

# **Conference on Cambodia's Microfinance Amid Global Financial Crisis**

***THE ROAD AHEAD FOR CAMBODIA***

***Legal & Regulatory Issues & Challenges***

**Bretton G. Sciaroni**

**August 20, 2009  
Phnom Penh Hotel**



**Sciaroni & Associates**

# GENERAL CONSIDERATIONS

- Rapidly Changing Legal & Regulatory Environment
- TA from IFI's has meant an increasingly professional financial environment
- NBC is a serious regulator with oversight responsibilities
- Every MFI should have a dedicated legal officer to keep up with the legal & regulatory changes



# DUE DILIGENCE

## ■ **Problems for Investors Interested in Investing in MFIs:**

### ■ **Lack of Substantial Public Records**

↳ Ministry of Commerce

↳ Tax Department

↳ Cadastral Office

### ■ **Licenses : MFI Banking License**

### ■ **No Credit Agency**

### ■ **No Court Records available in a systematic and transparent manner.**

### ■ **Newspapers?**

### ■ **Annual Reports**

↳ MFI Annual Audit Required (NBC Prakas No. B7.04-204; 2004)

↳ MEF Prakas 643 (2007) - Annual Audits for Companies of certain size.



# DUE DILIGENCE Cont'd

## Encumbrances on Movable Property

- There is no official registry of encumbrance on movable properties in Cambodia. Such encumbrances are a matter of private contract between the chargor, mortgagor or pledgor and the person to whom the assets are charged, mortgaged or pledged. It is possible under the Law on Secured Transactions (2007) to file a notice on collaterals at the Secured Transactions Filing Office of the MOC (STFO). However, not all encumbrances are filed at the STFO and in any case the STFO does not assess the validity of encumbrances filed. Hence, a search on the STFO's website will only give an incomplete view of a company's encumbrances.

- NOTE:

- Foreign investors often have to rely on the local MFIs' accounts rather than independent review in public registries.
- Similarly, local MFIs may have difficulties in assessing whether potential borrowers have already charged their assets or are involved in litigation.



# LIMITED PERFECTION OF COLLATERALS (Movable Property)

- A foreign investor financing a local MFI will seek to secure its investment with collaterals. In the case of local MFIs, those are mainly movable assets as MFIs seldom owns land. As mentioned above, interests on movable assets may be filed at the STFO. However the Law on Secured Transactions does not provide for a registration system (with STFO assessing the validity of a filed encumbrance). In fact anyone who can pay a few thousand riels may file an interest on a third party. In the absence of a neutral independent validation process, the STFO cannot guarantee an investor's interest. At best it gives a presumption only of priority.
- NOTE: In practice, the collateral that investors might obtain are charges over shares of the MFI or personal guarantees from directors or shareholders.



# LIMITED PERFECTION OF COLLATERALS

## Immovable Property

- As a matter of law, only mortgages over immovable property with hard title can officially be registered with the cadastral authorities. In practice however, many landowners are yet to obtain hard title deeds, especially in rural areas targeted by the MFIs.
- In addition, the registration system for hard title deeds varies from one local cadastral office to another. The lack of standardized and transparent registration process makes it difficult for the MFIs to assess the cost and timing of such process.



# UNCERTAINTIES IN ENFORCEMENT OF COLLATERALS

- **Litigation: A three tiered court system characterized by:**
  - ↪ Limited Resources;
  - ↪ Significant backlog of cases;
  - ↪ Limited number of attorneys.
- **Specialized Dispute Resolution Mechanisms**
  - ↪ Land Disputes: Cadastral Commission and the National Authority for Land Disputes;
  - ↪ Collective labor disputes: Statutory Arbitration Council (see [www.arbitrationcouncil.org](http://www.arbitrationcouncil.org) )
  - ↪ General Labor Disputes: Labor Court not yet established.
  - ↪ Commercial Disputes: Law on Commercial Court now in draft form.
- **Alternative Dispute Resolution**
  - ↪ Strong tradition of conciliation of disputes;
  - ↪ Commercial Arbitration Law (provides for National Arbitration Centre);
  - ↪ Commercial contracts generally provide for arbitration outside of Cambodia (e.g. ICC, Singapore International Arbitration Centre);
  - ↪ Cambodia is a party to the New York Convention on Recognition of Foreign Arbitral Awards and has adopted domestic legislation implementing terms of the Convention (also included in the Civil Procedure Code).



# PROBLEMS WITH ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

- Foreign investors will most likely subject their investment to foreign laws and foreign jurisdictions or arbitration. However; there is a risk that Cambodian courts will not automatically enforce foreign judgment or awards:

- **Enforcement of foreign judgments:** given that the Cambodian Code of Civil Procedure which is in force since July 2007 recognizes the validity of foreign judgments under certain conditions and in particular subject to a guarantee of reciprocity between Cambodia and the foreign country in which the court is based; and that to date and to our knowledge the enforcement of a foreign judgment has not been tested in Cambodia and no agreement on reciprocity of court judgments, to our knowledge, is presently in force between Cambodia and other countries; it is possible that a court in Cambodia would reassess the merits of the case before deciding whether to enforce a foreign judgment. Thus in the event of dispute between the parties to an investment agreement, a judgment by a foreign court and based on foreign law will not necessarily be automatically enforceable in Cambodia.



# PROBLEMS WITH ENFORCEMENT OF FOREIGN ARBITRAL AWARDS Cont'd

- **Enforcement of foreign awards:** given that Cambodia has ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards in May 2001, and passed the necessary domestic law, awards of foreign arbitrators should be binding and enforceable on the parties in Cambodia. However it must be noted that current judicial practice suggests that the courts of Cambodia may not always be willing or able to recognize or enforce a foreign arbitral award without a re-examination of the merits of the case.



# OTHER LEGAL UNCERTAINTIES

- Under the Cambodian Contract Law the maximum interest chargeable of a loan enforceable in Cambodia is 5 percent per annum “*unless otherwise provided by law*” (Article 59). However, a subsequent Regulation issued by the NBC is interpreted by the Royal Government as allowing banks and financial institutions to set interest rates on deposits and loans at a rate negotiated between the parties to the deposit or loan. As a matter of law the Regulation, which was issued by the NBC has the status of ministerial regulation and would not rank superior to the Contract Law. However, as a matter of practice the Regulation has been accepted by the Government as repealing the 5 percent provision in the Contract Law in respect of banks and financial institutions. It still remains a legal uncertainty for foreign investors in local MFIs.



***Thank You for Your Attention!***

**For Further Information, Please contact:**

**[info@sa-cambodia.com](mailto:info@sa-cambodia.com)**

