

LEGAL FRAMEWORK FOR DOING BUSINESS

1. Establishment of Business Entities

The Law on Commercial Enterprises (LCE), which was promulgated in September 2005, provides a comprehensive legal framework for the establishment and operation of businesses. It allows for the establishment of the following forms of business organisation: (i) a *Sole Proprietorship*; (ii) a *General Partnership* (in which the partners are personally liable for the partnership's obligations); (iii) a *Limited Partnership* (in which a general partner is personally liable for the partnership's obligations and a limited partner is liable only to the extent of his agreed contribution); and (iv) a *Limited Liability Company*, which may be either a private limited company (which may not have more than 30 shareholders, may restrict share transfer, and may not offer shares to the public), or a public limited company (which may offer shares to the public).

a) Nationality, legal personality and foreign business

The LCE stipulates that a company is considered to have Cambodian nationality if it has a registered office in Cambodia, and at least fifty one percent of its shares are owned by Cambodian nationals. Only companies with Cambodian nationality will be permitted to register corporate names that imply such nationality. A limited liability company with Cambodian nationality is referred to as a "local company". A general partnership that has acquired legal personality is deemed to be of Cambodian nationality only if the general partnership has a place of business and a registered office located in Cambodia, and more than fifty one percent of the record ownership interest is held by natural or legal persons of Cambodian nationality.

Cambodia places very few restrictions on the level of foreign participation in investments. As a result, a substantial proportion of investors choose to establish one hundred percent foreign-owned limited liability companies.

The LCE further stipulates that a foreign business is a legal person formed under the laws of a foreign country where it has a place of business and doing business in Cambodia. The three main forms of a foreign business are a representative office, a branch and a subsidiary.

A representative office and a branch are agents of their principals and do not have a legal personality separate from their principals. A foreign business shall be considered to be "doing business" if the foreign business performs any of the following: (i) rents office or any other space for manufacturing, processing or performing services for more than one month; (ii) employs any person for more than one month; or (iii) performs any other act permitted for a foreign physical and legal person by Cambodian laws.

b) Representative Office (RO)

A Representative Office or commercial relations office is primarily designed to facilitate sourcing local goods and services, and collecting local information for the parent company. It also serves as a vehicle for promoting and marketing the offshore parent's products and services in the country. It is best suited to assist foreign firms wishing to promote their products in the Cambodian marketplace. It may perform the following acts in Cambodia: (i) contact customers for the purpose of introducing customers to its principal; (ii) research commercial information and provide the information to its principal; (iii) conduct market research; (iv) market goods at trade fairs and exhibit samples and goods in its office or at trade fairs; (v) buy and keep a quantity of goods for the purpose of trade fairs; (vi) rent an office and employ local staff; and (vii) negotiate commercial contracts on behalf of the parent company, although such contract must be entered into by the parent company.

The RO is however subject to tax requirements with regard to the withholding tax on salaries paid to employees in Cambodia.

c) Branch Office of Foreign Company

A Branch Office of a foreign company ("BO") is an office that is opened by a company of another foreign country for the purpose of conducting a particular commercial activity in Cambodia. The BO is the same entity as the parent company, and therefore carries its same name. In addition to conducting the same activities as the RO, it may regularly purchase goods and services or conduct regular professional services or other operations engaged in manufacturing, processing and construction as a local enterprise as long as it does not perform acts prohibited by law to a foreign physical or legal person.

One notable consideration for branches is that the foreign parent company can be legally liable for the losses and debts of the branch. The BO is subject to the commercial registration requirement of the Ministry of Commerce (MoC) and must also meet local taxation obligations. Moreover, the LCE required that the word "Branch Office" be placed before or after the name of the parent company.

d) Subsidiary

A subsidiary is a company that is incorporated in Cambodia with a legal personality separate from the principal foreign company and has at least fifty one percent of its capital held by that foreign company. Each subsidiary is subject to commercial registration requirement of the MoC. The LCE stipulates that the memorandum and articles of association (M&A) of the subsidiary incorporates all the elements regarding its formation, management, right and other obligations. A subsidiary may be incorporated in the form of a partnership or limited company and may carry on business the same as a local company except for any act that is prohibited for foreign natural or legal person by Cambodian laws.

2. Incorporation of a Limited Liability Company (LLC)

a) Incorporation process

There are mainly three government institutions which exercise jurisdiction over companies during the incorporation process, namely: (i) the Ministry of Commerce (MOC); (ii) the Ministry of Economy and Finance (MEF); and the Council for the Development of Cambodia (CDC), if it is an investment company.

Anyone can register a company with the MOC through its online access although using a legal professional is highly advisable for companies with a complex shareholding structure. A request for the company name search with the MoC/Intellectual Property Department is a prerequisite to ensure the intended name is available. The application for incorporation is done with the MoC/Legal Department. The newly incorporated company must obtain a Business Licence (*Patente*) from the MoC and register for VAT with the General Department of Taxation (GDT). Effective from January 2015, a shareholder or director is required to appear physically at the GDT to have the necessary personalised digital record.

There is an additional requirement to obtain prior specialised licences from various government entities if a company's Memorandum and Articles of association (M&A) lists its corporate objectives as doing business within a certain regulated business sectors, such as banking, construction and real estate, financial leasing, insurance, medical, mining, oil and gas, and telecommunications.

b) Characteristics of an LLC

The LCE requires a minimum capital investment of four million Khmer Riel, or about USD 1,000, at the current exchange rate. The shareholders' liability is limited to the value of his/her capital contribution. A private LLC must issue a minimum of 1,000 shares with a par value of not less than KHR 4,000 per share. The company has only one class of share unless the M&A specifies other classes. If the M&A provides for more than one class of share, the rights of each class of share may be absolute, relative, or contingent. The rights, privileges, restrictions, and conditions attaching to the shares of each class must be detailed in the M&A.

A private LLC can have one or more directors, while a public LLC must have at least five but not more than 15 directors. Shareholders elect directors by ordinary resolution and in turn the board of directors elects a chairman from among its members by a majority vote. Each director is elected for a term of two years with possibility of re-election. Any legally competent natural person over 18 years of age may serve as a director. For directors serving in regulated sectors like banking, insurance and listed companies, there are more stringent requirements, *i.e.* in term of submission of criminal records clearance from a Cambodian or foreign jurisdiction as the case of nationality may be, proof of no previous bankruptcy within the last five years, a minimum experience of at least three years in the field relevant, and clearance of conflict of interest.

For public listed companies, the Securities Exchange and Commission of Cambodia requires that its board has at least one-fifth (1/5) as independent directors. In case of a foreign national, independent director shall have six months of prior working experiences in Cambodia before his/her appointment.

In term of corporate governance, the LCE contains many advanced provisions, which follow current international best practice in countries with developed capital markets, such as: (i) imposition of a “duty of care” on directors and officers; (ii) provision for derivative lawsuits brought by investors in the name of the company against misbehaving directors; (iii) detailed provisions for a company’s board of directors, including statements of their powers, provisions for their removal at shareholder discretion, committees, and disclosure of conflicts of interest; (iv) detailed provisions for company shares, including authorisation of different classes of shares and share options, and prohibition of bearer shares; (v) prohibition of dividends or share buybacks when insolvency of the company would result; (vi) detailed rules for shareholder meetings, voting, proxies and other investor-protective matters; and (vii) requirements for financial statements, audits and shareholder access to them.

** Article courtesy of Dr. Sok Siphana, Advisor to the Royal Government of Cambodia*

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