continue residing in the immovable property.

Easements

General Concepts of Easement

<p>Right to use or control another's land for a specific and limited purpose</p>	<p>An easement is the right of one land owner to use land of another land owner, <i>for a specific limited purpose</i>.⁷ An easement involves two separate properties owned by two separate owners. Since an easement is a real right, it attaches to the land and to the subsequent owners of both parcels. For this reason, an easement is generally perpetual unless it is terminated by operation of law or agreement.</p>
<p>Only easements created by contract or actions by land owners or occupants are real rights under the Civil Code</p>	<p>Different jurisdictions classify easements differently. In fact, under the 2001 Land Law (as well as the 1992 Land Law) Cambodia classified easements differently from the way they are classified now under the Civil Code.</p> <p>The 2001 Land Law recognized three types of easements:</p>

⁷ See 'easement' in Black's Law Dictionary, 7th edition, 1999, page 527.

1. Easements by nature:
2. Easements by law
3. Easements by contract

Under Book V, Chapter 7 of the Civil Code on “Real Rights,” only one type of easement is considered a real right, and that is an easement by contract. However, as we shall see, the owners or occupants of the land can sometimes acquire an easement through their actions, and without a formal contract.

The other two situations addressed under the 2001 Land Law, easements by nature and easements by law, are not considered easements under the Civil Code. Rather, these situations are related to the rights and obligations of ownership, and are covered in Book V, Chapter 2 of the Civil Code on Ownership, and have the same effect as prior law.

Easements by nature and easements by law under 2001 Land Law are ownership rights and obligations under Civil Code

Easements by nature under Articles 144-146 of the 2001 Land Law address the situations where water flows naturally from one land across the land of another. This can be a real problem in Cambodia especially during the rainy season, when water flows from land that is higher than the surrounding properties. The 2001 Land Law provided for the rights and prohibitions on how property owners deal with naturally flowing water. The Civil Code provides similar rules on rights and obligations of property owners to deal with naturally flowing water in Article 145 – 151.

Easements by law under Article 147 of the 2001 Land Law are rights of way imposed by law on one piece of land in order to benefit another property or the general public. The typical situation is where one parcel of land has no access to a roadway and the owner needs to cross someone else’s land to be able to enter the land from the road. Other situations of easements by law under the 2001 Land Law prevented neighbors from building or planting trees too close to the boundary of

adjoining properties.⁸ See the Civil Code in Articles 143-144 and 152 – 154. See, for example, Article 144, Civil Code (Right of Way for enclosed land)

There is no substantive difference between the protected interests as a result of the different classifications under the 2001 Land Law and the Civil Code. It is more a matter of the way that the Civil Code organizes the real rights sections to include only those real rights that the owner of land separates out to grant or transfer to another person, usually on a temporary basis. When separated real rights are extinguished, the separated right merges with the owner's remaining rights. It is not up to the land owner to decide whether to grant the so-called easements by nature and easements by law. So in that sense, these easements by nature and easements by law are not real rights.

Articles 285-305 of the Civil Code are the rules on creating easements and the rights and obligations of the property owners related to the easements.

Article 285, Civil Code (Definition of Easement)⁹

(1) An "easement" is the right to use the land of another for the benefit of one's own land, in accordance with the purpose specified in the contract of creation; provided that an easement may not be created that contravenes public order.

Definition of
easement

(2) The other person's land that is used for the benefit of one's own land is referred to as the "servient land", and the land that enjoys the benefit of the easement is referred to as the "dominant land".

(3) A perpetual lessee or usufruct holder is also entitled to create an easement using the subject land as the dominant land.

The terms "servient land" and "dominant land" are commonly used with reference to easements, as they were in the 2001 Land Law and laws of

⁸ Article 148 of the 2001 Land Law, which was not repealed by the Law on the Application of the Civil Code, addresses a special situation concerning constructing fences and buildings along public roads.

⁹ Article 177 of the 2001 Land Law prohibits creation of easement by contract on private part of co-owned property.

many other jurisdictions. These terms are used the same way in the Civil Code; that is, one land, the servient land, is subordinate to the dominant or controlling land.

- Servient land – the land that is the burdened by the easement, also called the subordinate land.
- Dominant land – the land that benefits from the easement.

Creation of Easement by Contract

Easement
generally
created by
contract

The definition of easement above suggests that the real right of easement is created by contract; and this is the most common way that easements are created. But as we shall see below, easements may also be created by prescription.

As stated in Article 286 of the Civil Code, the easement contract can be in writing or otherwise. As is the case of the other usufructuary real rights (perpetual lease and usufruct, but not rights of use and stay) an easement is a real right that attaches to the servient and dominant land, and can be held up to a third party only if the easement agreement is in writing and registered in the Land Register.

Article 287, Civil Code (Assertion Conditions of Easement)

Real right of
easement must
be in writing
and registered
in the Land
Register

(1) Unless an easement is registered, it cannot be held up against third parties.

(2) An easement that has been registered may be held up against a person acquiring the servient land.

A holder of a registered easement has the same rights as the owner of the servient land to protect the easement right against disturbance:

Article 294, Civil Code (Easement holder's real right of claim)

An easement holder may exercise the same rights to demand return, to remove disturbance and to prevent disturbance vis-à-vis an infringement of the easement as the owner.

Fees for
easements

- Fees: Since the owner of the servient land is granting something of value to the owner of the dominant land, the servient land owner

can, and often does sell the easement right or charges fees that must be paid to exercise the right. Failure to pay the fees, if charged, is grounds for the servient owner to apply to the court for the relinquishment of the easement (Article 295, Civil Code).

- **Duration:** Easements granted by contract can be for any duration. Unlike the other usufructuary real rights, all of which have time limitations, an easement continues until something happens to extinguish it. But, if the agreement specifies a time limit, the easement is generally extinguished at the end of the time in the agreement.

Easement can
be for any
duration

Article 296, Civil Code (Stipulation of Term of Easement)

(1) Where a term is stipulated in the contract that creates the easement, the easement shall be extinguished at the expiry of such term.

(2) Where a term is not stipulated in the contract of creation of easement, the owner of the servient land may apply to the court for extinguishment of the easement. The court shall decide whether to extinguish the easement or not, by considering the facts such as the circumstances of the creation, the execution in the past, existence or inexistence of the consideration.

- **Assignment of easement:** What happens if the owner of the dominant land assigns the dominant land by lease, usufruct or right of use and stay? The answer to this question is provided in the Civil Code:

Article 288, Civil Code (The scope of persons who can acquire easement)

In addition to the owner of the dominant land, a lessee, perpetual lessee, usufruct holder or holder of a right of use or right of stay over the dominant land is entitled to enjoy the benefit of [to acquire] an easement, except where otherwise provided in the contract creating the easement.

The first place to look in such a case is at the contract creating the easement. If the contract is silent on the issue, the lessee or other usufructuary rights holder has a right to enjoy the easement. Of course, the assignment is subject to the same conditions that are

binding on the owner of the dominant land.

- Appurtenant nature of easement: An easement is appurtenant to the dominant land, which means that it is attached to the dominant land and remains attached to the dominant land if the dominant land is assigned or transferred (unless otherwise provided in the easement agreement). But the land subject to the easement is owned by the servient land owner, and the easement holder (the dominant land owner) has no right to assign or lease the easement separately from the dominant land.

Easement
cannot be
assigned
separately from
the dominant
land

Article 289, Civil Code (Appurtenant nature of easement)

(1) An easement passes along with the ownership of the dominant land if the ownership of the dominant land is assigned, except where otherwise provided in the contract creating the easement.

(2) An easement may neither be assigned nor made the subject of other rights separately from the dominant land.

- Extinguishment of easement: Like other real rights that have been separated by the owner and assigned to others, when an easement terminates, it merges back with the rights of the land owner – in this case, the servient land owner. As discussed above, if the contract specifies duration of the easement, it terminates – or extinguishes – on the date specified in the contract. The contract may also provide other reasons for termination, such as the violation of the terms of the easement.

In addition to extinguishment at the end of the contractual contract period, and failure to pay any fees charged for the easement, discussed above, the Civil Code (at Article 291) provides other grounds for extinguishment due to failure of the easement holder to comply with the obligations imposed on the easement holder. In these cases, the servient land owner applies to the court for extinguishment of the easement and also may seek damages.

Easements and Prescription

In Chapter 7, Real Rights: Possession, of this book we discussed how people may acquire ownership of land through “Prescriptive Possession” (*sitt kan-kab tam-arch-nhar-yuk-karl*.)” These rules about acquiring ownership through prescription are found in Articles 162 – 178 of the Civil Code,

Articles 300 – 305 of the Civil Code provide rules related to prescription that apply in two different situations with respect to easements. First, easement can be acquired by *prescriptive acquisition*, and second, they can be extinguished by *prescriptive extinction*.

Acquisition of easement by prescription acquisition

Prescriptive acquisition of an easement occurs when the owner of one parcel of land (dominant land) acquires an easement by using the servient land and the use is continuous and apparent. The Civil Code defines what is meant by continuous easement and by apparent easement.

Article 300, Civil Code (Acquisitive prescription of easement):

(1) An easement may be acquired by acquisitive prescription, but only where it is continuous and apparent.

(2) “Continuous easement” refers to an easement where without human action being required, the easement has materialized only because of the location of the place, and without interruption has been [in the state of] providing a benefit to the dominant land and imposing a burden on the servient land.

(3) “Apparent easement” refers to an easement that has become apparent and materialized through an externally visible structure or other vestige.

Article 301 of the Civil Code prescribes how the easement operates in the context of undivided ownership. That is, if one co-owner acquires an easement by prescription, the other co-owners acquire the easement.

Time period for prescriptive acquisition of easement

As discussed in “Chapter 7: Real Right - Possession,” the time period

for the acquisition of ownership by prescriptive acquisition, at Article 162 of the Civil Code, is 10 or 20 years, depending on whether the possessor is acting in good faith and without negligence. Under Article 178, the same rules apply for the prescriptive acquisition of an easement:

Article 178, Civil Code (Prescriptive acquisition of rights regarding immovable)

(1) A person who peacefully and openly exercises a right regarding an immovable such as a perpetual lease, usufruct, right of use/right of residence, servitude, leasehold or pledge for his own benefit shall obtain such right after either 10 years or 20 years, in accordance with the classifications set forth in Article 162 (Prescriptive acquisition of ownership over immovable).

Extinction of Easement by Prescriptive Extinction

There are basically two ways that a person can lose an easement through prescriptive extinction. Under the Civil Code, an easement holder can lose the easement by failure to use all or part of it.

Article 304, Civil Code (Extinctive Prescription of Easement)

If the easement holder does not exercise part of the easement, that part of the easement shall be extinguished by prescription.

In addition, the holder of an easement can lose the easement if an occupant of the servient land fulfills the conditions for prescriptive acquisition of the land (see Article 162 of the Civil Code).

Article 305, Civil Code (Acquisitive prescription of servient land occupant and fate of easement)

(1) If the occupant of the servient land fulfills the conditions for acquisitive prescription, the easement shall thereby be extinguished.

(2) If the easement holder exercises the easement within the period of occupancy required for acquisitive prescription, the servient land acquired by prescription by the occupant shall be subject to the burden of the easement.

Time period for Prescriptive

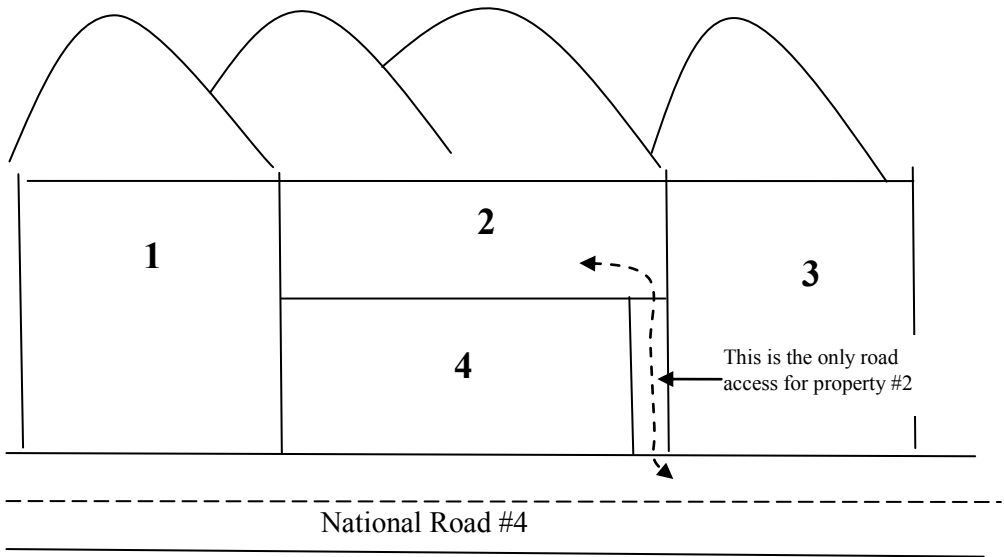
Article 302 of the Civil Code indicates that the general rules for prescriptive extinction of rights applies in the case of prescriptive extinction of easements.

Article 500, Civil Code (Extinctive prescription for property rights other than claims and ownership)

Except as otherwise provided in this Code or in other laws or ordinances, the period for extinctive prescription regarding property rights other than claims and ownership shall be 15 years. The provisions pertaining to extinctive prescription regarding claims shall apply mutatis mutandis to extinctive prescription for property rights other than claims and ownership.

Look at the diagram below and try to answer several study questions about the diagram.

Figure 1: Easements



Study Question 55: Rights of third parties

The diagram shows 4 parcels of land. Three parcels border the National Road

#4. *Parcel 4 is owned by Mr. Four. Behind parcel 4 is parcel 2, owned by Ms. Two. The only way that Ms. Two can get from the road into her land is by crossing parcel 4.*

(1) Is Ms. Two entitled to access across parcel 4, or must she negotiate an easement with the owner, Mr. Four? If so, by which rule? Can Mr. Four deny her access?

(2) Can Ms. Two demand that the access road be located in the middle of parcel 4?

Study Question 56: Rights of third parties

Parcel 3 in the diagram is a farm, owned by Mr. Three. The owner of parcel 4 granted Mr. Three an easement to use the access road across parcel 4 (the same one used by Ms. Two) so that the farmer could plant more on his farm. This easement had no termination date, and it was not registered with the Land Register. Later, Mr. Three leased his farm (parcel 3) to Mr. C.

Can Mr. Four prevent Mr. C from using the access road to reach the back of parcel 3?

Mr. C often drives his cart across the access road, and sometimes he leaves the cart parked on the access road and Ms. Two cannot get into her land. What legal rights does Ms. Two have to resolve this situation?

Study Question 57: Rights of third party purchasers

Mr. Four decides to buy parcel 2 from Ms. Two. After the purchase, what happens to the access road used by Ms. Two?

Mr. Four tells Mr. C that he can no longer use the easement granted to him to use the access road. What rights, if any, does Mr. C have?

Would these rights be different if the easement to benefit Parcel 3 had been registered?

Conclusion

This concludes our study of the usufructuary real rights of perpetual lease, usufruct, rights of use and stay and easements. All these real rights share some common characteristics – the primary one being these rights grant the holders the rights to use property owned by others, while the owner retains ownership. All of the rights can be created by oral or written contract. All the rights, with the exception of the rights of use and stay, must be in writing and registered in the Land Register in order for the holder of the rights to hold them up against third parties. The Civil Code contains general rules about the duration of the various rights, and whether they can be assigned, leased, or inherited. However, for most of these general rules, the parties can provide different results in their contracts.

CHAPTER 9

IMMOVABLE PROPERTY REAL SECURITY RIGHTS

Types of Real Security Rights
Real Security Rights under the Civil Code
Pledge
Hypothec
Retention Right
Preferential Rights

Topics Covered
in this Chapter

Review of Real Rights

In the previous two chapters, we studied that owners of immovable property can separate three specific categories of their rights as owners, known as “real rights,” and transfer them to other people, while still retaining ownership. In Chapter 7, we discussed the first category, the real right of possession, specifically possession with the intent to acquire ownership, either by (i) acquisitive possession (*sitt-kan-kab-cha pokeak*) under conditions set forth in the Land Law, or (ii) prescriptive possession (*sitt-kan-kap tam-arch-nhar-yuk-karl*) which is recognized for the first time in Cambodia in the 2007 Civil Code.

In Chapter 8, we discussed the second category, usufructuary real rights, which are: perpetual lease, usufruct, rights of use and stay and easements. Basically, the different usufructuary (use and enjoyment) real rights grant other persons rights to use and enjoy the immovable property, and in most cases, substantially limit the owner’s right to use the property subject to the usufructuary right.

In this chapter, we discuss the third category of real rights – called real security rights – which are different means by which the owner of movable or immovable property can use that property to secure a debt or other obligation to another person. Real security rights also include

rights that a creditor has to claim a real right against the movable or immovable property of a debtor to secure the debt owed to the creditor.

Types of Real Security Rights

Real security rights can be categorized into two broad categories: rights created by agreement between the debtor and creditor, and rights created by operation of law, but based on an underlying obligation of the debtor to pay the creditor.

A real security right by is created by agreement whenever a property owner grants a creditor a real right to the owner's property as security – or collateral – for a loan. For example, a property owner needs cash for different purposes, and the owner does not want to sell the property to get the cash. Or, a person wants to buy property, but does not have enough cash to do so. In these situations, the owner of movable or immovable property borrows money from a creditor and grants the creditor a real security right to the owner's property. The creditor can force the sale of the secured property (the collateral) if the debtor fails to repay the loan. The Civil Code establishes the methods for creating and enforcing real security rights created by agreement of the parties.

Real security
rights created
by agreement
or operation of
law

In other cases provided in the Civil Code, real security rights come into existence by operation of law when a debtor does not repay debts or perform certain legal obligations. For example, a property owner contracts with another person to carry out some work related to the property, or the property owner incurs debts for other reasons. The Civil Code allows the creditors to assert rights to property owned by the debtor in the event the debtor fails to pay the claims. These real security rights are created by operation of law, and not directly by agreement between the parties.

Real security rights are commonly used to secure monetary obligations; however, they are also used to secure non-monetary obligations. For example, large construction contractors often have to provide security in the event the construction work is not completed.

Rules related to real security rights are in Book 6 of the Civil Code, entitled “Security” (Articles 766 – 899). There are five specific types of real security rights:

Article 767, Civil Code (Types of real security rights)

(1) The types of real security rights are limited to those established in the Civil Code or in special laws, and no other type of real security may be created.

(2) The five types of real security rights established in the Civil Code are (i) rights of retention, (ii) preferential rights, (iii) pledge, (iv) hypothec and (v) security right by way of assignment of title.

Five specific
real security
rights under the
Civil Code

As you can see by reading Book 6 of the Civil Code, the topic of real security rights is very technical. These technical details are necessary for Cambodia to provide the legal framework for economic development and investment in the country. Some of the real security rights in Book 6 of the Civil Code will seem unfamiliar to ordinary Cambodians. But other types of real security rights are familiar to them as these rights are based on customary practices that Cambodians have developed for themselves. Consider the following examples:

Examples of
real security
rights

- Ms. Sreynou needs \$300 to buy cement and make emergency repairs to her house, but she will not have the money until her next payday. Ms. Sreynou takes her diamond ring, which is worth \$500, to a money lender and borrows money for one month, leaving her ring as security for the debt. When she gets paid on the next payday, she takes the money (plus interest) to the money lender and gets her ring back. If she does not pay the money back, she will not be able to get her ring.
- Mr. Farmer needs money to buy a small tractor to help make his farming more efficient. He pays half the cost of the tractor and owes the other half to the tractor seller with interest charge. If the farmer does repay the debt (plus interest), the seller will take back the tractor for resale to satisfy the debt.
- Mr. Rithy and his wife want to buy a house, but they do not have enough money to pay for the house. They borrow money from the bank to buy the house and give the bank a real security right in the

house. Mr. Rithy and his wife pay off the loan plus interest until the loan is fully repaid.

Real security rights can be granted over movable and immovable things

As with some of the other “real rights,” real security rights can be granted with respect to both movable and immovable things. In the examples above, Ms. Sreynou and Mr. Farmer used their movable property to secure their debts, while Mr. Rithy and his wife used their immovable property to secure their debt.

Because the focus of this book is immovable property law, we will limit our discussion to real security rights with respect to immovable property.

Immovable property real security rights prior to the Civil Code

Before looking at the Civil Code provisions on real security rights related to immovable property, it is helpful to look briefly at the how these rights have developed in Cambodia.

Real security rights under the 1992 Land Law: hypothec and pledge

Under Article 141 of the 1992 Land Law, there were only two basic forms of immovable property real security rights: pledge and hypothec (mortgage). The fundamental difference between these type types of security relates to whether the owner or the creditor has possession of the property subject to the security. In the case of a loan secured by hypothec, the owner of immovable property retains possession of the property and grants the creditor the right to sell the property if the owner fails to repay the debt as provided in the loan agreement.

Two types of pledge: antichresis and gage

In the case of pledge, the owner is generally dispossessed of the property that secures the loan. There were two types of pledges under the 1992 Land Law. In the first type, the owner is dispossessed of the immovable property that secures the loan, and the creditor has the right to use the property and the take the fruits of the property to repay the loan interest. This type of security is known as an antichresis (*antichrèse* in French). For example, Mr. One, a rice farmer, owes

money to his neighbor, Mr. Two, also a rice farmer. Mr. One grants Mr. Two the right to farm Mr. One's rice field until Mr. One's debt has been repaid. Mr. Two plants and harvests the rice and the profits from the crop are applied to some portion of the debt and the interest owned by Mr. One. After the debt (and interest) is repaid, the property is returned to the owner, in this case, Mr. One. While the antichresis remains in effect, the creditor (in our example, Mr. Two) enjoys the same rights to the property as a usufruct holder.

In the second type of pledge under the 1992 Land Law, the parties had another option:

Article 148, 1992 Land Law

A delivery of the immovable property by the debtor to his creditor is optional and not compulsory. It may be made by mere delivery of the immovable property title certificate.

The real security right described in Article 148 of the 1992 Land Law is known as gage. The owner is not dispossessed of the immovable property but is dispossessed of a movable thing – the land certificate or title document related to the immovable property. Giving the creditor possession of the land title document secures the loan because without the title document, the owner is not able to sell the land or register any other obligation against the land. When the loan plus interest is repaid, the land title or land ownership document is given back to the owner. In our example, Mr. One gives his land ownership document to Mr. Two to secure the loan, and when the loan and interest is repaid, the land title is returned to the owner – Mr. One.

The 2001 Land Law continued these same types of secured loans for immovable property, but clearly separating antichresis and gage:

Article 197, 2001 Land Law

Immovable property may be put up as surety by its owner to secure the payment of a debt by way of hypothec, antichresis or gage.

The types of securities under the 1992 and 2001 Land Law are substantially identical, although the 2001 Land Law added more detailed requirements. Among the details added were rules about the

Real security
rights under the
2001 Land Law:
hypothec,
antichresis and
gage

rights and responsibilities of the creditor in possession of the land in the case of antichresis, or the debtor in possession of the land subject to gage.

In the case of all three types of real security rights, the 2001 Land Law included more safeguards regarding the sale of the property in the event the owner defaults on the debt, and more details about the requirement to register all three types of real security rights in the land register.

Real Security Rights under the Civil Code

Article 767 of the Civil Code names the 5 real security rights recognized by the Civil Code:

1. right of retention
2. preferential right
3. pledge
4. hypothec
5. security right by way of assignment of title

Looking at the list, we can see immediately that two of the real security rights, pledge and hypothec, have been carried over from the 1992 and 2001 Land Laws. These two types of securities are created by agreement whereby the owner of property grants a security right to property to secure a debt¹ to a creditor. That is, the owner uses the property as collateral to secure the payment of the debt to the creditor.

The other three real security rights (right of retention, preferential right and security right by way of assignment of title) were not included in the prior Land Laws. They were not included because they either (1) relate only to movable property (security right by way of assignment of title), or (2) the rights are outside the scope of the land-related topics covered by the prior Land Laws (right of retention and preferential right).

¹ Usually, the owner of property grants a real security right over the owner's property to secure the owner's debt. However, an owner can grant a real security right to secure the debt of another person.

In the discussion that follows, we will look at each of the real security rights that apply to immovable property. The first four of the specific real security rights can apply to immovable property, but the fifth, real security right by way of assignment of title applies only to movable property, and will not be discussed in this book.²

After discussing general requirements for registering real rights in the Land Register, we will discuss the key points for each of the four real security rights related to immovable property. Because many readers are already familiar with real security rights from the 1992 and 2001 Land Laws, we will begin with these two real security rights – pledge and hypothec. Then we will follow with the new real security rights – the right of retention and preferential rights.

Registration of Real Security Rights Pertaining to Immovable Property

As discussed in the previous chapters, one of the key issues to know about real security rights pertaining to immovable property is whether the rights have to be registered to assert the right against third parties. The applicable rule for registration of immovable property real rights is paragraph (1) of Article 134 of the Civil Code:

Real security rights pertaining to immovable property must be registered, except for right of retention

Article 134, Civil Code (Assertion Conditions of Creation, transfer and alteration of real right)

(1) Except for a right of possession, a right of retention, a right of use, and a right of stay, the creation, assignment and alteration of a real right pertaining to an immovable cannot be asserted against a third party unless the right is registered in accordance with the provisions of the laws and ordinances regarding registration.

² Real security right by way of assignment of title, described in Articles 888 – 899 of Civil Code, applies only to movable properties. The owner of the property assigns the title – ownership – of the thing to secure a debt. When the debt is repaid, ownership reverts back to the owner. In some cases, actual possession of the thing is delivered to the creditor, but other times, only the documents relating to ownership of the thing is delivered to the creditor. This is similar to a pledge of a movable property.

Thus, of the four real security rights pertaining to immovable property, only one of them, the right of retention, does not have to be registered for the rights holder to assert the right against a third party.³

Pledge

A pledge is a type of real security interest where the borrower (or someone on the borrower's behalf) gives possession of specific property to the creditor to hold as security – or collateral – for repayment of the debt. If the borrower does not repay the loan, the creditor can request the court to force the sale of the property to satisfy the debt. Securing a debt through pledge of movable property is a very common way for people all over the world and is used by people like Ms. Sreynou above, who pledged her diamond ring for repayment of her debt for money to buy cement and hire someone to repair her house. It is also used in very complicated commercial contexts.

Article 816, Civil Code (Meaning of Pledge)

A pledgee/creditor⁴ is entitled to hold possession of the thing that the pledgee/creditor has received from the debtor or a third party as security for pledgee/creditor's claim, and to obtain satisfaction of the pledgee/creditor's claim out of such thing in preference to other creditors.

- A pledge is not created until the pledged thing is delivered to the pledgee/creditor.

Article 818, Civil Code (Creation of Pledge and Necessary Handover of the Property Holding)

(1) A pledge shall be created when the thing to be pledged is delivered to the pledgee by the debtor or a third party who provides the security.

(2) The delivery referred in Paragraph (1) includes summary

³ Preferential rights are not specifically exempt from registration under Article 134 of the Civil Code. However, as we shall see, registration of certain preferential rights is required in order to assert the rights against third parties. See Civil Code Articles 811 and 812. Also, see the discussion about special rules that apply to gage and antichresis created prior to the application of the Civil Code, discussed at the end of the section on hypothec.

⁴ We have replaced the term pledgee with pledgee/creditor throughout this part to avoid confusion, since pledgee is an awkward word.

delivery provided by Paragraph (3) of Article 299 (Assignment of possession).

The pledgee/creditor may not allow the person pledging the property to retain direct possession of the property pledged. Civil Code Article 819.

- The pledgee/creditor has the right to use any fruits produced from the pledged property, and has priority to use these fruits to satisfy the pledgee/creditor's debt before other creditors. However, the pledgee/creditor's right cannot be asserted against another creditor who has higher priority. Civil Code Articles 821 and 822, and refer to the discussion of preferential rights, discussed below.
- Unless otherwise provided by law, the pledgee/creditor cannot become the owner of the thing pledged if the debtor defaults on the debt. The pledged property must be sold or otherwise disposed of as provided by law. Civil Code, Article 827, (Prohibition for making pledge contract to acquire property ownership).

The reason for this prohibition is to prevent the creditor from taking unfair advantage of the debtor. Often people pledge property that is more valuable than the amount of the loan. Or, the thing pledged may have increased in value since the pledge was granted. The creditor is entitled to receive the amount of the loan plus interest, and if the pledged thing is sold for more than the amount owed the creditor, the extra must go to the debtor (or to other creditors of the debtor, as the case may be). If the property is sold for less than the amount owed, the creditor still has a right to claim the outstanding balance; however, the outstanding balance is unsecured.

The general rules in the Civil Code for all pledges are in Articles 816-828; for pledges of movable property, see Articles 829 – 833; and for immovable property pledges, see Articles 834-842.

Some of the key points that apply to pledges over immovable property include:

- Unless otherwise provided in the agreement, the pledgee/creditor has the right to use and receive profits of the immovable property in accordance with its ordinary use. If the pledged property is cultivation land, special rules apply about the right of a pledgee/creditor to harvest crops even after the pledge is extinguished. Civil Code Articles 834 and 837.
- Unless otherwise provided in the agreement, the pledgee/creditor must bear all the management costs and other expenses related to the immovable property, and may not demand interest on the loan. Civil Code Articles 835, 836 and 837.
- The duration of pledge on an immovable property cannot be for more than five years, but may be renewed for a period not more than five years from the date of renewal. Civil Code Article 838.
- In addition to the provisions discussed above, the provisions related to hypothec apply to pledges over immovable property. Civil Code Article 839.

Hypothec

A hypothec is a real security right given by the property owner to a creditor to secure the repayment of a loan by a debtor, without transferring possession of the property to the creditor. If the loan is not repaid, the creditor has the right to apply to the court to force the sale of the property to satisfy the debt.

Hypothec is a property right given to a creditor as security for the repayment of a loan

Hypothecs, called “mortgages” in some jurisdictions, are used frequently in many countries as a means for people to purchase immovable property for their residences and businesses, as well as to borrow money for other purposes. Hypothecs provide a relatively secure way for creditors to lend money because the loan is secured by a specific property, and the loan secured by hypothec has priority over claims by most other creditors. In this section, we will look at the key requirements in the Civil Code for the creation and enforcement of hypothecs.

Article 843, Civil Code (Meaning of Hypothec)

(1) A hypothec/creditor is entitled to obtain satisfaction of his claim in priority to other creditors out of the immovable property that has

been furnished as security by the debtor or a third party without transfer of possession.

(2) A perpetual lease or usufruct may also be made the object of a hypothec. The provisions of this Chapter Five shall apply with the same effect in such a case.

(3) Where a special law allows a certain type of property other than immovable property to be the object of a hypothec, such law shall apply.

Hypothec has
priority over
other claims
against
immovable
property subject
to hypothec

Article 843 of the Civil Code identifies three important aspects related to hypothec:

- Priority in repayment of claims to hypothec: The creditor (hypothec) has priority to satisfy his or her claims from the property subject to hypothec before other creditors (except as provided in the provisions related to preferential rights, discussed below). This is one of the most important reasons that a creditor is willing to loan money in the first place, as the creditor knows that his or her claims have first priority over the claims of other creditors. However, the creditor's claims have priority only with respect to the property subject to the hypothec, so the creditor must ensure that the value of the property is at least equal to the amount of the loan (plus interest and other costs).
- Possession remains with owner: In contrast to a pledge, discussed above, possession of the property subject to hypothec remains with the debtor, and is not delivered to the creditor. In this way, the owner of the property can continue to use the property as a residence or for business, and may lease the property or make other use of it according to the owner's wishes.
- Type of property: Only immovable property can be subject to hypothec, unless otherwise provided by law.

Hypothecs are created by agreement between a creditor and the person who furnishes the immovable property as security. Usually the other party is the debtor, but a third party may furnish property to secure the debt of another person. For example, parents may use their property as collateral to secure the debt of their child.

For most ordinary people, the experience with using a hypothec will be to buy a condo, a house or a small parcel of land. But businesses often need to raise large sums of money to expand their businesses, to buy new equipment, or to purchase supplies. A business owner or company may have multiple creditors and multiple hypothecs on the same or different properties (in addition to unsecured debts to other creditors). In these cases, the requirements for creating and enforcing hypothecs are very technical, and are beyond the scope of this book.

Hypothec created in authentic written form and registered to be able to assert against third person

Some of the key additional points about hypothecs include the following:

- Hypothec is created by written agreement. Civil Code Article 844.
- To be able to assert a hypothec against a third party, the instrument creating the hypothec must be in authentic form and registered in the Land Register. Civil Code Articles 845 and 134 (discussed earlier in this chapter).
- There can be multiple hypothecs created on the same immovable property. In such a case, the ranking of the hypothecs will be in the order of registration in the Land Register. Civil Code, Article 851.
- There also can be joint hypothecs to secure one debt. That is, more than one property is used as collateral to secure a single loan. In the event of default, the creditor can satisfy repayment of the loan from the sale of one of the properties, or proportionally from the proceeds of the sales of both properties. There are special rules in the case of both joint hypothecs on many properties AND multiple hypothecs related to the same property. Civil Code Articles 857 and 858.
- As with other real security rights related to immovable properties, the creditor cannot assume ownership of the secured property if the debtor defaults on repayment of the loan. Rather, the creditor must apply to the court to force the sale of the property. This rule protects the debtor since in many cases, the value of the immovable property is greater than the outstanding claim by a single creditor. Other secured or unsecured creditors (in the later case when

In case of default, creditor must apply to court for compulsory sale of property to satisfy claim

repayment is due) may also have claims against the debtor, but if not, the debtor should receive the benefits if the value of the property is greater than the claim.

Article 853, Civil Code (Forced Sale of Hypothecated Immovable Property)

In the event of a failure to perform on a debt, a hypothec may apply to the court for compulsory sale of the hypothecated immovable property.

As discussed above, the 2001 Land Law recognized gage as a separate form of real security right, which is no longer recognized under the Civil Code. The Law on the Application of the Civil Code included special provisions to protect the rights of parties who created gage prior to the application of the Civil Code, or who did not conform to the new requirements established in the Civil Code.

- A gage under the 2001 Land Law becomes a hypothec

Gage under the 2001 Land Law becomes a hypothec under the Civil Code

Article 55, Law on Application of the Civil Code (Treatment of Gage)

1. A gage based on the Land Law of 2001 shall be deemed as hypothec based on the Civil Code subsequent to the date of application [of the Law on Application of the Civil Code].⁵

2. Gage registration shall be deemed as hypothec registration by assumption based on the provisions of the first paragraph above. However, this provision shall not bar the parties from registering hypothec by cancelling the gage registration.

3. The holder of a gage shall return the ownership certificate to the gage creator immediately subsequent to the date of application [of the Law on Application of the Civil Code].

- Special rules apply for the registration of unregistered real security rights created under the 2001 Land Law

⁵ The Law on the Application of the Civil Code was promulgated in May 2011, and became applicable on December 21, 2011, according to the Notification of the Ministry of Justice No. 10, dated December 20, 2001, on the Date of Application of the Civil Code.

Article 56, Law on Application of Civil Code (Treatment of Contract of Unregistered Real Security Rights)

Special rules apply for the treatment of unregistered gage or antichresis created prior to the application of the Civil Code

1. In case of making a contract to create an antichresis by an authentic deed provided in the Article 207 of the Land Law of 2001 and the subject matter of the antichresis was handed over, but no registration was made prior to the date of application [of the Law on Application of the Civil Code], the effect of the right to such antichresis shall exist from the date of application [of the Law on Application of the Civil Code] .

2. In the case of making a contract to create a hypothec by an authentic deed provided in Article 201 of the Land Law of 2001, but where no registration was made prior to the date of application [of the Law on Application of the Civil Code], the effect of such hypothec shall exist from the date of application [of the Law on Application of the Civil Code].

3. In case of making a contract to create a gage by an authentic deed provided in Article 220 of the Land Law of 2001, but no registration was made prior to the date of application [of the Law on Application of the Civil Code], shall be deemed as a contract creating a hypothec on the date of application [of the Law on Application of the Civil Code].

4. If a hypothec provided in the third paragraph above is registered, the creditor of the hypothec shall return the ownership certificate back to the Creator.

For other rules on hypothecs see Articles 846-850, 852, 854-887 of the Civil Code.

Retention Right

Creditor obtains retention right to secure debt owed by the property owner

The right of retention is one means by which a creditor can obtain security for payment of a debt owed to the creditor by another person. Unlike hypothec or pledge, the owner does not grant the security right; instead, the Civil Code gives the creditor the right to assert the right of retention over the property of the debtor if the debtor fails to repay a debt. There are two basic features of a right of retention: (1) the creditor must be in possession of the thing retained, and (2) the debt claimed by the creditor must arise in regard to the thing retained and must be due.

Article 774, Civil Code (Meaning of Retention Right)

(1) Where a person possessing a thing belonging to another has a claim arising in regard to such thing, the person may retain the thing until the claim is satisfied. However, if the claim has not yet become due, the right of retention shall not be created.

(2) The provisions of paragraph (1) shall not apply where the possession commenced as a result of a tortious act.

For example, Mr. Chantha built a small office building for Ms. Bopha. The building is finished, but Mr. Chantha has not given Ms. Bopha the keys and has not handed over the building to her because she has not paid \$5,000 that she agreed to pay Mr. Chantha before he is required to hand over the building to her. Mr. Chantha retains possession of the building claiming a right of retention for the money owed.

In this case, Mr. Chantha has possession of the building and the debt owed by Ms. Bopha arose out of the building constructed by Mr. Chantha and became due at the completion of the construction.

Study Question 58: Retention Right

In the example above, what if Ms Bopha left her car parked at the building built by Mr. Chantha while Ms. Bopha went to Singapore for a holiday. Could Mr. Chantha also claim possession and a right of retention to the car for repayment of the debt owed by Ms. Bopha for constructing the building?

Restrictions of
use of property
possessed
under a right of
retention

The right of retention can be asserted with respect to movable and immovable property, but it is less commonly used for immovable property. In the first place, the retention right holder (creditor) must be in possession of the concerned property in order to assert the claim. Second, retaining possession of the immovable property alone does not produce any income to pay the debt, and in fact the retention rights holder may incur expenses maintaining the property. Further, the retention rights holder does not have the right to sell the property for payment of the debt – but must go to court to force the sale of the property.

Article 775 of the Civil Code gives the rights holder the right to collect fruits produced by the thing to satisfy the debt; however, this is not always satisfactory as some things do not produce fruits.

Article 775, Civil Code (Priority right to receive payment from the fruit of the property)

(1) The holder of a right of retention may collect fruits produced by the thing retained and apply them to satisfy the secured claim with priority to other creditors.

(2) The fruits described in paragraph (1) must first be applied to the payment of the interest and the surplus, if any, to the principal.

In Mr. Chantha’s case, the building would not produce any fruits unless it is leased to someone else, or otherwise used by Mr. Chantha to produce income. Under Article 776 of the Civil Code, the holder of a right of retention (that is, the creditor) must retain possession of the property as a “good faith manager” and is not permitted to use,⁶ lease or give as security the thing retained – without the consent of the debtor. If the debtor agrees, the property can be leased or used for security, thus producing fruits and repaying the creditor.

Generally, if the creditor loses possession of the thing, the right of retention is extinguished. However, this is not the case if possession is lost as a result of lease or pledge of the thing with the consent of the debtor.

Loss of possession generally extinguishes the right of retention

Article 780, Civil Code (Extinction of right of retention by loss of possession)

(1) A right of retention is extinguished by the loss of possession of the thing retained. However, this shall not apply to cases where the thing retained has been leased or pledged with the consent of the debtor in accordance with the provisions of paragraph (2) of Article 776 (Duty of holder of the right of retention to preserve the thing retained).

For rules on the rights and responsibilities of retention rights holder and on the termination of this right see Articles 776-780 of the Civil Code.

⁶ The retention rights holder can use the property only if necessary to preserve it. Civil Code Article 776, paragraph 2.

Preferential Rights

As often happens, some people incur too many debts and obligations that they cannot repay. Creditors request the court to force the sale of the debtor's property to repay the debts. Or property may be sold off for other reasons, such as the death of the owner or the liquidation of a business. Everything is fine if the sale of the property is sufficient to cover all the debts of the owner, but what happens if the debts are more than the value of the property? Who gets paid first?

Let's take the example of Mr. Chantha above – if he does not have actual possession of Ms. Bopha's building, he cannot exercise a right of retention. What rights does he have? He would seek collection of the debt, and force the sale of Ms. Bopha's property to pay the money she owes to him. But this will take time, and Ms. Bopha may have other creditors who are also trying to collect the money she owes them. Who gets first priority in getting repayment from Ms. Bopha?

Preferential Rights in Chapter 3 of Book 6 of the Civil Code, beginning at Article 781, establish the order of priority for the satisfaction of claims of various creditors against all the (movable and immovable) properties of a debtor. Some of the creditors have “general preferential rights” because their claims are not limited to a specific property of the debtor. Other creditors have “special preferential rights” because their claims are to a specific property – either a specific movable or specific immovable property. Within these groups of general and special preferential rights holders, the claims are ranked according to the priority of the claim.

General and
special
preferential
rights

Article 781, Civil Code (Meaning of Preferential Rights)

(1) A creditor holding a preferential right has a right to obtain satisfaction of the claim from the assets subject to preferential rights in priority to other creditors.

(2) A preferential right held by a creditor over all of the property of the debtor is called the general preferential rights.

(3) A preferential right held by a creditor over a specific property of

the debtor is called a special preferential right. In this case, the preference right over a specific movable held by the creditor is called a preferential right over a movable, whereas the preferential right over a specific immovable held by the creditor is called a preferential right over an immovable.

General and special preferential rights

The idea behind preferential rights is to establish a fair and reasonable way to distribute assets of a single debtor to pay off debts owed to multiple creditors. Other classes of real security rights discussed in this chapter⁷ provide creditors with preferential rights over specific immovable property of the debtor. But holding one of these other real security rights over a specific immovable property does not mean that the creditor always has the highest priority over that immovable property. Furthermore, what if the amount of the debt owed to the creditor is more than the specific immovable property subject to the security right? Can the creditor try to satisfy the debt from other property of the debtor?

The following Study Question illustrates various aspects of preferential rights as discussed in this section.

Study Question 59: Preferential Rights, part 1

Facts:

Mr. Thom died in 2012. Everyone thought he was very rich, as he owned a shop on Monivong Boulevard, which has 15 employees; the house he lived in; two big cars and a cashew plantation in Kampong Cham, which employs 10 employees. Mr. Thom, who had never married, was survived by two brothers and his elderly mother. Mr. Thom's mother had been living with him for many years and required two people to provide her constant care. Mr. Thom had been the sole supporter of this mother, as her other two sons (Mr. Thom's surviving brothers) had never been very successful and could barely support their own families.

⁷ These include the right of retention (discussed in the previous section) and pledge and hypothec (discussed in later sections).

After giving Mr. Thom a very lavish funeral, his brothers were shocked to learn that Mr. Thom had the following property and creditors:

- 1. In 2000, Mr. Thom bought his house for \$75,000, which he paid in cash.*
- 2. In 2005, Mr. Thom bought a shop on Monivong Boulevard for \$600,000. Bank One loaned Mr. Thom \$500,000 to buy the shop. This loan was secured by a hypothec on the shop, which was registered in the Land Register in May 2005.*
- 3. At the same time, Bank Two loaned Mr. Thom \$100,000 he needed to pay for the shop. This loan was secured by a hypothec on Mr. Thom's house, which in 2005 had a value of over \$100,000. This hypothec was registered in the Land Register in May 2005.*
- 4. In 2011, Mr. Thom bought land in Kampong Cham for \$100,000. Bank Three loaned Mr. Thom money to buy the land parcel. However, Bank Three would not accept the land as collateral for the loan, so Mr. Thom granted the bank a second hypothec on his shop, which had been steadily increasing in value since he bought it. Bank Three registered this hypothec in the Land Register in 2011.*
- 5. In 2011, Bank Four gave Mr. Thom a personal loan of \$50,000 to prepare the Kampong Cham land and plant cashew trees.*
- 6. Mr. Thom almost always paid his loans according to the repayment schedule, but at the time of his death, none of the loans had been fully repaid.*
- 7. Although he paid his loans, Mr. Thom was not so careful about paying his employees, and at the time of his death, Mr. Thom owed two months of salary and benefits to all of the employees in his shop, at the cashew plantation, and the caretakers he provided for his mother.*
- 8. Mr. Thom owed a construction company \$10,000 for improvements made to his house a few months before he died.*
- 9. Mr. Thom also owed EDC over \$500 for electricity for this house and the shop, and the electricity would be cut off if not paid.*
- 10. Mr. Thom's brothers had to hire someone to take over the management of the shop and the cashew plantation so that they could remain in operation until the estate was settled.*
- 11. Mr. Thom's family owed over \$10,000 for the lavish funeral his family provided for him.*

12. Mr. Thom has \$20,000 in his bank account, and two cars worth about \$10,000 each.

Questions:

Reread Article 781 of the Civil Code and identify which of Mr. Thom's creditors have:

1. General preferential rights
2. Special preferential rights over an immovable property

Keep reading the discussion below to see if your answers are correct.

- Persons holding general preferential rights have a priority right over ALL the property of the debtor, regardless of whether the property is subject to another real security right.

Article 783 of the Civil Code identifies these people:

Article 783, Civil Code (Meaning of General Preferential Rights)

A person having a claim arising from any of the causes provided below has a preferential right over all of the property of the debtor:

- (a) Expenses for common benefit
- (b) Claims held by employee
- (c) Funeral expenses
- (d) Supply of daily necessities.

General preferential right have priority over ALL of the property of the debtor

Since Mr. Thom has only \$20,000 in his bank account, it is clear that some of his assets will have to be sold to pay off his creditors – before any remaining assets are distributed to his heirs. Persons holding preferential rights listed above have their claims satisfied in the order of priority listed above, and before all other creditors.

These different types of general preferential rights holders are described in more detail in Articles 784 – 787 of the Civil Code.

- Persons holding certain claims that relate to a specific immovable property (special preferential rights) will have their claims repaid after general preferential rights holders are repaid, and before other creditors holding rights to the specific immovable property.

Article 799, Civil Code (Preferential Rights to Immovable Property)

A person having a claim that arises out of any of the following events has a preferential right over a specific immovable property of the debtor:

- (a) Preservation of an immovable property*
- (b) Work on an immovable property*
- (c) Sale of an immovable property.*

The three different classes of special preferential rights holders over immovable property are described in more detail in Articles 800 – 802 of the Civil Code.

The claims for preservation of or work on an immovable property will be recognized only to the extent that the preservation or work increased the value of the property, and the increase remains at the time of the claim (Civil Code Articles 800 and 801). Under Articles 811 and 812 of the Civil Code, a person asserting a claim arising out of preservation of an immovable property or work on an immovable property cannot assert the claim against a third party unless the claim is registered in the Land Registry immediately after the preservation of or work on the property is done. In both instances, an expert appointed by the court will determine the increase in property value resulting from the preservation of and work on immovable property.

Study Question 60: Preferential Rights, part 2

- 1. Which of Mr. Thom's creditors have the following general preferential rights?*
 - (a) Expenses for common benefit*
 - (b) Claims held by employee*
 - (c) Funeral expenses*
 - (d) Supply of daily necessities.*

- 2. Which of Mr. Thom's creditors have the following special preferential rights to an immovable property – and to which immovable property?*
 - (a) Preservation of an immovable property*
 - (b) Work on an immovable property*

Ranking of Different Types of Preferential Rights

The Civil Code has specific rules to govern situations when there are multiple preferential rights holders.

Articles 803, 805 and 806 of the Civil Code establish basic rules when there are multiple preferential rights holders.

- Multiple general preferential rights are ranked according to Article 783 (discussed above).
- Where there are both general and special preferential rights over a specific property, the special preferential right over a specific property takes priority.
- A preferential rights for expenses for common benefit (that is, to maintain the property for all creditors) has priority against all creditors that benefit from the expenses. So in Mr. Thom's case, the expenses to keep the shop and plantation in operation take priority over the claims by the banks holding the hypothecs to those properties as they will benefit from the expenses of keeping the properties in operation.

Ranking of
multiple
preferential
rights

Article 803, Civil Code (Ranking of General Preferential Rights)

(1) Where multiple general preferential rights exist, their respective priority rankings shall follow the order prescribed in Article 783 (Definition of general preferential right).

(2) Where a general preferential right and a preferential right over a specific property coexist, the preferential right over a specific property shall have priority. However, a preferential right for expenses for common benefit shall have priority as against all creditors benefited thereby.

- Multiple special preferential rights are ranked according to Article 799 (discussed above).

Article 805, Civil Code (Ranking of Preferential Rights to Immovable Property)

(1) Where multiple special preferential rights coexist over the same immovable property, their respective priority rankings shall follow the order prescribed in Article 799 (Preferential Rights over

Immovable Property.

- If two or more people have preferential rights over the same property AND their priority rankings are equal, their claims are satisfied in proportion to their respective claims.

Article 806, Civil Code (Preferential rights with equal ranking)

Where two or more persons have preferential rights over the same object and their priority rankings are equal, they shall receive satisfaction in proportion to the amounts of their respective claims.

Study Question 61: Preferential rights with equal ranking

ABC Company has two creditors that have claims against the same property owned by the company. Mr. One's claim is for \$10,000 and Mr. Two's claim is for \$20,000. Both creditors have the same priority ranking. The problem is, after the sale of the property, and satisfying claims of higher ranking preferential rights holders, there is only \$20,000 remaining to pay Mr. One and Mr. Two. Under Article 806 of the Civil Code, how is this money to be divided between Mr. One and Mr. Two?

Effect of Preferential Rights

Persons having general preferential rights enjoy higher levels of security in satisfying their claims than other creditors, including creditors with claims secured by a specific immovable property. That is, general preferential rights holders can assert their claims against ALL assets of the debtor. In contrast, a person holding a special preferential right to a specific immovable property has security only to a specific property. If that specific property is not sufficient to satisfy the claim, the creditor will have to try to collect the balance from the remaining assets of the debtor – along with other unsecured creditors.

Rules about satisfying claims by general preferential rights holders protect the rights of special preferential rights holders

Thus, there are rules about how the claims of general preferential rights holders are satisfied, in order to protect the rights of those holding special preferential rights in a specific immovable property.

We will not discuss all of these rules, only some the key points, as follows:

- General preferential rights holder must first seek to satisfy claims out of property other than immovable property before claiming against immovable property.
- If general preferential rights holders have to resort to claims against immovable property to satisfy their claims, they must first seek to satisfy the claim from immovable property that is not subject to a special security right.

Article 809, Civil Code (Effect of General Preferential Rights)

(1) A person having a general preferential right may not receive satisfaction out of immovable property unless he has first resorted to property other than immovable property and failed to obtain full satisfaction therefrom.

(2) With regard to immovable property, satisfaction must first be sought out of those that are not subject to a special security right.⁸

A person having a general preferential right to an immovable property may not assert that right in priority to the right of a registered third party unless the general preferential right has been registered. However, the holder of an unregistered general preferential right over an immovable may assert that right in priority to other creditors whose claims are not secured by specific immovable property.

Claims by unregistered general preferential rights holder only take priority before claims by unsecured creditors

Article 810, Civil Code (Effect of General Preferential Rights against third party)

The holder of a general preferential right may, even where the right is not registered over an immovable property, assert such right in opposition to a creditor who has no specific security right over the immovable property. However, such right may not be asserted in opposition to a registered third party.

- Registered preferential right for preservation of immovable and work on an immovable take priority over a hypothec.

⁸ The term 'specific security right' refers to a preferential right over a specific immovable, pledge, hypothec or security right by way of transfer of title.

Article 813, Civil Code (Relationship between hypothec and preferential right for preservation of an immovable property and work on immovable property)

A preferential right registered in accordance with Articles 811 (Effect of preferential right for preservation of immovable property against third party) and 812 (Effect of preferential right for work on immovable property against third party) may be exercised in priority to a hypothec.

For other rules on the effect of preferential rights to immovable property see Articles 811, 812, 814, and 815 of the Civil Code.

Conclusion

This ends our discussion of real security rights – the different means by which immovable property can be used to secure a debt or other obligation to another person. Real security rights can be created by agreement and in specific situations are created by operation of law. The ability of property owners to use their property as collateral to secure loans, and the rights of creditors to collect debts owed by other persons, are essential to economic development in the country. Access to credit allows people to buy homes and allows businesses to expand and grow. But in order to have access to credit, the law must ensure that creditors have security rights to repayment of their debts.

The laws and practices related to creating and enforcing real security rights are very complex. This chapter covers only the key points related to these complex matters. Persons and businesses, who may be considering creating a real security right, would be wise to seek the advice and assistance of experts.

This chapter also concludes our discussion of real rights under Cambodian law. In the next chapter, we will discuss the process of registration of these real rights.

CHAPTER 10

REGISTRATION AND TRANSFER OF IMMOVABLE PROPERTY

Topics
Covered in
this
Chapter

Land Registration – An Overview
Cambodia’s Cadastral Registration System
Systematic Land Registration
Registration Procedures for Special Types of Ownership
Subsequent Registration
The Effect of Registration
Duplicated or Triplicated Land Certificate

Land Registration – An Overview

Cambodia is implementing what is known as a cadastral registration system (or cadastral conservation regime) that was established by the 2001 Land Law. In this cadastral system, land ownership and other immovable property real rights are entered into in the official cadastral registry, called the Land Register. The Land Register, which is maintained by the Cadastral Administration,¹ generally acts as indisputable proof of ownership (or rights) to the recorded property. There are only a few exceptions where information recorded in the cadastral registers can be contested.

Cambodia
has a
cadastral
registration
system

In this chapter, we will first discuss the cadastral system generally, followed by detailed descriptions of procedures used in Cambodia to create and maintain the Land Register. We will briefly compare the cadastral registration system with the document recordation system used in some countries (usually countries with common law legal traditions). This comparison of two different systems will help set the context for the final part of this chapter, the legal effects of registration under Cambodia’s cadastral registration system.

¹ The Cadastral Administration is part of the Ministry of Land Management, Urban Planning and Construction (MLMUPC), and operates at the national, capital/provincial, and municipal/district/khan levels.

The term cadastre refers to a comprehensive register of ownership, boundaries, value and other information related to a particular parcel of immovable property in a country or region. Although historically the cadastral register was created for taxation collection purposes, in modern times it functions as a record of immovable property ownership, and includes official copies of not only ownership certificates, but also related legal rights and supporting documents such as purchase or transfer contracts, hypothec, perpetual leases, easements and other burdens on the property, as well as details about the owner and the size, location and boundaries of the property.

Definition
of
Cadastre

As Cambodia implements its cadastral registration system, the Cadastral Administration has had to deal with the same problems of conflicting ownership documents and claims that are currently clogging the normal judicial system. However, after the process of first time systematic registration is complete, the cadastral index maps and cadastral register will generally serve as indisputable proof of land ownership and the legal basis for issuing, reissuing or verifying ownership certificates or giving cadastral information regarding a particular land parcel.

The idea of having a cadastral registration system is to give Cambodia a stable and reliable system for determining immovable property ownership and other real rights and burdens related to a particular property, which in turn would improve land tenure security, reduce land ownership disputes, provide better access to credit and boost investor confidence. However, before the country can benefit from a cadastral registration system, it must overcome one critical hurdle: it must complete the process of accurately registering all immovable properties in the Land Register. In the 10-year period from 2000 to 2010, Cambodia registered about 1.5 million land parcels out of an estimated 15 millions parcels in the whole country. Although the process is getting more efficient with experience, a lot of work remains to be done.

General
description
of Land
Register

The 2001 Land Law refers to Cambodia's cadastral registers as "Land Register." Practically, the Cadastral Administration maintains several different registers for registering different types or classifications of immovable property rights. Some register temporary state recognition of rights to the concerned properties (such as

rights related to acquisitive possession land). Others register state recognition of ownership and other rights (such as private immovable property ownership, co-ownership, state land ownership and indigenous minority community collective land ownership). All of these registers are considered as part of the “Land Register” established under the Land Law.

Entries on
the Land
Register
are legal
and
binding

Except in relatively few instances of a mistake by a cadastral official or fraud by a concerned party, the courts must, as a matter of law, accept the cadastral index maps and the Land Register as legally binding and final (meaning that the registered information normally cannot be subject to judicial review).² For these reasons, parties to land transactions have the obligation of making sure the Land Register and other cadastral documents accurately reflect their agreement or any changes they have made. In the following discussion about the procedures used for creating and maintaining the Land Register, you will see how strict and precise the law and regulations are to ensure accuracy and reliability in the Land Register.

Cambodia’s Cadastral Registration System

Under a cadastral registration system, the government must prepare cadastral index maps for all the land in the country and record the size, location, boundaries and ownership of land parcels in the Land Register. In Cambodia, Articles 226-8 of the 2001 Land Law assign these functions to the Cadastral Administration under the Ministry of Land Management, Urban Planning and Construction (MLMUPC) and require the Cadastral Administration to guide, manage and implement the national land registration process.

When the Land Law was enacted in 2001, very little of the land had actually been registered, so the first task was to register all the land for the first time. The 2001 Land Law provides two separate procedures for first time registration: systematic land registration and sporadic land registration. Systematic land registration is carried out on a village-by-village basis, registering most, if not all, the land parcels in the village. This work is done with a high degree of technical expertise and precision equipment, resulting in very reliable index maps and “ownership

² There are two other exceptions where someone other than the registered owner is recognized as owner: (1) a person having a right of succession upon the death of the owner, and (2) a claim of ownership resulting from prescriptive possession.

certificates” (viBaØabnbRtsmAal;m©as;Gclnvtßú)
(vignear bonbut somkoil m'chas akchoilnak vathuk).

Sporadic registration is done at the specific request of a person who needs to register their land before systematic land registration comes to their area. While this sporadic registration procedure is improving, the data, and particularly the demarcation and measurement of land boundaries is often not as reliable as that generated through the systematic land registration procedure. For this reason, persons undergoing the sporadic registration procedure may receive “possession certificates” (viBaØabnbRtsmAal;siTişkan;kab;dIFØl bα smAal;siTişePaK³). (vignear bonbut somkoil sith kankub deithly or vignear bonbut somkoil sith pokeak)

Notes:

Ownership certificate –

(viBaØabnbRtsmÁal;m©as;Gclnvtßú)

(vignear bonbut somkoil m'chas akchoilnak vathuk) certificate issued to recognize definitive ownership after completing the systematic registration process.

Possession certificate --

(viBaØabnbRtsmÁal;siTişkan;kab;dIF

Øl bα smÁal;siTişePaK³). (vignear bonbut somkoil

Eventually, all land parcels will undergo first time registration through the systematic land registration procedure to receive an *ownership* certificate. A land parcel that was first registered under the old or new sporadic procedure, and for which a *possession* certificate was issued, would go through the systematic procedure to receive an *ownership* certificate. First time registration is deemed to be complete only when an *ownership* certificate is issued.

Once the land is registered, (either as ownership or possession land) the appropriate Land Register has to be continuously updated to reflect any transfers (such as a sale or succession), grants of real rights (such as perpetual lease, hypothec, etc.) or grants by the state of social or economic land concessions on registered state private property.

Changes subsequent to the first time registration (by systematic or sporadic procedures) are recorded through what is referred to as “subsequent registration.”

These registration procedures are discussed in detail below.

Article 229 of the 2001 Land Law sets out the tasks and responsibilities of the Cadastral Administration to carry out these two registration procedures as well as other functions assigned by the Land Law.

Article 229 of the 2001 Land Law

The Cadastral Administration has the following tasks:

- *To carry out systematic land registration according to the provisions of a sub decree on the procedure of establishing cadastral index map and Land Register;*
- *To reinforce the sporadic registration system according to the procedures to be determined by sub decree;*
- *To do the necessary cadastral plotting for all parcels including the establishment of their boundaries, the division of parcels, the unification of parcels, the correction of parcel boundaries, and in general any change in their sizes whether caused by natural or voluntary acts;*
- *To produce a Land Register and to register the names of the owners and all collected data relating to the physical features, area, and identity of the immovable properties;*
- *To update any modifications/transformation concerning a right arising out of a transfer contract such as sale, gift, exchange or transfers through succession or related to change in nature or status of land such as a construction, filling in or digging up of land, etc;*
- *To maintain all cadastral documents including cadastral index maps, lists of owners' names, the Land Register and all legal documents relating to each land parcel;*
- *To issue to owners certificates acknowledging them as owners of an immovable property and other certificates relating to land parcels;*
- *To compulsorily issue the photocopied plan and information related to the location, identification, land boundaries, and rights related to such parcel to the applicant at [the applicant's] request;*
- *To register all hypothec, antichrèse, gage, long-term leases, or easements encumbering on immovable property and to provide information to any person who seeks information from the Land Register with regard to the situation of ownership that is the*

Tasks of the
Cadastral
Administration

subject of such hypothec, antichrèse, gage, long-term lease or easement.

Systematic Land Registration

The *systematic land registration* procedure is being implemented pursuant to Sub decree 46, On Procedures for Establishing Cadastral Index Maps and Land Register, dated May 31, 2002 (Sub decree 46).³

Cadastral
Administration
to demarcate
land boundaries
village by
village

The general idea of the systematic land registration procedure is that the Cadastral Administration will systematically demarcate and register all the land in Cambodia, on a village-by-village basis, and record the names of the owners and the details of the land in the Land Register for all interested persons to inspect. This process is referred to as “adjudication” because the Cadastral Administration, through the Administrative Commission, examines all the evidence about the land and the people who claim to be owners, resolves all disputes related to a particular parcel, and definitively and finally decides who is the owner of the parcel.

Steps in the Systematic Land Registration Process

According to Articles 2 and 3 of Sub decree 46, the capital/provincial governor declares an area and administrative boundaries where systematic registration will take place (called an adjudication area) and sets up an Administrative Commission for each adjudication area. The role of the Administrative Commission is to:

Administrative
Commission
established to
support the
registration
process

Article 3 of Sub decree 46 (2002)

Arrange the public display of the cadastral index maps and the list of owners;

Receive all complaints, investigate and resolve in accordance with an agreement;

Make a conclusion on the adjudication record;

Make a proposal for providing the rights on land to the occupants, to the owners or keeping the land as State property.

³ Prior to the effective date of the 2001 Land Law, a pilot systematic land registration process was carried out under Sub decree 11 On Procedures for Establishing Cadastral Index Maps and Land Register dated March 22, 2000.

Preparation of
Cadastral Index
Maps that
matches land
parcels with
owners and
possessors

After giving notice to local people and other concerned persons, and convening local meetings to explain the land registration process and its significance, Cadastral officials will go to the adjudication area and interview local people and land occupants, survey, demarcate and measure all land parcels in the adjudication area, and complete land parcel data collection forms. The information obtained in this process will be used to prepare cadastral index maps that match listed landowners (*m'chas dei*) with their land. (Articles 6 and 7, Sub decree 46).

The land law as well as the sub decree requires that throughout the systematic land registration process, all persons in the adjudication area, including landowners, holders of possession certificates and other concerned persons, are to cooperate with authorities by giving oral evidence, relevant documents, or any other evidence deemed necessary for the demarcation and registration process. (Article 236 of the 2001 Land Law; Article 5, Sub decree 46).

Following land parcel data collection, the Cadastral Administration Demarcation Officers set parcel boundaries and temporarily assign owners of the land based on the evidence and testimony on record. They will then create an Adjudication Record of the adjudication area. According to Article 11 of Sub decree 46, the *Adjudication Record* shall consist of:

Contents of
Adjudication
Record

- the cadastral index maps,
- the list of owners
- the land parcel data collection forms. Each land parcel data collection form shall show:
 - the identification of the land parcel;
 - the identification of the landowner and
 - the date of adjudication (Article 10 of the Sub decree)

Adjudication
Record made
available for
public comment
for 30 days

This Record is made available for public comment during a public display period of 30 days (Article 11, Sub decree 46). During this time, information from the Adjudication Record is displayed in a public area, such as school or other conspicuous place in the village where the land

parcel is located. Technical officers of the Cadastral Administration are available at the site every day, including weekends and holidays, and anyone can ask for an explanation of any aspect of the Record (Article 5, Sub decree 46). Within this period, any party claiming an interest or error in any land parcel listed on a cadastral index map can file an objection or request a correction with the Administrative Commission (Article 12, Sub decree 46).

Correcting
mistakes in
Adjudication
Record

The Field Manager from the Cadastral Administration can correct any mistakes on the Adjudication Record so long as such alterations do not affect anyone's lawful interests. Other alterations can only be made with the consent of the party who is affected by the alteration (Article 11, Sub decree 46).

Resolving
objections and
disputes
regarding the
Adjudication
Record

The Administrative Commission will try to resolve the objection or dispute by seeking agreement from all concerned parties through a conciliation procedure (Article 12, Sub decree 46). If the concerned parties are unable to reach an agreement, the objection or dispute will be submitted to the National Cadastral Commission (NCC) for resolution (including another optional conciliation or hearing to issue administrative decision) in accordance with the procedures set out in the relevant Sub decrees 47 (2002) and 34 (2006) on the Organization and Functioning of the Cadastral Commission (Article 12, Sub decree 46), as detailed below.

Effect of
approval and
acceptance of
the Adjudication
Record

At the end of the 30-day public comment period, the *undisputed* entries on the cadastral index map, list of landowners and other documents forming the Adjudication Record shall be approved by the capital/provincial governor. When the approved Adjudication Record is accepted by the competent provincial or national Cadastral Administration, it becomes the indisputable record of demarcation and status of the listed land parcels. The effect of this process is that both the boundaries of the properties and identity of owners are settled at law (Article 13 and 14, Sub decree 46, see also Article 239, 2001 Land Law).

In the event a dispute is not finally resolved before approving the Adjudication Record, the Adjudication Record will indicate the status of the dispute resolution. A certificate of land ownership for a disputed land parcel will not be issued until the dispute is finally resolved, at which time the approved Adjudication Record will be amended accordingly (Article 14, Sub decree 46).

The systematic land registration is a state-driven, extensive process through which the landowners receive immovable property ownership certificates at almost no cost. The process employs teams of cadastral surveyors, investigators and administrative adjudicators and requires the production of very accurate cadastral index maps. The maps are prepared using advanced technology tools such as orthophoto maps,⁴ precision Geographic Positioning System (GPS) (not the hand-held GPS for travelers), and computerized systems.

Through this systematic process, which is summarized in the table below, reliable cadastral index maps of the entire country will be established and will demarcate boundaries of land parcels and link the parcels to their owners.

⁴ An orthophoto map is made from scaled aerial photos taken with a special camera.

Table 1: Summary of Systematic Land Registration Process

1. A systematic land registration project is initiated for a specific area.
2. The Cadastral Administration accepts the project initiative and makes necessary arrangements for implementing the project.
3. The concerned Capital/Provincial Governor declares an 'Adjudication Area' and sends letter to local authorities advising of the adjudication area.
4. The Governor appoints the Administrative Commission for the area and with technical assistance from the Cadastral Administration, organizes project orientation meetings for the Administrative Commission members.
5. Public meetings are held in each adjudication area to explain the adjudication process to the local residents.
6. Cadastral Administration officials go to the adjudication areas (after giving 7 days notice).
7. Cadastral Administration officials survey land parcels in the area, starting with collecting information from local authorities and drawing a sketch map of the adjudication area. Each identified land parcel is assigned a temporary reference, and local people and owners or occupants are interviewed. All concerned persons are required to give evidence, documents or other information necessary to the demarcation and adjudication process.
8. Where adjoining neighbors agree, the land boundary is demarcated and adjudicated in accordance with the agreement.
9. Where adjoining neighbors are not present or there is no agreement among the adjoining land occupants or possessors, the boundaries are demarcated and recorded based on available evidence (especially physical evidence such as fences).
10. Based on the land parcel data collected, Demarcation Officers establish boundaries for each land parcel in the draft Cadastral Index Map.
11. Cadastral index maps match up with listed owners with their respective land by land parcel references.
12. The complete set of cadastral index maps and full list of owners are displayed for public comment during a public display period of 30 days, in a conspicuous place in the village where the land parcel is located.
13. During the public display period any person claiming an interest or finding any error in relation to any land parcel on the cadastral index map or list of landowners can file an objection or correction request with the officer on duty or through local authorities.
14. If there is an objection or correction request filed, the objecting party and recorded landowner are invited to participate in a dispute resolution procedure, or where appropriate the Field Manager will make a correction in response to the request.
15. If no party objects within the public comment period, the entry concerning that land parcel on the cadastral index map and in the list of landowners shall be approved by the capital/provincial governor. The entire Adjudication Record is submitted to the competent provincial or national Cadastral Administration for review and acceptance. Once accepted, Adjudication Record becomes the indisputable record of land demarcation and status.
16. Cadastral Administration registers the parcel in the Land Register and issues immovable property *ownership* certificates.

Study Question 62: Systematic Land Registration Process

Re read the steps in the systematic land registration process listed above.

Imagine that while gathering information about a particular adjudication area, there are conflicting claims about who owns or lawfully possesses a particular parcel of land, or conflicting claims about the boundaries of adjoining properties. How should the Cadastral Administration officials carry out their duties to draw up and mark a cadastral index map for the area that is needed for public display?

Sporadic Land Registration

Sporadic land registration in areas not yet covered by Systematic land Registration

As noted above, systematic land registration takes a long time and it may take many years before it reaches all parts of the country. Some people may need to register their land before systematic land registration comes to their area. In these cases, people may register their land through the sporadic land registration procedure. This procedure is established by the 2001 Land Law to allow land possessors to register their immovable property immediately (rather than waiting for systematic land registration). Sporadic land registration is implemented in accordance with Sub decree 48 on Sporadic Land Registration Procedure, dated May 21, 2002 (Sub decree 48).

Due to constraints faced by the Cadastral Administration, Sub decree 48 was not implemented immediately from its effective date. It is still in the early stages of implementation and in some cases the requirements prescribed in the sub-decree are not fully and strictly followed, particularly on the notice and public display requirements.

Transition from "old" sporadic land registration system to the current system

Prior to the implementation of Sub decree 48, a similar land registration process was in use. This earlier process, often referred to as "old sporadic registration procedure" was carried out pursuant to various regulations issued between 1989 and 1997. Steps under the old and new sporadic procedures are very similar; however, due to a shortage of technical equipment and capacity, the old sporadic procedure did not produce reliable information particularly about the land boundaries.

Although this old registration procedure has been replaced, it continues to influence the implementation of the current sporadic land registration procedure.

Steps in the Sporadic Land Registration Process

Under the current or “new” sporadic land registration procedure the Cadastral Administration does not conduct a village-by-village land parcel survey. Instead land possessors must individually apply to register their immovable property. (Article 7, Sub decree 48).

Land
possessors
must apply and
pay cadastral
service fees for
registration

Accordingly, land possessors (the land registration applicants) must file applications, through local territorial authorities, with the district Cadastral Administration (district office of Land Administration), detailing their land possession and sources of land acquisition, pay cadastral service fees and submit any relevant documents to support their land right claims. Upon receipt of an application, the district Cadastral Administration decides whether the application is adequate and appropriate, and if so, will record the application in the Application Ledger and set dates for demarcation and measurement and for displaying the Adjudication Record (Article 8, Sub decree 48).

Notice of
demarcation

The District Governor of the area where the land parcel located will first issue a notice on land boundary demarcation to the applicant as well as the general public. Sub decree 48, Article 9, requires that the applicant be given at least 14 days notice prior to the date set for demarcation. The notice to the general public must be posted in public places in the area concerned (such as the district hall, commune hall and at a conspicuous place in the village where the land parcel is located).

Demarcation
officers come to
survey the
property

On the date set in the notice, the Cadastral Administration will send demarcation and measurement officers to demarcate and measure (survey) the plot in question and gather basic evidence regarding the land’s status (Article 10, Sub decree 48). All concerned persons must cooperate with authorities and provide any evidence or testimony deemed necessary for the demarcation and registration process (Article 6, Sub decree 48).

As in systematic land registration, where neighbors agree with the claim by the applicant, the boundaries are demarcated in accordance with their agreement (Article 10a, Sub decree 48). In the event that the neighbors are not present then the land boundaries shall be demarcated in accordance with the available evidence (Article 10b, Sub decree 48).

Boundaries are demarcated

One of the differences between systematic land registration and sporadic land registration is the way that disputes are resolved. In the systematic land registration system, if there is a dispute during the demarcation process the demarcating officer would prepare the Cadastral Index Map based on the available evidence, particularly the physical evidence, and list the name of the party officer believes is more likely the lawful landowner (*m'chas dei*). The officer may attempt to conciliate the dispute first or simply advise the concerned party to file an objection with the Administrative Commission before or within the public display period.

Dispute resolution in sporadic land registration procedures

In contrast, if there is a dispute during the land parcel demarcation process under sporadic land registration, the field officer or local authorities usually attempt to resolve it. If the dispute cannot be resolved by the field officer or local authorities, the district Cadastral Administration is mandated to forward the dispute for conciliation at the *district* level in accordance with Sub decree 47 on the Cadastral Commission.⁵ The measurement can be completed only after the dispute is finally resolved (Article 10 para. 3 and 4, Sub decree 47).

Also, according to Article 8 of Sub decree 48, if, in the process of reviewing the land registration request, the investigation by the district Cadastral Administration reveals conflicting claims as to the interests in the land parcel (as opposed to dispute over the land boundaries), the dispute shall be submitted to the *district* level conciliation by the Cadastral Commission.

⁵ Sub Decree 47 on Organization and Functioning of the Cadastral Commission, dated May 31, 2002.

Study Question 63: Conflicting Evidence

Article 10(a) of Sub decree 48 states that in the sporadic land registration process, “If the applicant and the owners or occupants of adjoining parcels are present and agree with the boundaries and there is no evidence to the contrary, the boundaries shall be demarcated in accordance with the agreement.”

In the systematic land registration process boundaries can be demarcated on the basis of agreement of the neighbors. There is no requirement that there be ‘no evidence to the contrary.’

Why do you think that the sporadic land registration procedure requires that before the boundaries are demarcated, there must be both agreement by the neighbors AND no evidence to the contrary, but in the systematic land registration procedure neighbors’ boundaries can be demarcated if the neighbors agree on the boundaries notwithstanding that there may be evidence to the contrary?

Public Display
for 30 days

Once the land parcel has been demarcated, measured and adjudicated, and the land parcel data collection form goes through technical review and is signed by the district office of Cadastral Administration, there must be a public display of the Adjudication Record for the land parcel. The Adjudication Record,⁶ which includes the land parcel map, land location sketch map and list of the owner for each parcel, must be posted at both the district hall and the commune hall, for 30 days for public comment.

Again, the District governor shall issue and arrange for posting another notice on the public display at the several places at least 7 days prior to the commencement of the 30 days public display (Articles 12 and 13, Sub decree 48).

After the end of the public display period, if there are no objections or correction request, the land parcel shall be recorded in the ‘sporadic

⁶ The content of the Adjudication Record under the sporadic land registration procedure is similar but not identical to that under the systematic land registration procedure.

Recording land
in Sporadic
Cadastral Index
Map

cadastral index map' (Article 15, Sub decree 48). If there is an objection or correction request, the district Cadastral Administration investigates the matter to determine if the objection is justified or not, If the matter is justified, the district Cadastral Administration can make appropriate corrections, if doing so does not affect the lawful interests of any persons. If the alteration affects the lawful interests of another person, the change can only be made with the consent of the affected persons. If the Cadastral Administration finds the objection is not justified, the dispute is submitted for resolution by the Cadastral Commission (Article 14, Sub decree 48).

If there are no unresolved disputes, and as in Article 16 of Sub decree 48, the District Cadastral Administration sends the following documents to the Provincial Cadastral Administration:

- Registration request;
- Adjudication Record;
- Notice of the demarcation date;
- Copy of the sporadic cadastral index map;
- Notice of the public display;
- Report on the results of the adjudication;
- Claims that are not resolved, if any;
- Requests to make changes/correction, if any;
- Results of the conciliation of resolved disputes, if any.

If the Provincial Cadastral Administration concludes that the adjudication documents are complete and correct, it shall sign and send all the above-mentioned documents to the National Cadastral Administration. When all the procedural and technical requirements are met, the competent Provincial or National Cadastral Administration generally records the appropriate information in the Immovable Property Register (Possession Register)

Provincial
Cadastral
Administration
certifies right to
the land

(*esovePAcuHbBaçlGclnvtßú = esovePAcuHbBaçl ePAk³*) (*seavphov chosbanchhi akchoilnak sathuk = seavphov chosbanchhi pokeak*), and issues a *possession* certificate to the land owner. It is extremely rare for an ownership certificate to be issued through sporadic registration, and this only occurs where precision GPS information and posts are established

for the concerned land parcel. This situation may change as the sporadic registration procedure is fully implemented to the technical level of systematic registration.

Table 2: Summary of Sporadic Land Registration Process

1. A possessor who wants to register his or her land files an application detailing their land possession and sources of land acquisition with the district Cadastral Administration, through local territorial authorities.
2. The applicant submits all relevant and supporting documents to the district Cadastral Administration.
3. Upon receipt of a complete application, the district Cadastral Administration records it in the Application Ledger and informs the district governor to issue a notice of demarcation date.
4. The district Cadastral Administration sends field officers to the subject land on the date set in the notice of the district governor.
5. The filed officers demarcate and survey the land parcel and collect basic evidence regarding the status of land possession (all concerned persons must cooperate with authorities and provide evidence or testimony).
6. The field officers determine whether there are any inconsistencies between the plot dimensions and boundaries submitted by the party and those revealed by the field investigation
 - If the field officer finds inconsistencies the district Cadastral Administration may refuse to register the land parcel, and the applicant may appeal the decision to provincial Cadastral Administration.
 - If the field investigation finds conflicting claims or objection by other party over the land parcel or its boundaries, district Cadastral Administration officers or local authorities attempt to resolve the dispute. If these attempts to resolve the dispute are not successful, the dispute is forwarded for conciliation or/and resolution by the Cadastral Commission;
7. If there are no conflicting claims or objection over the land parcel or its boundaries, the land parcel data collection form is certified by the district Cadastral Administration as technically correct, the district governor issues another notice on the date set to commence the public display of the Adjudication Record.
8. On the date set for public display, the district Cadastral Administration displays the adjudication record for a 30-day public comment period.
9. During the public display period any party objecting the possession or claiming an interest in the parcel on the map can file an objection, or make a request to correct an error in the record.
 - If there is an objection the objecting party and recorded possessor will then submit to the dispute resolution procedure under the Cadastral Commission
 - If there is a request to correct an error, the Cadastral Administration will investigate and make correction or changes based on the agreement of all the concerned parties.
10. If there are no objections, the concerned land parcel shall be recorded in the applicable cadastral register (generally in Immovable Property Register) and the requesting party will receive a *possession* certificate.

Study Question 64: When systematic and sporadic land registration procedures are used.

In what circumstances would systematic land registration be used and in what circumstances would sporadic land registration be used?

In the event that an area is declared for implementing a systematic land registration project, should a possessor of land in that area request sporadic land registration rather than wait for the completion of the systematic land registration? Why or why not?

What are some of the fundamental differences between the two procedures of land registration and why do you think the procedures are different?

Complementary Land Registration

As noted above, in the course of systematic land registration in an adjudication area, some land parcels are not fully adjudicated and therefore not registered. There are various reasons for this, such as the possessor did not participate in the registration process or there were disputes or objections about the land parcels or boundaries that could not be resolved by the end of the systematic adjudication process. Because owners or possessors did not complete the process, they could not receive ownership certificates.

Complementary land registration is for possessors who failed complete systematic land registration

Rather than carrying out an entire systematic registration process for these incompletely adjudicated parcels, the government established the complementary land registration procedure. See Circular 06 of MLMUPC On Principles and Procedures for Complementary Land Registration, dated May 05, 2006 (Circular 06). Complementary land registration is for owners or possessors who were not able to complete systematic land registration and who subsequently have resolved the disputes or other impediments to registration. The Cadastral Administration does not consider complementary land registration as a distinct process, but as complementary to the systematic land registration process. There is a cadastral service fee for complementary registration, as there is the case of the sporadic land

registration process.

Complementary land registration uses systematic and sporadic land registration processes

To start the complementary land registration process, the owner files a request for completing the registration of the land and pays cadastral service fees to the district Cadastral Administration. After this, the district Cadastral Administration will carry out the remaining steps that were not completed during the systematic land registration project so that the land parcel can be registered in the Land Register and the landowner can receive a land ownership certificate. In completing these steps, the Cadastral Administration will follow sporadic land registration procedures, as outlined above. At the end of complementary land registration process, the Cadastral Administration issues an ownership certificate to the landowner.

Registration Procedures for Special Types of Ownership

Registration of special types of land ownership

In addition to the procedures for first time registration of land, the government established special procedures for registering Indigenous Minority Community land (Sub decree 83 of 2009); and for management, use and registration of co-owned buildings and for transforming a land parcel of a co-owned building into a co-owned land parcel (Sub decree 126 of 2009); and for registering co-owned land.

Procedures related to forests and state land inventories

In addition, there are other special cases related to the identification of state properties that may have impacts on claims by private possessors. These include procedures for establishment, classification and registration of the permanent forest estate (Sub decree 53 of 2005) and procedures for establishment of state properties inventories (chapter 2 of Sub decree 129 of 2006). Although these two procedures are not directly related to land ownership under the Land Law, the process of identifying the properties that belong to the state could have critical impacts on the determination of private land ownership or possession rights under the Land Law

Subsequent Registration

Subsequent registration is to update the Land Register

So far, we have discussed the first time registration of land ownership,⁷ either by systematic or sporadic registration. But the Land Register is supposed to contain information about real rights other than ownership. Also, ownership information changes all the time -- people buy and sell land, give land as gifts, divide land parcels, consolidate adjoining land parcels into a single parcel, convert the physical use of the land, or die, leaving land to their successors. Also, owners may want to enter into long term (perpetual) leases, or grant security interests to their property to secure loans. In this section, we will discuss how the Land Register is constantly updated to show these changes with respect not just to the land itself, but to include information about real rights other than ownership – that is, the full category of immovable property.

As we saw in Article 229 of the 2001 Land Law, one of the responsibilities of the Cadastral Administration is:

- *To update any modifications/transformation [on the Land Register] concerning a right arising out of a transfer contract such as sale, gift, exchange or transfers through succession or related to change in nature or status of land such as a construction, filling in or digging up of land, etc;*
- *To register all hypothec, antichrèse, gage, long-term leases, or easements encumbering on immovable property and to provide information to any person who seeks information from the Land Register with regard to the situation of ownership that is the subject of such hypothec, antichrèse, gage, long-term lease or easement.*

Cadastral Administration must update the Land Register with each transfer of ownership and other real rights

In addition to the Cadastral Administration's obligation to produce a Land Register, Article 238 of the Land Law states that:

Article 238, 2001 Land Law

Any subsequent changes in such data [concerning registered properties – including ownership status] must be registered [on the Land Register] as soon as the Cadastral Administration is informed

⁷ First time registration procedures focus on registration of the land itself, and not other types of immovable property.

of such changes.

Subsequent Registration of ownership transfers

As noted in Chapter 1, ownership of immovable property is indivisible – there is only one owner (although ownership can be shared). The owner can and frequently does grant rights to this property to other persons, thus limiting the owner’s rights. While these persons are not “owners,” they do have rights attached to the property that must be recognized by the owners and all other persons.

Transfer of ownership does not take effect until registered

Thus, as a practical matter, the most important fact that a person needs to know about a particular parcel of land is the identity of the registered owner – and generally in the case of sporadic registration, the registered possessor. In order for the Land Register to provide this key information, there must be a way to ensure that all transfers of ownership are recorded. This is assured by Cambodian law, which provides that a private agreement between the parties is not legally sufficient to transfer ownership to the land – the transfer comes into effect only when it is registered in the Land Register.⁸ This means that the authentic transfer document that the seller executes in order to transfer ownership (or registered possession) must be registered with the Cadastral Administration.

Once a transfer of ownership (or registered possession) is registered and the owner’s name on the Land Register is changed, a cadastral memo on the transfer is entered on the land certificate.

Subsequent Registration of real rights other than ownership

Registration required to assert certain real rights against third parties

Real rights other than ownership are valid and enforceable against the parties even without registering the right in the Land Register. However, some of those real rights cannot be asserted against third parties unless they have been registered.

Article 134, Civil Code (Assertion Conditions of Creation, Transfer and Change of Real Rights)

⁸ Articles 134 and 135 of the 2007 Civil Code and Article 244 of the 2001 Land Law as amended by Article 80 of the Law on Implementation of the Civil Code.

(1) Except for a right of possession[sitt kan-kab], a right of retention, a right of use, and a right of residence, the creation, assignment and alteration of a real right pertaining to immovable property cannot be asserted against a third party unless the right is registered in accordance with the provisions of the laws and ordinances regarding registration.

The real rights that must be registered to be enforceable against third persons are within two categories: usufructuary real rights and security rights covered by Article 134 of the Civil Code. The purpose of registration of real rights other than ownership is to ensure that the general public has a way to find out about the real rights that have been granted by the owner as these rights are attached to the property and can be asserted against all persons. For example, a potential buyer would need this information before purchasing the property, as would a potential lender before considering the owner's request for a loan secured with a hypothec.

Study Question 65: Registration of real rights other than ownership

Why do you think the Civil Code does not require the registration of a right of possession, right of retention, right of use and right of residence?

How can a potential buyer or lender find out about the existence of these rights if they are not registered?

Formalities for ownership transfer documents

Articles 244 and 245 of the 2001 Land Law, as amended⁹ establish the requirements for transferring ownership of immovable property that has been registered in the Land Register:

Authentic documents signed by authorized person

Article 244, 2001 Land Law

Cadastral attestations constitute official confirmation of legal documents.

Ownership of immovable property can be established by written documents according to the form of authentic documents prepared by competent authority. The documents must be filed with the

⁹ As amended by Article 80 of the Law on the Application of the Civil Code.

*Cadastral Administration.***Article 245, 2001 Land Law**

A contract transferring ownership over immovable property shall be in writing in accordance with authentic documents prepared by competent authority in order to register this contract at the Cadastral Administration.

The “form of authentic documents prepared by competent authority” [*lik-khet yak-tha-phut*] referred to above is a standard transfer document that is drawn up by the Cadastral Administration (the competent authority). Practically, this standard transfer document must be completed and signed/thumb-printed by the parties in front of witnesses. If the parties make up their own document format, then according to Article 245 of the 2001 Land Law, they run the risk of it not being accepted for registration. If the transfer is not registered, then ownership is not legally transferred.

Must use
documents
approved by
Cadastral
Administration

The standard transfer form issued by the Cadastral Administration requires certification signatures of commune chief and district governor where the concerned property located.

There is a lot of confusion about what is or is not an authentic document used in the laws (see the 1992 Land Law, the 2001 Land Law as amended, and the 2007 Civil Code). Under the Civil Code, an authentic document may be required for the purpose of immovable property registration or for legal effect of contract creation. See Article 9 of the Law on the Application of the Civil Code for a detailed explanation of different types of authentic documents which also include notary’s or notarized documents (for contract creation or assignment of hypothec or succession).

Authentic
documents

Different authentic documents may be issued by different competent authorities for different purposes. Practically, authentic documents issued by local authorities follow fully or with minor deviation from the standard format prepared by the Cadastral Administration. These standard formats are being used for the purpose of registration or the administrative recognition of an immovable property right transfer or

creation.

Contracts for Ownership Transfers

Article 160 of the Civil Code sets out the means of acquiring ownership:

Article 160, Civil Code (Acquisition of ownership over immovable property)

Ownership over immovable property may be acquired not only via contract, inheritance or other causes set forth in this Section IV but also based on the provisions set forth in this Code and other laws.

Civil Code
contract
provisions

The Civil Code has detailed provisions about the formation of sales, exchanges, success and gifts generally, and in some cases, specific rules related to immovable properties. These provisions are much more detailed than prior law:¹⁰

- Sale – Chapter 1, Book V, Contract of Sale (beginning with Article 551)
- Exchange – Chapter 2, Book V, Contract of Exchange (Articles 566-567)
- Succession – Book VIII – Succession
- Gifts – Chapter 3, Book V, Contract of Gifts (Articles 569 under the rule of Article 160)

Below are some of the provisions of the Civil Code related to contracts and other formalities related to ownership transfer. Read them carefully and see if you can identify changes made by these provisions in comparison with related provisions in the 2001 Land Law as enacted.

¹⁰ See Articles 63 – 84 of the 2001 Land Law as enacted. Most of these Articles in Chapter 6 were replaced by the 2007 Civil Code and were deleted by the Law on the Application of the Civil Code. Several articles of Chapter 6 of the 2001 Land Law were not deleted, and remain in effect: (1) Article 69, transfer tax must be paid *before* registration will be allowed; and (2) Articles 72 – 74, which establish the right of succession of immovable property held by acquisitive possession.

Article 515, Civil Code: (Nature of sale)

A sale is a contract whereby one party, called the 'seller', is obligated to transfer ownership or other property rights¹¹ to the other party, called the 'buyer,' and the buyer is obligated to pay the purchase price to the seller.

Article 516, Civil Code: (Formation of sale contract)

A sale contract is formed based only on the agreement of the parties thereto unless otherwise provided by law. However, the parties may require as a condition for the formation of the contract the execution of an authentic document or a private document signed by the parties in their individual capacities.

Article 517, Civil Code: (Unilateral promise to sell or purchase)

(1) Where a promise is made with respect to either a sale or a purchase, the sale shall become effective from the time that the promisee expresses to the promisor an intention to complete the sale.

(2) Where no period is fixed for the expression of intention described in paragraph (1), the promisor may issue a notification to the promisee demanding the expression of intention within a fixed period of reasonable length regarding whether the promisee intends to complete the sale. If the promisee fails to provide the expression of intention within such period, the promise shall lapse.

Article 525, Civil Code: (Persons who may not be buyers (1))

(1) An administrator appointed by law, court order or contract may not be a buyer, either directly or through a third party, of goods that the administrator has been entrusted to sell.

(2) Paragraph (1) shall apply with the same effect to government officials responsible for the execution or administration of compulsory sale.

(3) Where a sale is conducted in violation of the provisions of paragraphs (1) and (2), such sale may be rescinded only by the person who owned the goods prior to the sale or by the heir of such person or such person's successor in interest.

Selected provisions of the Civil Code related to formation of contract

Persons who may not be buyers

¹¹ See the footnote to Article 196 of the Civil Code that explains the meaning of property right.

Article 526, Civil Code: (Persons who may not be buyers (2))

(1) A judge, prosecutor, court clerk or other court official may not be a buyer, either directly or through a third party, of goods or rights as to which civil actions are pending before the court at which such person works or practices.

(2) Paragraph (1) shall apply with the same effect to lawyers and notaries public becoming buyers of goods or rights involved in actions in which they are retained.

(3) Where a sale is conducted in violation of paragraphs (1) and (2), such sale may be rescinded only by the seller, the opposing party in a civil action involving the goods or rights, or their respective heirs or successors in interest.

Study Question 66: Sale of immovable property between spouses

Article 67 of the 2001 Land Law (which has since been repealed by the Law on the Application of the Civil Code) prohibits contracts for sale between spouses. What do you think were the policy reasons for this prohibition?

The following are some of the provisions of the Civil Code related to marital property that replace provisions of the Law on Marriage and Family.¹²

Contracts
related to
marital property

Article 969, Civil Code:(Matrimonial property contract and statutory property system)

(1) Prior to or after their marriage, a husband and wife may enter into a contract governing their property relationship; provided that such contract may not contravene the provisions governing the right to demand support and the legally secured portions.

(2) Unless the husband and wife have entered into a contract with regard to their property, their property relations shall be governed by the provisions of Sub-section II (The Statutory Property System).

¹² Article 78 of the Law on the Application of the Civil Code abrogated all except Articles 76, 77 and 79-81 of the Law on Marriage and Family, Decree No. 56 Kr. Ch, dated 26 July 1989. See also other transitional provisions related to registration of spousal property contracts in Chapter 4 of the Law on the Application of the Civil Code.

Article 970, Civil Code: (Required formalities and conditions for perfection of matrimonial property contract)

(1) A matrimonial property contract shall be concluded in writing.

(2) Where the husband and wife conclude a contract that differs from the statutory property system, such contract cannot be held up against third parties unless it is registered.

Article 976, Civil Code: (Disposition of common property of the spouses)

(1) The common property may not be sold or otherwise disposed of without the consent of both spouses.

Notwithstanding paragraph (1), provided that with the permission of the court, one spouse may sell or otherwise dispose of common property in circumstances where this is unavoidable for the preservation of matrimonial cohabitation and livelihood.

(2) If one of the spouses sold or otherwise disposed of a common property without the consent of the other spouse nor a permission of the court, the non-consenting spouse may demand that the court nullify such disposition within two years commencing from the date when that spouse is aware of such disposition if the common property that was disposed of is immovable, and one year commencing from the date when that spouse is aware of such disposition if the common property that was disposed of is movable.

See also Articles 527, 534-537 and 162 of the Code.

The Effect of Registration

The effect of registration in a cadastral registration system, like the system created by the 2001 Land Law, is that it conveys legal status of ownership (or acquisitive possession) on whoever is recorded on the Land Register.

Registration is necessary to convey legal status of ownership (or acquisitive possessor)

As we saw, in accordance with Article 69 of the 2001 Land Law (as well as Article 135 of the Civil Code), registration is necessary in order to legally transfer immovable property ownership. If the registration does not take place, then ownership is not transferred. Legally the property is still owned by the Seller/Transferor.

Article 65, 2001 Land Law

The contract of sale itself is not a sufficient legal requirement for the transfer of the ownership of the subject matter.

Consider the following Study Question concerning situations where a buyer does not register the transfer of ownership.

Study Question 67: Effect of Registration of Transfer of Ownership

What legal rights would a buyer have who executed and fully performed a contract to purchase a registered land but did not register the transfer as required by Article 69 of the Land Law?

Imagine that Mr. Seller sells the land to Mr. Buyer 1 but Mr. Buyer 1 does not register the transfer of the property. Imagine that, knowing this, Mr. Seller enters into a contract with Mr. Buyer 2 who does register the transfer with the Cadastral Administration. What rights would Mr. Buyer 1 have with regard to the land?

Cadastral Registration System versus Document Recordation System

In cadastral registration system people know with certainty who the owner is

In order to fully understand the significance of registration under Cambodia's law, it may help to compare this system with "recordation" system (also called a deed recordation system in English). We have seen that in the cadastral registration system, ownership is transferred by the act of registration in the Land Register. Thus by looking at the Land Register, people would know, with a high degree of certainty, who lawfully owns (or possesses) a particular parcel (though there are a few exceptions).

In recordation system, people know who claims to be the owner

In contrast, in the recordation system, the state provides a statutory framework for a land records office where people can file their *claims* to ownership and other rights and interests in a particular property. The land records office does not decide the *substance* of the claims filed – only that the documents meet any required formalities. And the land records office never makes a determination of ownership; in a dispute

the parties must take the matter to the court for a decision. Thus, in a recordation system people can rely on land records to know who *claims* to own or have another interest in a particular parcel. The only way to know for certain is to get a court ruling.

In the recordation system, ownership or interests in the property is transferred when the parties make and fulfill the obligations required of their private contract to transfer the ownership or other interests to the property from the owner to another person. In a typical case, ownership is transferred when the seller gives the buyer a “deed,” which is a formal document conveying ownership or other right or interest to the property to another person. Deeds are used for land transactions and are similar to authentic documents – they may have to be in a format established by law, and they usually have to be witnessed and notarized. The new owner then takes the “deed” to be recorded with the land records office.¹³

In recordation systems, ownership transferred by formal deed

The most important purpose of recordation is to provide accurate land records so that the state and any person may find out who claims to ownership and other interests to land within a particular jurisdiction. Many documents related to land are filed with the land records office, such as long-term leases, mortgages [hypothech], easements, and court orders for liens against the property in relation to debts against the owner of the property. Before purchasing a property, the buyer (usually the buyer’s lawyer) will make a thorough search of the land records (as well as tax records) to ensure (to the extent they can tell from the records) that the seller is the owner and that there are no outstanding claims against the property.¹⁴

Buyers research land records to try to determine who is the owner

In general, ownership and other real rights must be registered to assert a claim against a third party. Thus, after ownership is transferred, the new owner will record the new owner’s “ownership deed” as soon as possible before someone else records a new claim against the same

¹³ Many of the states of the United States have recordation systems. The land records office may have different names in different states; a common name is the Recorder of Deeds. Standard forms for deeds and other legal instruments to record interests in land are often established by statute.

¹⁴ Sometimes these searches go back to the original land grant. Some states have laws protecting people against land title claims older than 60 years.

property.

Under recordation systems, it is up to the private parties (or, as is often the case, their lawyers) to ascertain the validity of an owner's ownership and the full extent of their rights over the parcel. Official cadastral maps are not part of a recordation system, thus buyers usually hire a private licensed surveyor to measure the land to make sure the boundaries match the description of the land in the contract of sale and the ownership deed. Because recordation systems offer so little protection, new owners often buy special insurance to protect against a pre-existing claim that was not discovered during the search of the public land records.

Study Question 68: Reasons for Cadastral Registration System

What are the possible reason could you think of that the National Assembly chose a cadastral registration system under the 2001 Land Law as opposed to the recordation system?

How might these other systems be more (or less) difficult to implement given Cambodia's current resources and capabilities?

What sorts of things do you know that are recorded or registered in the Cadastral Register presently under the Cadastral Administration in Cambodia?

Study Question 69: Recordation of ownership deed

On the morning of January 5, Mr. Seller sells his land to Mr. Buyer One. Mr. Buyer One pays the sales price and Mr. Seller gives Mr. Buyer One an ownership deed to the land. Later that same day, Mr. Seller sells the same parcel of land to Ms. Buyer Two, and after receiving payment for the land, he gives Ms. Buyer Two an ownership deed to the same parcel of land. Neither Mr. Buyer One nor Ms. Buyer Two know that Mr. Seller has sold the same land to another person.

Ms. Buyer Two rushes directly to the land records office and records her ownership deed. Mr. Buyer One decides to wait until January 6, to register his

ownership deed.

When he goes to record the ownership deed, he learns that Ms. Buyer Two recorded her deed already.

Between Mr. Buyer One and Ms. Buyer Two, who has the better claim to ownership?

Effect of Registration in the Land Register

In title registration system, title passes on registration of the transfer (not on completion of the contract)

In the *cadastral registration* system the transaction that takes place between the seller and buyer does not transfer ownership to the purchaser. It is merely a necessary step in the process of transfer - an instruction to the Cadastral Administration to transfer ownership to the purchaser by updating the land register. The buyer and seller may have completed all the formalities of the contract of sale, and the seller may have paid the purchase money, but ownership does not transfer until the Cadastral official has actually updated the Land Register by crossing out the seller's name and inserting the buyer's name, and in Cambodia by inserting remarks about the transfer from seller to the buyer). At that point, the buyer becomes the new legal owner.

In cadastral registration system, Land Register confers valid legal ownership

The Cadastral Administration enters the information provided in the appropriate transfer documents (authentic contract). Once this information is entered into the Land Register, the Cadastral Administration confers ownership on the new owner. It may happen that the information the parties relied on is not correct; however, commonly the effect of registration is to give validity to the invalid transaction (called "ownership transfer by registration"). If the transaction was entered into with good faith and without force, fraud or gross negligence in relation to the transaction, the transfer cannot be reversed administratively.

Cadastral index map and Land Register have legal value and precise effect

Article 226, 2001 Land Law

Ownership of immovable property shall be guaranteed by the State. For that purpose, the Cadastral Administration under the supervision of the Ministry of Land Management, Urban Planning and Construction shall have the competence to identify properties, establish cadastral index maps, issue ownership titles, register lands

and inform all persons as to the status of a parcel of land in relation with its nature, size, owner and any relevant encumbrances over such parcel.

Article 239, 2001 Land Law

A cadastral index map and Land Register have legal value and precise effect. A cadastral map and Land Register shall not contain deletions, additions or any other modifications at the exception of those that have been expressly authenticated.

Cadastral offices at all levels are legally responsible to ensure the due and proper maintenance of such Land Registers and the accuracy of survey operations and to preserve the documents.

Study Question 70: Effect of Registration

Imagine that after Mr. Seller has registered his property in the Land Register, he decides to sell the land. Mr. Seller and Mr. Buyer enter into a property sale contract. Mr. Buyer pays the purchase price to Mr. Seller and Mr. Buyer takes possession (occupation and control) of the property.

Is Mr. Buyer now the owner of the property? What if Mr. Seller now denies the sale and tries to move back into the property on the basis that he is still the registered owner?

What if the transfer to Mr. Buyer was not registered at the Cadastral Administraton?

What if Mr. Seller, knowing that Mr. Buyer did not register the transfer sells the property again to someone else after that person checks the land register and sees that Mr. Seller is in fact the registered owner? Maybe Mr. Seller tells the new buyer that he lost the ownership certificate and that is why he does not have it (when in fact he gave it to the first Buyer).

Study Question 71: Effect of Recordation under Recordation System

Ms. One is the owner of a piece of property. Her sister, Ms. Two sold the property to Mr. Three. We don't know how Ms. Two did this – she may have purported to act on behalf of Ms. One, or claimed to be Ms. One, or for some reason mistakenly believed that she is in fact the true owner of the land. It

appeared that Ms. Two succeeded in transferring property ownership to Mr. Three: a transfer contract was executed, purchase monies paid, Ms. Two gave an ownership deed to Mr. Three, and Mr. Three recorded the deed in the land records office.

Mr. Three had no reason to believe that there was anything wrong with the sale as he genuinely believed that Ms. Two was the owner. Because Ms. Two, as a matter of fact, was not the owner then the property ownership, as a matter of law, never transferred to Mr. Three.

If Mr. Three, believing that he is the owner, sells the property to Mr. Four, (signs a transfer contract, gives an ownership deed, which is recorded etc.). The property ownership was still not transferred despite the fact that Mr. Three in good faith believed he was true owner and legally able to transfer ownership to Mr. Four.

This is because, as mentioned, under the general rules of property only a true owner can transfer ownership of the property to another person. Given that Ms. Two never had the legal capacity to convey ownership in the property, ownership remains with Ms. One. Mr. Three and Mr. Four own nothing. Mr. Three and Four may have actions against Ms. Two on other grounds, but they never owned the property.

In the examples from the study question above, if these transactions took place in a “ownership transfer by registration” jurisdiction, then if Mr. Three registered his ownership transfer from Ms. Two *and the titling officer inscribed the transfer in the land register* then Mr. Three would acquire ownership in the property if he is innocent (he acted in good faith and no fault party). Once Mr. Three’s name is entered as owner in the Land Register, Mr. Three would have become the legal owner recognized as such by the law despite the fact that he acquired his ownership by an invalid transaction.. Subsequently, the transfer to Mr. Four would also be valid and cannot be reversed administratively, and only in a few exceptional cases, by the court.

Information in
the Land
Register is
guaranteed by
the State and
protected by
law

The point is that in an “ownership transfer by registration system” the Land Register is the all-important document. What it states is guaranteed by the state and protected by law and whoever is listed on the register as owner is by law the true owner (except in a few circumstances see below). A purchaser (or anyone with an interest in a particular piece of property) can, absent any knowledge of any fraud or serious misconduct by the seller, rely totally and solely on the Land Register and need not be concerned with whether there are unrecorded interests or unregistered parties that may have a claim to the property in question.

Only a person
named as
current owner
on Land
Register legally
recognized as
owner

The person named as current owner on the Land Register is the only person that can be recognized at law as the owner of the property. Except in a very few exceptional cases (see below), no one else can be recognized as the owner no matter what kind of documents or proof of ownership that the other person may have. This concept is known as *indefeasibility of title*.

Presumptions regarding registration

Do Articles 226 and 239 of the 2001 Land Law mean that entries in the land law can never be challenged? Or, if they can be challenged, on what basis can they be challenged? It seems that in most ownership transfer by registration systems, the land register can be contested, although in very limited circumstances.

Article 137 of the Civil Code suggests that there could be challenges to the Land Register, though it is not clear what type of challenges could be raised.

Article 137, Civil Code. (Presumptions regarding registration)

(1) Where a right [sitt] is registered in the immovables register, it is presumed that such right [sitt] belongs to the person to whom it is registered.

(2) Where a previously registered right [sitt] is deleted from the immovables register, it is presumed that such right [sitt] has been extinguished.

As noted in Chapter 7, the French Civil Code defines presumptions as consequences drawn by the law or judge from a known to an unknown fact.¹⁵ The statutory presumption in Article 137 means that if Mr. Owner is registered as the owner of a parcel in the Land Register, then Mr. Owner is the owner until proven otherwise. The same goes for Mr. Bank, who registers a security interest in Mr. Owner's property -- under Article 137, it is presumed that the security interest belongs to Mr. Bank, until proven otherwise.

Going back over the discussion in this chapter about how the Cadastral Index Map and the Land Register were created in the first place, and the careful procedures that are followed in first time registration as well as complementary registrations, a person challenging information in the Land Register has a very high burden to prove that the Land Register should not be legally binding in a particular case. What is clear is that the presumption does not make it impossible to ever challenge the Land Register, but it does place the burden on the person challenging the Land Register to show that it is wrong.

Duplicated or Triplicated Land Certificate

The land possession or ownership certificate is a very important document that should be kept in a safe and secure place. However, as often happens, people lose things; they get stolen or misplaced or damaged by improper storage. And particularly in rural areas, land certificates can get exposed to the natural elements. Neither the 1992 Land Law nor the 2001 Land Law specifically provided rules for dealing with lost or damaged certificates, but the Cadastral Department has established procedures for requesting and issuing duplicated certificate (*Tuk-tei-ta* Certificate) when the original certificate is lost, stolen or damaged, and triplicated certificate (*Tak-tei-ta* Certificate)

Procedure for
replacing lost or
damaged land
possession or
ownership
certificate

¹⁵ French Civil Code, Article 1349. There are many examples of presumptions in Cambodia's Civil Code, for example, Article 137, presumptions regarding immovable property registered in the immovables register; Article 988, presumption of paternity for a child conceived by the wife in a marriage is the child of the husband; and Article 45, presumption of simultaneous death in certain circumstances.

when the duplicated certificate is lost, stolen or damaged.¹⁶ The procedures are summarized in the table below:

Table 3: Procedures for Duplicated or Triplicated Land Certificate

1. The property owner (or his/her legal representative) whose certificate was lost, stolen or damaged, submits a signed/thumb-printed written request for issuance of a duplicated or triplicated certificate to the Provincial Cadastral Office through the Commune chief and/or District Cadastral Office. The written request must specify clear reasons for the loss or damage to the original or previous certificate with the date and place of incident or attachment of the damaged certificate.
2. The applicant pays the Cadastral service fee to the district Cadastral Office and the request is stamped.
3. The district Cadastral Officer checks the content of the request and verifies the applicant against the information in the copy of the Cadastral Register maintained at the district Cadastral Office and then sends the request to the provincial Cadastral Office.
4. The Cadastral Conservation Office at the provincial level checks and verifies the request and applicant against the information in the copy of the Cadastral Register maintained at the provincial Cadastral Office;
5. The provincial Cadastral Conservation officer prepares 4 copies of Declaration on Cadastral Extract of the concerned land for signature of the provincial Cadastral Office Chief and then sends the Declaration with relevant documents to the provincial governor for approval.
6. After getting the provincial governor's approval, the provincial Cadastral officer arranges for a 30 day posting of the Declaration at the provincial hall and commune hall and sending a copy of Declaration to be kept at the district Cadastral Office. Any interested person can file a complaint or objection within the 30-day period.
7. After the 30-day period, if no valid complaint or objection was made, the provincial Cadastral officer prepares another Declaration stating the Approval of the Provincial Governor to render the old (lost/stolen/damaged) certificate null and a replacement certificate (specified Tuk-tei-Ta or Tak-tei-ta Certificate) shall be issued after posting the second Declaration in the same manner as applied to the first Declaration.
8. If it appears that the request is warranted, a replacement certificate stamped of *Tuk-tei-ta* or *Tak-tei-ta* on it is issued by the competent Cadastral Office to the property possessor or owner.

Study Question 72: Duplicated or Triplicated Land Certificates

Why do you think the process for getting a duplicated or triplicated land certificate is so complicated?

In what circumstances might the land possessor or landowner try to get a

¹⁶ Cadastral Department Instruction III/1995, dated March 20, 1995, on Cadastral Conservation.

duplicated or triplicated possession or ownership certificate when in fact, the original has not been lost, stolen, or damaged?

Conclusion

This ends our study of one of the most important topics in this book, Cambodia's cadastral registration system and legal procedure for transferring immovable property ownership and other real rights. As we learned, the procedures for first time systematic registration of land are very thorough and have opportunities for people to participate in every step of the process. Registration relies on evidence collected from the land occupants, other concerned people (such as neighbors or adjacent land occupants or owners) and from local and national authorities. In the properly implemented registration process, the people as well as the state agents are given due opportunity to dispute the information in the Adjudication Record, object to another's claim of possession or ownership, and to request corrections to the records, even if the person requesting the correction has no direct interest in the concerned land parcel. It is only through proper and transparent implementation processes that Cambodia can build and maintain a Land Register and land registration system that will secure property ownership and other real rights and foster development in the country.

CHAPTER 11

EXPROPRIATION OF PRIVATE PROPERTY

Topics Covered
in this Chapter

INTRODUCTION TO EXPROPRIATION

EXPROPRIATION LEGAL FRAMEWORK

BASIC STAGES IN EXPROPRIATION PROCESS

PUBLIC INTEREST NATURE OF THE PROJECT

FAIR AND JUST COMPENSATION

COMPLAINT PROCEDURES

EXPROPRIATION UNDER INVESTMENT PROTECTION AGREEMENTS

Introduction to Expropriation

In the previous chapters, we discussed the concepts of immovable property and the rights of ownership [*kam'sitt*] to that property, including the most significant right of an owner, the right to assert his or her ownership against any other person. We learned that immovable property ownership is indivisible – there is only one “owner” of a particular parcel of land, although in certain cases there can be shared ownership of the same immovable property.

The owner of immovable property can, and often does, grant others “real rights” to his or her property, thus limiting the owner’s rights. This does not mean that the persons holding those real rights are “owners;” rather, these real rights have value and are attached to a specific parcel of land and the rights holders can assert their real rights against any person. The 2007 Civil Code recognizes the following real rights:

1. Ownership
2. Possession
3. Usufructuary real rights
4. Security rights

One of the most important ways to protect ownership and other real rights is to register those rights in the Land Register, which is being created across the country. However, Cambodia is still in the process of first time registration of all the land parcels in the country, and many people who are owners, possessors or holders of other real rights have not yet registered them.

All the chapters up to this point have focused on how Cambodia's Constitution and laws, like laws in other democratic countries, protects private property owners and others holding rights to the property from having those rights taken by any other person or entity against the wishes of the person holding the right.

While Cambodia's Constitution protects the right of private ownership, the Constitution also recognizes that sometimes public interests or national interests outweigh the interests of private ownership rights, and the state can expropriate – or take – a person's private property by forcing the person to transfer his or her property to the state, even if the person does not agree.

Expropriation is necessary for development in the country

Some of the most common examples of expropriation are when the state takes private property to build public infrastructure projects, such as roads, bridges, railroads, water and electricity networks, irrigation systems, schools, hospitals, airports and other similar developments that serve the interests of the general public.

Less common examples would be when the state temporarily or permanently takes immovable property when necessary to defend the country's territory or protect national security, or to protect ancient temples or natural resources.

Expropriation is an important and necessary power of the state – without it, the state would not be able to undertake important public infrastructure facilities needed for the country's development. This is also an extraordinary power and while its exercise can greatly support

development in the country, it can and often does have severe negative impacts on the persons whose land or other property is taken. Thus, expropriation must be exercised in strict compliance with the Constitution and other laws pursuant to the Constitution.

What is meant by the term “Expropriation”?

Expropriation is one of several different terms commonly used when referring to the state’s exercise of its power to take private property for public interest purposes. Some countries, including Cambodia, refer to this power as the power of “expropriation” or “taking;” while others may use terms that have essentially the same meaning, such as: “eminent domain,” “condemnation,” “compulsory acquisition,” “involuntary acquisition,” “involuntary taking” or other similar term depending on local practice.

Definition of
Expropriation

In this book, we will use the terms “expropriation” or “taking” because these are the terms used in Cambodia’s Constitution, Land Law and Law on Expropriation. Black’s Law Dictionary defines eminent domain (another term for expropriation) as follows:

The inherent power of a governmental entity to take privately owned property, [especially] land, and convert it to public use, subject to reasonable compensation for the taking. This term is built on the concept of a moral obligation to pay for governmental interference with private property.

This definition identifies the two fundamental elements of expropriation:

- (1) the property must be taken for public use, and
- (2) the state must pay reasonable compensation for the property.

Expropriation Legal Framework

There are four laws that form the basic legal framework for expropriation in Cambodia. The foundation for the power is the Constitution, which specifically authorizes expropriation in Article 44. The 2001 Land Law reinforces the constitutional provisions. The Land

Law and the Civil Code, define ownership and other real rights to immovable property, and govern how these rights are created and exercised.

Finally, the Law on Expropriation, promulgated in February 2010,¹ sets out how the state exercises its constitutional power to take private immovable property. The law deals with very complex economic and social issues, some of which have never been fully addressed in Cambodian law and practice. Several sub decrees, prakas and other regulatory texts are being developed to guide implementation.

It is not possible for this book to address all of the complex issues addressed in the Law on Expropriation. In this chapter, we will focus on the key principles and procedures in the law, as well as some of the policy considerations for implementing the law. Having a good understanding of these key issues will help in understanding this developing area of law.

The Constitution

The legal basis for expropriation in Cambodia is found in the last paragraph of Article 44 of the 1993 Constitution, as follows:

Article 44, 1993 Constitution:

All persons, individually or collectively, shall have the right to ownership [m'chas kam'sitt]. Only Khmer legal entities and citizens of Khmer nationality shall have the right to own land [dei].

Constitutional
basis for
expropriation

Legal private ownership [m'chas kam'sitt] shall be protected by law.

The right to take ownership [kam'sitt] from any person shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance.

We can see that the Cambodian Constitution law follows the general legal principles of eminent domain (expropriation) in the legal

¹ Preah Reach Kram No. NS/RKM/0210/003, dated February 26, 2010, promulgating the Law on Expropriation.

Movable and
immovable
property rights
protected

dictionary. The ownership protections guaranteed by Article 44 of the Constitution apply to *all types of property* – movable and immovable – and they apply to any person – whether they are citizens or not. That is, the state cannot take a person’s movable property (such as a car, ox-cart, water jar, harvested crops or intellectual property) or immovable property (such as land, house, other structures or trees) except as provided in the Constitution.

2001 Land Law

Articles 1 and 5 of the 2001 Land Law reinforce the constitutional guarantees as they apply to land and other types of immovable property, but give no specific guidance about expropriation, except to state that it must be carried out according to the constitution:

Article 1, 2001 Land Law:

This law has the objective to determine the regime of ownership [kam 'sitt] for immovable properties in the Kingdom of Cambodia for the purpose of guaranteeing the rights of ownership and other rights related to immovable property, according to the provisions of the 1993 Constitution of the Kingdom of Cambodia.

Article 5, 2001 Land Law:

*No person may be deprived of his **ownership** [kam 'sitt], unless it is in the public interest. Taking of ownership shall be carried out in accordance with the forms and procedures provided **by law and regulations** and after the payment of fair and just compensation in advance.*

In summary, under Cambodia’s Constitution and the 2001 Land Law, establish four basic criteria that the state must meet before it can expropriate private ownership “rights” to land and other property. These are:

1. the property may be expropriated only for public interests,
2. fair and just compensation must be paid to the property owner and or rights holder,
3. compensation must be paid prior to actual taking, and
4. expropriation must be done in accordance with law and regulations.

Four basic
criteria for
expropriation
under
Cambodian law

Study Question 73: Meanings of expropriation terms in the Constitution

Review Article 44 of the Constitution and Article 5 of the 2001 Land Law) and see if you can answer these questions:

- (1) What is “general or public interest”? Is general interest different from public interest?*
- (2) What does the term “ownership” mean? Put another way, what property rights enjoy legal protection?*
- (3) What is “fair and just compensation”? What standard is used for calculating the compensation? Who has the final say on the issue of compensation?*
- (4) When must compensation be paid to meet the requirement for payment in “advance”?*

As you can see from trying to answer these questions, the provisions in the Constitution and the Land Law cited above, there are many unanswered questions about how expropriation will be applied.

Law on Expropriation

Over the past 15-20 years, the Royal Government has undertaken numerous infrastructure projects, some funded by the state’s budget and many funded with support from multi-lateral, bi-lateral and even non-government donors.

One of the challenges, particularly in a developing country like Cambodia, is to ensure that infrastructure development projects do not benefit one segment of society at the expense of others. Several different legal and policy approaches are required to provide social financial and other assistance for the broad range of people who may be adversely affected by infrastructure development whether through expropriation of private property or the development of state public land that people have been using with or without permission.

Some of the donors have their own requirements for how the state exercises its power of expropriation of land and property needed for the development, as well as requirements for compensating people adversely affected by the development. Two multi-lateral donors, the

World Bank and the Asian Development Bank (ADB) have very detailed requirements for compensating not only property owners or rights holders, but also providing compensation and assistance to persons who are adversely affected by the development. The absence of a specific expropriation law or regulations for Cambodia led to inconsistent practices, often depending on the source of funds for the project.

The Law on Expropriation was enacted to address some of these issues. However, the Law on Expropriation is not a law on development. It is not designed to address all of the social issues that result from development projects, nor does it provide social assistance to every one adversely affected by development projects.

The law itself has only 38 articles that state very broad principles and rules to govern a very complex process. It is a new area of law for Cambodia and numerous sub decrees and implementing regulations will need to be developed to fully implement the law. However, the law has flexibility to address many of the social and other issues that arise during the implementation. We will discuss some of those issues later in this chapter.

As stated in Articles 1 and 2, the aims and objectives of the law specifically relate to the mechanisms and procedures by which the Royal Government implements the power of expropriation of private property recognized by the Constitution:

Article 1, Law on Expropriation

This law aims to define an expropriation in the Kingdom of Cambodia by defining the principles, mechanisms, and procedures of expropriation, and defining fair and just compensation for any public physical infrastructure construction, rehabilitation, and expansion project serving public and national interests and development of the Kingdom of Cambodia.

Article 2, Law on Expropriation:

The objectives of this law include such as:

- *To ensure fair and just taking of private legal ownership rights,*
- *To ensure a fair and just compensation in advance,*

Aims and
objectives of
Law on
Expropriation

- *To serve the national and public interests, and*
- *To develop public physical infrastructures.*

The Law on Expropriation defines expropriation in more detail than the Constitution and the 2001 Land Law:

Article 4,, Law on Expropriation

Paragraph 1. Expropriation refers to taking, with fair and just compensation in advance, of ownership [kam 'sitt] of immovable property or real rights to immovable property of a physical person or private legal entity or public legal entity, which includes land, buildings, and cultivated plants/crops, and for construction, rehabilitation or expansion of public physical infrastructure serving the national and public interests.

Definition of
expropriation in
Law on
Expropriation

Basic Stages in Expropriation Process

Expropriation usually takes place in the context of a public infrastructure project, such as building a road, bridge, hospital, school or airport. Designing and implementing public infrastructure projects is a long and complex process. It involves several different agencies of government, hundreds of experts and technicians, and large sums of money, depending on the project. Projects can take many years to complete, and may be completed in phases, such as the completion of a national road one section at a time.

Generally, there are five phases in a project cycle –

1. needs identification,
2. pre-project feasibility studies,
3. project feasibility study and detailed design,
4. implementation of an approved project or component of a project and land acquisition, and
5. project implementation monitoring and evaluation.

As noted above, acquisition of land usually takes place in the implementation phase of a project; however the need for expropriation will likely be apparent at the very beginning of the project. Expropriation of private land likely will be very costly, and will be a

major concern in phase 2, the pre-project feasibility studies as well phase 3, project feasibility study and detailed design. It is during these studies that the project planners will need to determine how much the project will cost, including the cost of expropriation. Since the Constitution requires that fair and just compensation must be paid in advance of the taking, project planners will need to have these funds allocated before they begin to implement the project.

The actual process of expropriating private property involves many activities in several stages alongside the corresponding infrastructure project. Expropriation is generally very long and complicated, especially when immovable property rights of many people are at stake. A complete expropriation process, along with the corresponding public infrastructure project, often takes several years to complete. Before looking at details of key provisions of the Law on Expropriation, it is useful have a brief overview of the entire expropriation process.

Under Cambodian law, only the state (the Royal Government) has the power to expropriate private property, and decisions on expropriation are made on a case-by-case basis, through a process managed by the Expropriation Committee, which is based in the Ministry of Economy and Finance.² Different ministries or authorities of the Royal Government, according to their legal authority, may propose and implement projects that require expropriation of private property. To simplify the process, we use an example of a single ministry.

The process can be simplified into 4 basic stages, as follows:

Stage 1:
Project design
and approval

Stage 1: Design project and obtain approval in principle to begin expropriation procedures.

In the first stage, the ministry implementing the project develops the project design, and identifies expropriation needed for the project. The

² The Expropriation Committee is established pursuant to Article 12 of the Law. It is led by the Ministry of Economy and Finance, with participants from other relevant ministries. The Committee's organization and functions are determined to a sub decree.

ministry develops a project budget as part of its annual budget proposal, which includes an estimated budget to pay compensation. See the discussion on “Who is Covered by the Expropriation Law.”

After the project budget is approved, the ministry submits a request to the Royal Government to approve the project in principle. The approval allows the Expropriation Committee to begin implementing the expropriation procedures. See the discussion on “Determining Nature of a Proposed Project.”

Stage 2: Prepare and approve the Expropriation Request.

Stage 2:
Prepare and
approve
expropriation
request

The Expropriation Committee prepares an Expropriation Request, which begins with a public survey to record details about the concerned immovable property and the owners and rights holders of the property. In most cases, the survey must include public consultations with provincial, district and commune authorities and representatives of villages or communities in the proposed project area in order to provide them clear and precise information and to collect feedback from all concerned parties regarding the proposed project.

After completing all the required steps and documentation, the Expropriation Request with the detailed survey report and recommendation of the Expropriation Committee is submitted to the Royal Government for approval. See the discussion on “Preparation of the Expropriation Plan.”

Stage 3: Issue Declaration on Expropriation Plan

Stage 3:
Issue
Declaration on
Expropriation
Plan

After the Royal Government approves for the Expropriation Request, the Expropriation Committee issues a Declaration on the Expropriation Plan. The Declaration clearly sets out the purpose of the project, and other detailed information to inform affected persons about the project location, timeframe for implementing the project, and the competent authority for carrying out the expropriation. The Expropriation Committee sends a copy of the Declaration, along with a copy of the Law on Expropriation, to every affected person.

The Expropriation Committee posts signs on the concerned sites that identify the property to be expropriated, and widely disseminates the declaration and posts it at Commune Hall of the project site.

This notice is very important because after the issuance of the Declaration of Expropriation Plan, people will not be permitted to sell or transfer the property, or to construct any new building or add to any existing building on the land. The state will not recognize the prohibited transactions, and will not pay compensation for any prohibited new or expanded construction. The state will only deal with persons who were the property rights holders on the date of the Declaration of Expropriation Plan.

Stage 4: Carry out the expropriation.

The Expropriation Committee makes a formal decision to take the property and notifies the affected people about its decision. This notice describes the immovable property rights being taken, the amount of compensation to be paid, and the deadline to vacate the site.

The Expropriation Committee pays the full amount that the Committee has determined to be fair and just compensation to the immovable property rights holders. See the discussion on “Fair and Just Compensation.”

Stage 4:
Carry out
expropriation

If people refuse to vacate the site by the deadline specified in the notice, the Expropriation Committee can request intervention from competent or public authorities for lawful measures to physically acquire the immovable property, including evicting the people from the site.

The expropriation process can proceed even if a dispute has not been completely resolved. The persons who are not satisfied with any decision of the Expropriation Committee still have the right to continue their complaints even after they have received compensation payment or the Expropriation Committee has actually taken the property. See the discussion on “Complaint Procedures.”

Public Interest Nature of the Project

Public interest

The state may exercise its power of expropriation only in the public interest. The question of public interest is a very hotly contested issue in some countries. Public schools, roads, hospitals airports and other similar public development projects are obviously in the public interest. However, some situations are likely to arise where the public interest in the project is not so clear, particularly where private developers ask the state to expropriate private property so the investor can build privately owned schools, hospitals, shopping malls and sports stadiums, for example.

Different standards for public interest

Standards in the 2001 Land Law

General public
interest
and
National
interest need

Neither Article 44 of the Constitution nor Article 5 of the Land Law clearly defines public interest. The Land Law seems to use public interest, general interest and common interest to mean essentially the same thing.³ However, Article 26 of the Land Law uses different terms with respect to taking the communal land of indigenous minority communities the two other terms – “national interest need” and “national emergency need.”

While public interest, common interest, and general interest appear to have the same meaning, some would argue that the terms *national interest need* and *national emergency need* in the Land Law, create a different standard of protection for the communal land of indigenous

³ The Land Law uses “public interest” in Article 16 (when state properties lose their public interest, they can be reclassified as private state property); Article. 116 (land rules to meet emergency or public interest need), and Article 148 (3) (competent authorities can decide to change the size of roads according to the necessary needs for the public interests). The term “common interest” is used in Article 148 (Land demarcation and ownership of property situated along public roads determined based on actual needs of common interests). The term “general interest” is used in Article 19 (additional penalty when illegal acquisition of state public land delays works undertaken in the general interest, in particular any acquisition of roadway reserves); and Article 114 (land rules for ensuring general interest).

minority communities.⁴

Land of
indigenous
minority
communities

As discussed in Chapter 4 of this book, Articles 23 and 24 of the 2001 Land Law define an indigenous minority community and set standards for membership in the community. Several indigenous minority communities have formed themselves into legal communities by adopting their statutes and registering with the Ministry of Interior. These are known as “indigenous minority communities with legally determined statutes.” and are eligible to own land communally. Lands registered as indigenous minority community properties do not belong to any one individual member of the community but rather to the registered community (the indigenous group as a whole). The state grants the land to the indigenous minority community as collective ownership and the Land Law imposes restrictions on the transfer of communal land.

Article 26 (last paragraph), 2001 Land Law:

The provisions of this article [which establishes communal property rights] are not an obstacle to the undertaking of works done by the State that are required by the national interest need or a national emergency need.

Standards in the Law on Expropriation

The Law on Expropriation, uses terms similar to those used in the 2001 Land Law and establishes two different standards of public interest: (1) general public interest and (2) national interest need, which are defined in Article 4.

(1) General
public interest

Article 4, Law on Expropriation:

Paragraph 3: “General public interest” refers to the use of land or property by the general public or by state agencies, state institutions or public institutions.

(2) national
interest need

Paragraph 4: “National interest need” refers to the limited projects or activities as follows:

- *construction, rehabilitation, preservation or expansion of*

⁴ Review Chapter 4 on the Classification of Property, which discusses *indigenous minority community* in detail.

- structures necessary for national defense or security affairs;*
- *occupation of land or property for practical implementation of territorial integrity defense policy.*

The term “national emergency need” is not specifically defined in Article 4; however, Article 10 describes situations when the state may exercise emergency expropriations under different procedures in a “special and emergency case,” which is:

Article 10, Law on Expropriation

Special and
national
emergency
case

[A] special and emergency case in which public security is so required, such as for fighting fires, floods, forest fires, earthquakes, imminent wars or terrorist attacks, and other situations as determined by the Royal Government. . . .

In the situations described above, the state may take the property without consultation, but is required to return it when the situation is over. Also under Article 10 and Article 16, in certain emergency situations that also involve national interest, the state has the discretion to expropriate the property without consultation required in other normal situations.

Expropriation of Communal Land of Indigenous Minority Communities

Study Question 74: Communal Land of Indigenous Minority Communities

Compare the last paragraph of Article 26 of the Land Law with Articles 4 and 10 of the Law on Expropriation.

Is there anything different about the nature of communal land of indigenous minority communities that you think supports a different standard in the expropriation of communal property?

What if some but not all of the communal land owners want to build a hospital or school on their land, would they apply to have the state expropriate their land, and if so, under which standard?

What if the Ministry of Health wanted to build a hospital on communal land of an indigenous minority community, and members of the community did not

agree to build the hospital?

The Law on Expropriation does not have any reference to the expropriation of communal lands of indigenous minority communities. Certainly it should be argued that pursuant to Article 26 of the 2001 Land Law, the expropriation would have to be a project serving the “*national interest need or a national emergency need.*”

In any event, implementing sub decrees will be needed to clarify the application of these different standards.

Public physical infrastructure projects

Article 5 contains a list of the types of public infrastructure projects that likely would meet the general public interest or national interest need requirements. Note that this is not a complete list:

Article 5 of the Law on Expropriation:

Public physical infrastructure projects include such as:

- (a) construction or expansion of railroads, roads, bridges, airports, ports and associated structures and facilities; construction or expansion of power stations, structures, facilities and lines for transmission and distribution of electrical energy;*
- (b) construction or expansion of buildings and facilities for postal, telecommunication and information technology systems;*
- (c) construction or expansion of roads, city space, vehicle parking lots, markets, parks, and public squares;*
- (d) construction or expansion of irrigation systems, clean water supply systems, sewage systems, and other public service facilities;*
- (e) construction or expansion of buildings for education, training, science, culture, health care, social security, and stadiums for performances to public audiences;*
- (f) construction or expansion of refinery and purification stations, buildings and facilities for protection of nature and environment;*
- (g) construction or expansion of buildings and facilities for exploration and exploitation of mineral resources and other natural resources;*
- (h) construction or expansion of gas systems, fuel pipes, oil refineries, oil rigs, and other systems;*
- (i) construction or expansion of buildings for settlement caused by serious natural disasters such as earthquakes, floods, fires,*

Public physical
infrastructure
projects

- and landslides, and for resettlement development;*
- (j) construction or expansion of buildings for protecting and supporting residents;*
 - (k) construction or expansion of border crossing posts;*
 - (l) construction, expansion or development of necessary structures for national defense or security;*
 - (m) establishment of new sites for protection of natural resources, forests, cultural and archeological patrimonies or protection of the environment; and*
 - (n) implementation of project in response to a national need based on the Royal Government's determination.⁵*

Nature of project determined on case-by-case basis

Expropriation
Committee
manages
process to
determine
public interest
nature

Just because a project appears to fall within one of the public infrastructure projects listed in Article 10, it does not automatically mean that the project meets the general public interest or national interest standard. The nature of the project is determined by the Royal Government on a case-by-case basis through a process managed by the Expropriation Committee, following the procedures in the Law on Expropriation.

Public
consultations
and survey

Before making its decision, the Royal Government is generally required to conduct public consultations in the project area to get the views of the concerned villages or communities, local territorial authorities and others interested in the project. In addition, a survey must be conducted to get details about the potentially affected land parcels and property owners and rights holders of the parcels.

Study Question 75: Public or Private Interest

The question of whether a proposed project is in the public interest or private interest is often very difficult to decide, particularly when the government involved is trying to attract investors and activities that will create jobs.

Under the United States Constitution, the government can take private property

⁵ See also the Law on Concessions 2007 which aims to promote and facilitate implementation of infrastructure projects with private funding in Cambodia in order to serve public interest and the need of the society and national economy and contains similar list of public physical infrastructure projects in Article 5.

only for “public use” and with just compensation. This vague standard has been challenged in the court many times by people who disagree that their property was taken for private rather than public use. These situations frequently arise when developers want to acquire land to build factories, shopping malls, entertainment and sports centers, and the like. In order to build the large projects, developers will have to convince a large number of private owners to sell their land, and negotiate with them on the price. Sometimes private owners refuse to sell, or demand a higher price than offered by the developer, blocking the developer’s plans.

The developers, and the government, take the position that the development is for the “public use” because the project will create jobs and generate much needed revenue. When people challenged these projects in courts, they frequently lose because the courts agree with the local government interpretation of “public use.” Some examples include a large privately owned sports facility in the heart of a major city, and a large privately-owned mixed use development in another large city.

Read carefully Articles 1, 2, 4(1), 5 and 7 of the Law on Expropriation. Do you think under Cambodian law, the state could take private property for essentially private projects that have public benefits, such as increasing tax revenue and creating employment?

Study Question 76: General Public or National Interest

A farmer in a village in Kampong Thom was digging holes to build a house and he uncovers some pieces of stone that appear to be part of an old temple. With this news, the government sent a team of experts from the Ministry of Culture and Fine Arts to investigate and explore the area. Subsequently, it was officially determined by the Ministry that this is a pre-Angkor temple. There is a proposal before the Royal Government to expropriate all the land in the 100 families in the village to preserve the ancient temple site.

What would be some of the questions you think that the Expropriation Committee would ask about this expropriation proposal, and whether it met the general public or national interest standards?

FAIR AND JUST COMPENSATION

When the state decides to expropriate immovable property to widen a road, or build new bridge or a new public school, many people living and doing business in the area will benefit from the new development. But others will not be so lucky, particularly people whose property is expropriated, those who need to relocate their homes and businesses, and others who lose their jobs and their means of livelihood.

In this section, we will find out who is entitled to receive compensation when private property is expropriated and how fair and just compensation is calculated and paid.

Who receives compensation in case of expropriation?

The Law on Expropriation (consistent with the Constitution) provides fair and just compensation in the case of expropriation. Article 4 of the Law broadly defines the group of persons entitled to receive compensation, as follows:

Article 4 Law on Expropriation:

Paragraph 2. “Immovable property owners and/or rights holders” refers to a physical person, private legal person, or public legal entity including a proprietor, possessor and all persons who have rights to land and are affected by an expropriation plan.

Paragraph 3. “Expropriation” refers to taking of ownership of, with fair and just compensation in advance, immovable property or real rights to immovable property of a physical person or private legal entity or public legal entity, which includes land, buildings, and cultivated plants/crops, and for construction, rehabilitation or expansion of public physical infrastructure serving the national and public interests.

With respect to a particular parcel of land that is being expropriated, the law requires fair and just compensation in advance only if the person or entity meets two criteria:

1. a proprietor or a person who has rights to the land being

- expropriated, and
2. affected by the expropriation plan.

A thorough understanding of property rights recognized and protected under Cambodia's legal system is a very important and primary factor for addressing the issue of who is entitled to receive fair and just compensation in advance of an expropriation of private property.

As we have seen in several chapters of this book,⁶ the concept of immovable property ownership under the Constitution, the 2001 Land Law and the 2007 Civil Code is not limited to definite and full ownership of the land only. Rather, ownership includes land plus the tangible and intangible property attached to the land (immovable property) and includes the right of the owner to grant real rights to others. Real rights created pursuant to law have value and are attached to the land, and persons who hold the real rights can assert those rights against any person, including the state in a case of expropriation.⁷

The Law on Expropriation is consistent with the Constitution, Land Law and Civil Code⁸ it uses not only the term "owner or ownership" but also "rights holders", "real rights", "rights to land", and "rights to occupy and use immovable property"; and specifies that "immovable property" under the coverage of this law includes land, structures and crops. As provided in Article 20 of the Law on Expropriation, disturbance to immovable property rights of lessees who have a valid agreement, suffer damages to business in operation and incur losses to capital actually invested in the business, are also entitled to compensation under the provisions of the Law on Expropriation. See Article 29, Law on Expropriation.

⁶ In particular, it may be helpful to review Chapter 1, Concepts of Property; Chapter 4, Classification of Property; and Chapter 5, Ownership.

⁷ See Chapter 7, Possession and Chapter 8, Other Real Rights.

⁸ The Civil Code was promulgated as law in 2007, (Preah Reach Kram No. NS/RKM/1207/030, December 8, 2007), prior to the enactment of the Law on Expropriation in 2010; However, the Civil Code was not applicable until December 21, 2011 upon the determined date of application of the Law on the Application of the Civil Code. See the Ministry of Justice Notice #10 KY.SChN/11 dated December 20, 2011.

Other provisions of the Law on Expropriation expand on the types of rights holders that are entitled to fair and just compensation:

1. Immovable property owners and/or rights holders

Proprietor,
acquisitive
possessor and
rights holders

As noted above, the Law on Expropriation uses the phrase “immovable property owners and/or rights holders” instead of “owners or ownership” alone. It describes in Article 4(2) “immovable property owners and/or rights holders” as “*a physical person, private legal person, or public legal entity including a proprietor, acquisitive possessor[*pokeak*] and all persons who have rights to land and are affected by an expropriation plan.*”

One of the areas that has been problematic for Cambodia in implementing some donor funded infrastructure projects is that the donors require the government to pay compensation to persons displaced by the project although the persons have no lawful ownership or possession rights to the land being acquired. Often, these people are “informal settlers” who occupy state public land, such as road right-of-ways, because they are landless and have no other place to live.

Informal settlers

Article 19 of the 2001 Land Law specifically prohibits the payment of “compensation or reimbursement for expenses paid for the maintenance or management of immovable property that was illegally acquired.” Article 19 does not prohibit the state from considering other ways to provide social assistance to these families in the context of a public infrastructure development project, such as social land concessions to families who would be without land or shelter as a result of the development project, or funds to assist these families to relocate. However, these social assistance programs are not specifically provided in the Law on Expropriation.

2. Lessee

Lessee

The Expropriation Law also specifies in Article 4(1) that expropriation refers to “*expropriation of immovable property ownership or real rights to immovable property ... including land, structure and crops ...*”, and

states in Article 4(6) that lessee refers to “*individual or legal entity who obtain rights to occupy and use immovable property from the owner of the immovable property.*”

Article 29 of the Law makes it clear that disturbance to immovable property rights of lessees who have a valid agreement, suffer damages to business in operation and incur losses to capital actually invested in the business, are also entitled to compensation under the provisions of the Law on Expropriation.

In summary, the Law on Expropriation should be interpreted consistent with the Constitution, the 2001 Land Law and the Civil Code. The Law on Expropriation uses not only the term "owner or ownership" but also “rights holders”, "real rights", “rights to land”, and “rights to occupy and use immovable property,” and it specifies that “immovable property” under the coverage of this law includes land, structures and crops.⁹

Compensation Standards

As you might imagine, determining what amount is fair and just compensation for expropriation of property will differ greatly depending on whether one is the buyer (the government) or the seller (the person whose property is being expropriated). Unlike sales between willing buyers and willing sellers, where the seller can simply refuse the offer of the buyer, expropriation amounts to a forced sale.

To some extent, the government buyer – through the Expropriation Committee – has the upper hand in an expropriation. Since it is the government’s responsibility to protect public funds, the Expropriation Committee must take care not to overpay for the property. However, the government also has an obligation to be fair and to protect the rights

⁹ The Law on Expropriation focuses primarily on immovable property ownership and rights and does not address movable property. Thus it is not clear whether the Law on Expropriation recognizes damages or losses to other movable property by an act closely associated with or consequential of an expropriation. The Constitution protects all types of property, immovable and movable.

of the forced sellers.

The Expropriation Committee will select an independent committee or agent to determine market value or replacement cost, which may help the Expropriation Committee make unbiased appraisals for fair and just compensation.

In addition, the law provides a means for challenging the level of compensation to a Grievance Committee, and ultimately to the courts. The complaint process will be discussed in a later section.

For compensation purposes, we will look at two broad classes of property: tangible (physical things) and intangible (rights). Different compensation standards are required to determine fair and just compensation for these different types of property.

Compensation standards for tangible property

Compensation for tangible property is easier to understand since most of own some tangible property, and frequently buy and sell tangible things. The Law on Expropriation has very contains very basic compensation standards for tangible property in Articles 22, 24, 25 and 26, as summarized below.

Compensation
standards for
tangible
property

1. Compensation is based on replacement cost or market price, although these terms are not defined.
2. Replacement cost and market price are to determined by an independent agent or committee selected by the Expropriation Committee, although it is not clear how or when the agent will be appointed.
3. Payable compensation amount is based on the overall compensation amount minus any land transfer tax and/or unused land tax due to the state.
4. The compensation rate shall not take into account any price fluctuation subsequent to the date of the Declaration on a concerned Expropriation Plan. The reason for this is that once the project is known, land values may go up (or down).

5. Compensation may be paid in cash, in kind or in replacement rights based on actual case and agreement between property owner (or rights holder) and the Expropriation Committee.

These standards seem clear and straight forward; however, many questions remain unanswered. Presumably, these questions will be addressed in the sub decree required by Article 24 (and other Articles).¹⁰

Replacement cost and market price

Simply stated, replacement cost is how much it would cost a person to replace an asset at a specific time. And, market price is the price is the price agreed between a willing buyer and a willing seller under ordinary circumstances, where they are both independent and on equal footing.

Replacement
cost versus
market price

But there is much debate about these definitions. Some donors and experts think there is little practical difference between the two terms. For example, the World Bank notes that: “Where markets provide reliable information about prices and availability of comparable assets or acceptable substitutes, market cost plus transaction costs (for example, all preparation and transfer fees) is equivalent to replacement cost.”¹¹

Here is an example of the definition of replacement cost that was included in a donor-funded road project for the Royal Government. See if you can see how the different compensation standards will be applied:

¹⁰ For example: When must an independent agent or committee be selected and commence their work in establishing the rates of replacement cost or market price for compensation purpose? How and based on what standards will the agent or committee determine compensation rates for different types of real rights? Can the determinations of the independent agent or committee be reviewed by the Expropriation Committee and/or the court? What will happen if there is no agreement between the property owner (or rights holder) and the Expropriation Committee with regard to the medium of compensation payment?

¹¹ ADB defines in the Glossary of its Summary of the Handbook on Resettlement: A Guide to Good Practice (1998) the term “replacement rates” as “cost of replacing lost assets and incomes, including cost of transactions.” Similarly the World Bank, in its Involuntary Resettlement Sourcebook (2008) page 51, explains that “replacement cost” is the method of evaluation of assets that help determine the amount sufficient to replace lost assets and cover transaction costs. The Sourcebook further states that “in applying this method of evaluation, depreciation of structures and assets should not be taken in account.”

Replacement cost is the amount calculated before displacement which is needed to replace an affected asset without deductions for taxes, and/or costs of transaction as described below:

- (i) productive land (agricultural, fishpond, garden, forest) based on market prices that reflect recent land sales, and in the absence of such recent sales, based on productive value;*
- (ii) residential land based on market prices that reflect recent land sales, and in the absence of such recent land sales, based on similar location attributes;*
- (iii) houses and other related structures based on current market prices of materials and labour without depreciation nor deductions for salvaged building materials;*
- (iv) standing crops based [on] current market value of the crop at the time of compensation;*
- (v) perennial crops and trees, cash compensation equivalent to current market value given the type, age and productive value (future production) at the time of compensation;*
- (vi) timber trees, based on diameter at breast height at current market prices.¹²*

Study Question 77: Calculating replacement and market cost

Imagine that the Takeo provincial government announces a plan to convert and expand a rural road into a ring road around the provincial town. Sophy has a parcel of land along that road where she built a wooden house and food stall on one part and planted fruit trees on the remaining part. If the road is built, her house and food stall would have to be removed completely and most of Sophy's land and fruit trees would be taken for the right-of-way for the expanded road.

The expropriation plan contains the same language as the example stated above.

Recently someone who did not know about the plan to expand the road offered to buy Sophy's land at \$5/m². However, she refused the offer because for her to get land with similar characteristics to her land (in terms of location, road frontage and land productivity or quality) she must pay \$10/m². To rebuild her

¹² Resettlement Plan for National Road 56 & National Road 68-B road project funded by the Asian Development Bank (ADB).

house and food stall at the new location would cost \$1,150. Sophy could sell the wood and other materials in her house and food stall for about \$400.

Sophy planted her fruit trees 10 years ago. Last year, she was able to earn \$100 from selling her fruit, and she can expect to earn at least that much for the next 10 years. If she has to plant new trees, she will have to wait 10 years before she can earn the equivalent of what she earns now.

How would the replacement cost be calculated for the following:

- (1) Land*
- (2) House*
- (3) Food stall*
- (4) Fruit trees*

Compensation for other types of property

So far we have discussed compensation for only certain types of tangible property. But as you know from earlier parts of this book, there is a broad range of intangible property that could be subject to involuntary acquisition by the state for development projects. How is fair and just compensation determined for this other type of property?

Article 29 of the Law on Expropriation provides the general rules for compensation to business owners affected by expropriation:

Article 29, Law on Expropriation:

A lessee who is holding a proper agreement is entitled to compensation for disruptions involved with the taking such as for dismantling structure and facilities, and transporting them to a new site.

For an immovable property lessee who is operating a business on the site shall be entitled to compensation for impacts on his/her business as well as to a just and fair additional allowances for the capital actually invested in the business operation up to the date of the declaration on expropriation plan.

For a taking of a site with business in operation, the immovable property owner is entitled to receive additional compensatory allowances at a fair and just rate for the cost of the actually affected property existing by the date of the declaration on expropriation

plan.

Study Question 78: Compensation for business losses

Let's look at the example of the very popular noodle shop that will not be able to operate when the provincial government widens a road. Although none of the land will be taken by the project, the shop will not be able to operate for 6 months while the road is being built because of limited access and excessive noise and dust.

What types of intangible property losses will the noodle shop owner have?

What information about the business do you need to know in order to calculate the compensation that must be paid in this case?

Looking at Sophy's example, we can see that much more detailed guidelines are required in order to properly compensate this small noodle shop owner. What if Sophy were to lose her entire shop, not just a suspension of services? What if Sophy were not the land owner, but was a lessee of the land owner?

The guidelines need to address different situations:

- Is the person the owner or the operator of the business?
- Is the business formal or informal?
- Is the business affected by suspension, relocation or closing?
- Under what situations should salaries or wages for employees or workers of the affected business be paid?
- What about loss of rental income if the owner rents the property?

These and many other questions need to be resolved in order to ensure fair and just compensation under the Law on Expropriation.

Compensation Options

Compensation
options

Article 24 of the Law on Expropriation provides methods for payment of compensation:

Article 24, Law on Expropriation

Compensation shall be made in cash, in kind or in term of replacement rights, according to the actual situation based on the consent from the immovable property owners and/or the rights owners/holders and from the Expropriation Committee.

The formalities and procedures for compensation payments shall be determined by a sub-decree proposed by the Ministry of Economy and Finance.

A quick reading of Article 24, might lead one to think that the law provides persons affected by the project three options for payment of compensation: in cash, in kind or in term of replacement rights. It is not clear that persons affected by the project can freely chose the option that they prefer. The important phrases in this Article are “based on the actual situation” and “agreement between immovable property owner and/or rights holder and the Expropriation Committee.”

Study Question 79: Compensation options

Do you think having a choice of these compensation options would help people like Sophy?

What types of people do you think would prefer cash over the other compensation options?

What happens if Sophy and the Expropriation Committee do not agree on the medium of compensation payment?

How does the phrase “based on the actual situation” affect the choice in the following situations:

-- The Expropriation Committee has replacement land but Sophy wants cash because she wants to move to another place?

-- The Expropriation Committee does not have replacement land and wants to pay Sophy in cash but Sophy wants replacement land?

Payment of Compensation in Advance

Payment must be made at least 30 days in advance of

Article 44 of the Constitution, Article 5 of the 2001 Land Law, and Articles 19 (first paragraph) and 21 of the Law on Expropriation require

expropriation that fair and just compensation must be paid in advance of the expropriation of private property by the state. But in practice, how long in advance? One day? One week? One month?

The Law on Expropriations does not state definitively the exact period of time that fair and just compensation must be paid in advance of expropriation. In this section, we will discuss several different articles from which we can deduce that compensation must be paid at least 30 days in advance of the taking. What the law actually states is that generally, an owner or rights holder may occupy the premises up to one month after compensation is paid. And during this time, the owner or rights holder is responsible for the property until the Expropriation Committee takes it over.

To put this time period in context, go back and read “Basic Stages of the Expropriation Process,” paying particular attention to “Stage 3: Expropriation Committee issues Declaration on Expropriation Plan,” and “Stage 4: Carry out the Expropriation.”

In Stage 3, the Expropriation Committee issues the Declaration on Expropriation Plan pursuant to Article 17 of the Law on Expropriation. The purpose of the declaration is to notify people that will be affected by the project about the project, the time frame of the project, and the competent authorities to carry out expropriation.

The date of the declaration of expropriation plan is very important as the declaration is official notice to people that their ownership or other rights will be taken by the project.

In the study questions above, when Sophy receives a copy of the declaration of expropriation plan, she is on official notice that she has to move. As a practical matter she would need to find a new location, rebuild her house and food stall, and make plans for getting her children in a new school. Like most other people, Sophy probably will not have sufficient cash on hand that she can use to buy the land and build her house and food stall.

In Stage 4, the expropriation actually takes place, and it begins when the Expropriation Committee makes an expropriation decision. According to Article 21 of the Law on Expropriation, notice of this decision must be given – presumably to all people affected by the expropriation, although the law does not contain any specific notice requirements.

The expropriation decision itself must contain specific information as provided in Article 20 of the law:

Article 20, Law on Expropriation

An expropriation of immovable property ownership and other real rights shall be exercised through a decision of the Expropriation Committee. An expropriation decision shall set out the following:

- *Ownership to immovable properties and real rights to immovable properties to be expropriated;*
- *Compensation to be paid;*
- *Deadline for the immovable property owners and/or rights owners/holders to vacate the site and hand over the immovable properties to the Expropriation Committee.*

It is not clear how long the time period is between the Declaration of Expropriation Plan (Article 17) and the issuance of the notice of the expropriation decision in Article 21. In any event, when Sophy and her neighbors receive this expropriation decision, they will know for sure the compensation amount the government intends to pay them for the property taken. In addition, the expropriation decision will state the specific deadline for owners and rights holders to vacate the properties and hand them over to the Expropriation Committee.

At some point after the notice of expropriation decision is given, the Expropriation Committee then pays the compensation in full. From the date compensation is paid in full, the owner or rights holder has the right to remain for a period up to one month, as provided in Article 31:

Article 31, Law on Expropriation

Unless otherwise agreed or permitted, the immovable property owners and/or the right owner/holders may continue to occupy the

immovable properties for a period up to 1 (one) month after the Expropriation committee has paid the full compensation in accordance with procedures set out in Chapter 4 of this law.¹³

Unless otherwise specifically authorized by the Expropriation Committee, at the end of the one-month period the owner or rights holder must leave the expropriated site and cannot return to occupy or use the site in any manner. Any unauthorized person who returns to occupy or use the expropriated site or any person, who, with ill intent, obstructs the implementation of an expropriation decision, will be subject to a fine and imprisonment, as provided in Articles 36 and 37 of the law.

Study Question 80: Payment in advance of taking

Sophy was informed that the government would acquire her land on April 1, but that she would not have move until May 15. On May 1, the government paid her compensation in full. What is the latest date to pay Sophy for the acquisition of her property?

Responsibility for property after payment of compensation

As noted above, after the government paid for the property the government intends to expropriate, the property owner or rights holder is entitled to remain on the property for at least thirty days after payment. In fact, the property owner or rights holder is responsible for safekeeping the property during the period prior to the property handover as provided in Article 27.

Owner
responsible for
property after
compensation
is paid and
before handing
over

Article 27, Law on Expropriation

After receiving full compensation payment, the immovable property owners and/or rights owners/holders shall continue to be responsible for safekeeping, dwelling, possessing and benefiting from those rights and immovable properties until the properties are accepted by the Expropriation Committee.

¹³ The procedures in Chapter 4 relate to three topics discussed above: Section 1: Procedures Prior to Expropriation; Section 2: Expropriation Process; and Section 3: Compensation for Expropriation.

Study Question 81: Responsibility for property after compensation paid.

In the study question above, Sophy knew that she would have to move, so she found a new place to relocate and was prepared to move as soon as the Expropriation Committee paid her for her property. She wants to move into her new place right away.

The Expropriation Committee is not yet ready to accept her property. Sophy thinks it should be the government's responsibility to take care of the property, as she is not able to be in two places at one time. If she stays on the expropriated land, she won't be able to set up her new business and will not be making any money. If Sophy came to you for advice, how would you advise her? What do you think is meant by legal responsibility to safeguard the expropriated property?

As might be expected, not all affected property owners will agree with the government's valuation of their properties and amount of compensation they will receive. Some people may argue that their land and other property are worth a lot more than the government will agree to pay. The Law on Expropriation establishes procedures to resolve these and other complaints that affected persons may have. We will discuss these procedures in later sections.

Some of these disputes can be very complex and their resolution may take a long time, especially for a large project affecting a large number of people. What happens if the property owner disagrees with the amount of money offered by the government and refuses to take the payment? Does the government have to wait until all the complaints are resolved before commencing with the project, or can the project proceed? And if the owner refuses to take the payment, how can the government meet the requirement to pay in advance of the acquisition?

Unresolved
disputes do not
stop land
acquisition

Payment in case of dispute

One of the biggest disputes that typically arises as a result of expropriation is the government's valuation of the property that the

government intends to take. Of course, the government wants to pay as little as possible for the property, and the property owner or rights holder wants to get as much compensation as possible. Each side may think their valuation of the property is “fair and just.” The difference here is that people really do not have a choice about selling their property, and in that respect, the parties to the forced sale are not equal.

The Law on Expropriation provides a process for challenging the government’s valuation of the property (discussed later in this chapter). In some cases, the challenges could last for months or even years.

What happens in these cases? If the project has to wait until all the compensation disputes have been resolved, the cost of the project likely would increase dramatically, and the benefits of the road, railroad, school or other public infrastructure project would be delayed. The question at this point is not whether the person has to sell the property or not, but the amount of compensation.

To avoid costly project delays, the Law on Expropriation provides that the government can still carry out the expropriation although an owner or rights holder refuses to accept the payment offered by the Expropriation Committee for the property, or takes the payment from the Expropriation Committee, but still pursues his or her complaint in accordance with Article 34 of the Law, actual expropriation can be made even if the dispute is not finally resolved.

Article 19, second paragraph, Law on Expropriation

Still an expropriation can be exercised, even though a dispute has not been completely resolved. The immovable property owners and/or the rights owners/holders who receive compensation payment from the Expropriation Committee still have the right to continue their complaint in accordance with the complaint and dispute resolution procedures set out in Article 34 in Chapter 6 of this law.

Complaint Procedures

Complaint procedures Some people living near a proposed infrastructure development project will be very happy to see the new development come to their area. The

value of their property may increase and they may realize new business opportunities from the development. But others will oppose the proposed development, particularly the people who will be displaced by the new development. Not only will they lose their property to the development, but they may not be able to benefit from the increased opportunities created by the development.

During Stage 2 of the expropriation process, the Expropriation Committee conducts a public survey and holds public consultations to provide information and obtain feedback on the proposed project by all those who would be affected by the project. This gives people an opportunity to raise any objections, but this is not part of the formal complaint process.

Chapter 6 of the Law on Expropriation provides basic principles and procedures for the resolution of complaints that people can file at different stages of a project cycle. There are only three articles in Chapter 6, so most of the details need to be elaborated in implementing sub decrees and other regulatory texts.

The first step of the complaint process is to file a complaint with the Expropriation Committee. If the complaint is not resolved to the satisfaction of the complainant, the complainant may appeal to the Grievance Committee established under the Law on Expropriation. There are three general types of complaints that a person might file. The discussion that follows describes the administrative process for resolving the various types of complaints that arise. In all these cases, if the person making the complaint is not satisfied with the administrative decision or action to resolve the complaint, the person may file a complaint with the court for judicial review of the administrative decision or action. However, if the person does not file a complaint with the court in a timely manner, the administrative decision would be deemed final.

Article 32, Law on Expropriation

The Expropriation Committee and the Grievance Committee shall have the competence to receive complaints for its review and

resolution.

Article 33, Law on Expropriation

Any immovable property owners and/or rights owner/holder who disagree with a decision of the Expropriation Committee can bring their complaint to the attention of the Grievance Committee.

Article 34, Law on Expropriation

In case of disagreement with a decision of the Grievance Committee, the immovable property owners and/or the rights owners/holders can file their complaint to the competent court, concerning expropriation procedures carried out improperly, concerning the expropriation which is not for serving public or national interest, and concerning the compensation payment which is not fair and just.

The formalities and complaint procedures shall be determined by a sub-decree.

Article 35 identifies three types of complaints:

- expropriation procedures were not carried out properly,
- the expropriation is not for serving public or national interest, or
- the compensation payment is not fair and just.

The first type covers a broad range of issues such as failure to give proper notice or failure to follow the timeframe specified in the law.

The second type relates to the nature of the project. An affected person can request that the Grievance Committee conduct an investigation about whether the nature of the project is in the public interest or national interest.

Three basic
types of
complaints

The third type of complaint concerns the determination of an affected person's property right claims, compensation entitlements, and compensation calculation.

Based on Chapter 6 and other related provisions of the Law on Expropriation, the complaint procedure probably will include three steps as follows:

- First, the concerned person must submit a request for reconsideration or redetermination of the decisions of the

Expropriation Committee.

- Second, if the person is not satisfied with or does not receive a new decision of the Expropriation Committee within a specified time period, the person can file an administrative complaint with the Grievance Committee, which is established under Article 14 of the Law and is led by the Ministry of Land Management, Urban Planning and Construction. Generally, there is a 30 working day time limit for concerned persons to submit the complaint. The Grievance Committee will then investigate the complaint. The Grievance Committee will decide those issues within its legal authority, and if the issue is outside its authority, the Grievance Committee will report the result of investigation with its recommendation to the Royal Government for decision.
- Finally, if the person is still not satisfied with the Grievance Committee or the Royal Government's decision or action, the person can file a complaint to the Court.

Complaint about Proposed Project Nature, Design and Scope Determination

Of these three types of complaints, only one of them – concerning the public nature of the project – is addressed in any detail, in Article 18.

Article 18, Law on Expropriation

After receiving a declaration on expropriation plan, the immovable property owners and/or the rights owner/holder may file a request for an investigation to be conducted in order to confirm that the expropriation is actually required for public or national interest or to determine whether the project site can be moved to another location. This request/complaint may be submitted through their lawyer or representative.

After receiving the declaration on expropriation plan, a request/complaint shall be submitted in writing, within 30 (thirty) working days, with the Complaint Resolution/Grievance Committee as set out in Article 14 of this law. The main content of the request/complaint shall include such as:

- *name of the immovable property owner and/or the right owner/holder, address and telephone number;*

Filing a request to investigate nature of the project

- *reason(s) for the request/complaint;*
- *description of legalities of the concerned land; and*
- *interest(s) of the immovable property owner and/or of the owner/holder of other rights to the land subject to confiscation.*

However, the immovable property owner and/or the rights owner/holder cannot file such a complaint/request for investigation in case it is a requirement for development of major national roads, bridges, railroads, facilities for connection and distribution of water and electricity networks, oil pipes, sewage pipes, branching drainage or master drainage systems, and irrigation systems.

Within 30 (thirty) days after completing the survey, the Complaint Resolution/Grievance Committee shall write a report with recommendations and submitting to the Royal Government for decision.

The third paragraph above specifies some types of projects that cannot be subject to an investigation by the Grievance Committee – these include major national roads, bridges, railroads, facilities for connecting and distributing water and electricity networks, oil pipes, sewage pipes, branching drainage or master drainage systems, and irrigation systems. But for all other projects, affected persons may request an investigation to confirm that the expropriation is actually required for public or national interest or to determine whether the project site can be moved to another location.

Study Question 82: Complaint about public nature of project.

In the situation where Sophy's land is being taken to build convert and expand a rural road into a ring road around the provincial town of Takeo Province, would Sophy and her neighbors be able to challenge the expropriation on the nature of the road? If so, what are some of the reasons she and her neighbors might have to challenge the road?

Complaint about rights or interests to affected land or property

Rights or
interests to
affected land or

For issues concerning rights or interests to affected land or property which is as important as the issue of compensation as the calculation of

property compensation will be based on the types of affected property rights, the property owners/rights holders will be first given opportunity to inform about their claims to the public survey team commissioned by the Expropriation Committee. If their claims are not appropriately recorded or there is omission in the survey record for any reason, the claimants should find a reasonable way to bring the issues to the attention of the Expropriation Committee. If after a reasonable time, no response or satisfactorily decision from the Expropriation Committee is received by the claimants, they can file their complaints to the Grievance Committee within any specified time limit. The Law on Expropriation does not provide any time limit or recommended action to be taken by the Grievance Committee in addressing this type of complaints.¹⁴

Expropriation under Investment Protection Agreements

Over the years, the Royal Government, in order to encourage foreign direct investment, have entered into agreements with partner country to protect investors from the partner country in the case of nationalization or expropriation of their investments.¹⁵ This situation presents some very interesting issues, and is a good way to end this chapter.

The second paragraph of Article 3 of the Expropriation Law specifies how the law applies in the case of investment protection agreements between the Royal Government and partner countries:

Article 3, paragraph 2, Law on Expropriation

This law does not supersede any issues on expropriation specified in any agreement or memorandum on investment protection between the Royal Government of Cambodia and partner countries. In case there is no such agreement or in case the agreement or the memorandum does not deal with expropriation issues, any

¹⁴ It is expected that the implementing sub-decree will address this gap in the Law.

¹⁵ Nationalization is not the same as expropriation; it occurs when a state takes ownership of private assets and converts them to state ownership. For example a state nationalizes factories and banks and operates them as state-owned enterprises. Many countries, including Cambodia pre-1979, nationalized all private property, without compensating private owners, when making the transition from a capitalist to socialist system of government. The state's policy on nationalization is of great concern to private investors, local as well as foreign.

expropriation shall be governed by this law.

If there is no investment agreement, the Law on Expropriation applies fully, but where there is an investment agreement, the Law on Expropriation applies only to the extent that the Law on Expropriation is not contrary to any expropriation principles and rules incorporated in the investment agreement.

It is helpful to look at one of these investment protection agreements to get an idea about how it would be applied in the case of expropriation of an investor of a country which has such an agreement. And, in looking at this issue, we can explore how compensation and other protections are different for investors covered by investment agreements and those that are not.

For this, we will look at the relevant provisions from the the investor protection agreement between Cambodia and Japan:¹⁶

Article 12:

1. Neither Contracting Party shall expropriate or nationalize investments in its Area of investors of the other Contracting Party or take any measure equivalent to expropriation or nationalization (hereinafter referred to as "expropriation") except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) upon payment of prompt, adequate and effective compensation pursuant to paragraphs 2, 3, and 4; and (d) in accordance with due process of law and Article 4.

2. Compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is earlier. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

3. The compensation shall be paid without delay and shall include

¹⁶ Law on Ratification of the Agreement Between the Kingdom of Cambodia and Japan on Liberalization and Investment Promotion and Protection, Preah Reach Kram No. NS/RKM/0208/010 (2008). For another example, see the Law on Ratification of the Agreement Between the Kingdom of Cambodia and Republic of Pakistan on Investment Promotion and Protection, See Preah Reach Kram No. NS/RKM/1007/026 (2007).

interest at a commercially reasonable rate, taking into account the length of time until the time of payment. It shall be effectively realizable and freely transferable and shall be freely convertible into the currency of the Contracting Party of the investors concerned, and into freely usable currencies as defined in the Articles of Agreement of the International Monetary Fund, as may be amended, at the market exchange rate prevailing on the date of expropriation.

4. Without prejudice to the provisions of Article 17, the investors affected by expropriation shall have a right of access to the courts of justice or administrative tribunales or agencies of the Contracting Party making the expropriation to seek a prompt review of the investors' case and the amount of compensation in accordance with the principles specified in this Article.

Article 4:

1. Each Contracting Party shall accord to investments of the other Contracting Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Reading Article 3(2) of the Law on Expropriation together with the these expropriation clauses in the investment protection agreement with Japan, we can see that the Law on Expropriation provides common institutional arrangements and national administrative procedures for the expropriation process as well as for resolving complaints from investors as well as other persons affected by expropriation.

Let's look at some specific examples to see how the Article 3(2) of the Law on Expropriation might be applied to a Japanese company:

Study Question 83: Expropriation under investor protection agreement

Facts:

Kenji Company is a Japanese company covered by the investment protection agreement between Japan and Cambodia. Kenji has a long-term lease (25 years) with Mr. Heng for 3 hectares on the edge of Takeo town, close to Sophy and her neighbors. The land is approximately 120 meters wide (on the road side) and 250 meters deep. Kenji built its offices and a small factory 75 meters from the current road, and constructed housing for guards and some other

workers on the area in front of the factory. The entire property is enclosed with a brick fence, which is set back 30 meters from the right of way¹⁷ of the existing road. The fence was built with a deep setback because Kenji and Mr. Heng knew that provincial authorities wanted to widen the road, although there had been no public discussion of the expansion. Kenji Company wanted to save itself the problem of moving if and when the road was enlarged.

After a few years of successful operations, Kenji Company decided to expand its factory on the back of the land, which was to take approximately one year to complete. Construction had just begun when Kenji and people in the area learned that the expansion project was going in the final design stage; however, no information had been provided to people in the area. Kenji continued with its expansion construction as there was a contract with the construction company and Kenji would have to pay damages if they broke the contract.

A month later, Kenji Company and other people in the area went to a public consultation. Kenji learned that all of the land to expand the road was going to be taken from Mr. Heng's land. This was done to save money, as opposite Mr. Heng's land were numerous shop houses that would have to be demolished and many families dislocated. Instead, the government decided to take 40 meters from Mr. Heng's land, and no land from the other side of the road. This would mean that the factory's fence and all the housing for workers would have to be demolished and rebuilt. Kenji and Mr. Heng thought that this was not fair to take all the land required for the road expansion from Mr. Heng's land. But, since the land for the factory expansion would not be affected, Kenji continued with the expansion.

One month later, Kenji representatives and the other people living in the area received the Notice on Declaration of Expropriation. Among other things, this notice said that people must not make any improvements to their property, and if they did so, they would not receive any compensation.

Furthermore, Kenji was informed that there would be no road access for at

¹⁷ The road right of way is the strip of land between the road and private or other type of property. The right of way is held by the state for road expansion.

least two weeks, and perhaps longer. This would be during the busiest time of the year for Kenji, and it is also during this time that new equipment for the factory expansion is due to be delivered and installed.

While the workers may be able to get in and out of the property to come to work, no supplies could be shipped in and no completed products could be shipped out. Any deliveries that Kenji had scheduled for this time period would not be made in a timely manner. Furthermore, the lack of road access would mean that the construction company could not get in and out to complete the construction project on time, and the new equipment for the expansion could not be brought in and installed.

Questions:

What should Kenji Company do about the construction of the expanded building? Remember, if Kenji breaks the contract, the construction company can claim damages.

Can Mr. Heng complain about the government taking all the property from their side of the road under the Law on Expropriations? How about Kenji – can the company complain under the Law on Expropriations? What can Kenji Company do under the investment protection agreement?

What if the road was not a provincial road, but a national road? Could Mr. Heng complain about the government taking all the property for their side of the road? Can Kenji Company complain about the nature of a national road under the investment protection agreement?

*What damages can Mr. Heng claim from the Expropriation Committee?
What damages can Kenji Company claim from the Expropriation Committee?
When does the government have to pay compensation to Mr. Heng?
Is there any different timeframe for paying compensation to Kenji Company under the investment protection agreement?*

What if any differences can you identify between the compensation of Kenji Company under the investment protection agreement and another factory owner not covered by an investment agreement?

Conclusion

This concludes our study of the legal principles, policies, procedures, guidelines and practices for (1) expropriation of private property by the state for development projects and (2) payment of fair and just compensation in advance of the expropriation.

To help addressing some of the concerns of Cambodia's development donors, Cambodia recently enacted a Law on Expropriation which set out common principles, mechanisms and procedures for expropriation of private properties for development projects serving general public interests, national interests or special/necessary and emergency cases. The Law does not address in detail all of the requirements for some development partners, particularly the World Bank and the ADB. However, it does provide common institutional arrangements and national administrative procedures for dealing with complaints from any investor affected by an expropriation plan in the same way as for other affected persons. The law leaves a lot of details to be spelled out in implementing regulations, that must be adopted in order for the law to be properly and fully implemented.

ANNEXES

1. List of Study Questions

<i>Study Question 1: What is property?</i>	6
<i>Study Question 2: What things can be property?</i>	8
<i>Study Question 3: Things that are not considered property</i>	9
<i>Study Question 4: Tangible and Intangible Things</i>	9
<i>Study Question 5: Real Rights</i>	18
<i>Study Question 6: Immovable Property by Law</i>	24
<i>Study Question 7: Distinguishing immovable property from movable property</i>	25
<i>Study Question 8: The need to make changes to the land law</i>	42
<i>Study Question 9: Reasons for making changes to the land law</i>	43
<i>Study Question 10: Changed attitudes and practices about land ownership in Cambodia</i>	44
<i>Study Question 11: Categories of immovable property</i>	59
<i>Study Question 12: Classes of properties under the 2001 Land Law</i>	61
<i>Study Question 13: Categories of immovable property</i>	63
<i>Study Question 14: Property classification, example 1</i>	65
<i>Study Question 15: Property classification, example 2</i>	65
<i>Study Question 16: Property classification, example 3</i>	66
<i>Study Question 17: Property classification</i>	66
<i>Study Question 18: Purpose of forest classification</i>	76
<i>Study Question 19: Ownership Rights</i>	81
<i>Study Question 20: Ownership Rights</i>	83
<i>Study Question 21: The extent of a person’s land ownership</i>	90
<i>Study Question 22: Encroachments under and above land</i>	93
<i>Study Question 23: Ownership rights to improvements on the land</i>	95
<i>Study Question 24: “Good Faith” and “Bad Faith”</i>	100
<i>Study Question 25: Rights to soil added to a land parcel by a navigable river</i>	104
<i>Study Question 26: Jointly owned properties</i>	110
<i>Study Question 27: Short-term Leases on undivided joint property</i>	113
<i>Study Question 28: Agreements to prohibit division of undivided joint property</i>	116
<i>Study Question 29: Indivisible Joint ownership</i>	119
<i>Study Question 30: Renunciation of Rights to Joint partitions</i>	123
<i>Study Question 31: Demanding Indivisible Joint Ownership</i>	123
<i>Study Question 32: Co-owned properties</i>	124
<i>Study Question 33: Co-ownership</i>	125
<i>Study Question 34: Limits on use of property by co-owners</i>	126
<i>Study Question 35: Regulation of common areas</i>	128
<i>Study Question 36: Retroactivity of Article 180</i>	130
<i>Study Question 37: Responsibilities of co-owners</i>	131
<i>Study Question 38: Destruction of co-owned property</i>	134
<i>Study Question 39: Separation of Real Rights by Owner</i>	136
<i>Study Question 40: Possession of State Public Property</i>	146
<i>Study Question 41: Acquisitive Possession Rights</i>	151
<i>Study Question 42: Possession of abandoned land</i>	157
<i>Study Question 43: Invalid possessions</i>	158
<i>Study Question 44: Issues that may arise when transferring possession rights</i>	159
<i>Study Question 45: Difference between acquisitive possession and ownership</i>	161
<i>Study Question 46: Acquisition of ownership by prescriptive possession</i>	162
<i>Study Question 47: Proving intention and good faith</i>	167
<i>Study Question 48: Type of land subject to prescriptive possession</i>	168
<i>Study Question 49: Only a perpetual lease can be a real right</i>	177
<i>Study Question 50: Rights and responsibilities of lessee</i>	179

<i>Study Question 51: Alterations to property under perpetual lease</i>	182
<i>Study Question 52: Repair and maintenance under perpetual lease</i>	185
<i>Study Question 53: Rights of Use and Stay - 1</i>	193
<i>Study Question 54: Rights of Use and Stay - 2</i>	193
<i>Study Question 55: Rights of third parties</i>	202
<i>Study Question 56: Rights of third parties</i>	203
<i>Study Question 57: Rights of third party purchasers</i>	203
<i>Study Question 58: Retention Right</i>	219
<i>Study Question 59: Preferential Rights, part 1</i>	222
<i>Study Question 60: Preferential Rights, part 2</i>	225
<i>Study Question 61: Preferential rights with equal ranking</i>	227
<i>Study Question 62: Systematic Land Registration Process</i>	240
<i>Study Question 63: Conflicting Evidence</i>	243
<i>Study Question 64: When systematic and sporadic land registration procedures are used</i>	246
<i>Study Question 65: Registration of real rights other than ownership</i>	250
<i>Study Question 66: Sale of immovable property between spouses</i>	254
<i>Study Question 67: Effect of Registration of Transfer of Ownership</i>	256
<i>Study Question 68: Reasons for Cadastral Registration System</i>	258
<i>Study Question 69: Recordation of ownership deed</i>	258
<i>Study Question 70: Effect of Registration</i>	260
<i>Study Question 71: Effect of Recordation under Recordation System</i>	260
<i>Study Question 72: Duplicated or Triplicated Land Certificates</i>	264
<i>Study Question 73: Meanings of expropriation terms in the Constitution</i>	271
<i>Study Question 74: Communal Land of Indigenous Minority Communities</i>	279
<i>Study Question 75: Public or Private Interest</i>	281
<i>Study Question 76: General Public or National Interest</i>	282
<i>Study Question 77: Calculating replacement and market cost</i>	289
<i>Study Question 78: Compensation for business losses</i>	291
<i>Study Question 79: Compensation options</i>	292
<i>Study Question 80: Payment in advance of taking</i>	295
<i>Study Question 81: Responsibility for property after compensation paid</i>	296
<i>Study Question 82: Complaint about public nature of project</i>	301
<i>Study Question 83: Expropriation under investor protection agreement</i>	304

2. List of Tables

<i>Table 1: References on history of Cambodia's immovable property legal framework</i>	41
<i>Table 2: Main Headings 1992 and 2001 Land Laws and 2007 Civil Code Provisions</i>	46
<i>Table 3: Status of selected provisions of 2001 Land Law after the 2007 Civil Code</i>	55
<i>Table 4: Rights to transfer immovable property under the 2001 Land Law</i>	77
<i>Table 5: Owners' rights and options with regard to improvements made in bad faith</i>	101
<i>Table 6: Owners' rights and options with regard improvements made in good faith</i>	102
<i>Table 7: Definitions and Elements for Acquisitive Possession</i>	155
<i>Table 8: Other Conditions to Acquire Lawful Acquisitive Possession or Owner Status</i>	156
<i>Table 9. Comparison of Acquisitive and Prescriptive Possession</i>	171
<i>Table 10: Summary of Systematic Land Registration Process</i>	239
<i>Table 11: Summary of Sporadic Land Registration Process</i>	245
<i>Table 12: Procedures for Duplicated or Triplicated Land Certificate</i>	264

3. List of Figures

<i>Figure 1: Illustration of rights to newly formed land masses in non-navigable rivers</i>	105
<i>Figure 2: Easements</i>	202

This book explains the fundamental concepts of immovable property law in Cambodia under the 2001 Land Law. The major topics include:

- Basic concepts of immovable property
- Historical view of Cambodia's Land Law up to December 2011
- Comparison of 1992 and 2001 Land Laws with relevant provisions of the 2007 Civil Code
- Classification of immovable property
- Real Rights – Ownership
- Forms of Ownership
- Real Rights – Possession
- Usufructuary Real Rights
- Immoveable Property Real Security Rights
- Registration and Transfer of Immoveable Property
- Expropriation of Private Property

