

**VDB** | *Loi*

Legal and Tax

**CROSS-BORDER ENGINEERING,  
PROCUREMENT, AND CONSTRUCTION  
CONTRACTS: PRACTICAL LEGAL  
STRATEGIES**

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The engineering, procurement, and construction (“**EPC**”) contract constitutes an important component when implementing a project. In this article, we will examine some practical issues related to EPC contracts in the context of cross-border M&A transactions from the perspective of Cambodian laws and practices.

### **Practical Issue 1: Alignment between the Engineering and Procurement Contract and the Construction Contract**

In the Cambodian context, the EPC contract is often split into two contracts—an engineering and procurement (“**EP**”) contract and a construction contract—for various reasons, such as tax efficiency (although this is no longer necessary in Cambodia) or because of the organizational structure of the contractors.

When a project involving these types of contracts is to be acquired by a new investor, the investor and its lenders will review the project documents in detail. It is not uncommon, in our experience, to find considerable inconsistencies between the EP contract and the construction contract, or terms that are incompatible with other project documents, such as the power purchase agreement. One of the reasons is likely attributable to the scenario where the project owner (as the employer under the EP and construction contracts) and the contractors are affiliates. This results in less aggressive negotiations regarding the contractual terms and less supervision of their execution.

Consequently, when reviewing the EP contract, the construction contract, and the project documents, new investors should carefully check the key terms of the agreements, such as the scope of work, completion, warranty, defect liability and cure period, governing law, and dispute resolution, to make sure they are consistent. If not, particularly if there are inconsistencies between the EP contract and the construction contract, a coordination agreement may be needed to close the gap between them.

A coordination agreement will usually contain the following:

- Provisions to guarantee the performance of each of the contractors to the other contractor.
- Provisions to make the key terms of the two contracts consistent.
- Provisions to eliminate that the contractors can use the other contractor’s lack of performance as a defense against their own default.
- Provisions to make the EP contractor and the construction contractor severally and jointly liable under both contracts.

During development of the coordination agreement, the new investor may take the opportunity to negotiate with the contractors to amend some of the terms under the contracts; for example, changing the standard of work (from “**due care**” to “**fit for purpose**”), the parameters for testing, the coverage and conditions of bonds and guarantees, and the choice of law and dispute resolution forum. Negotiating and concluding these matters can be quite challenging and time consuming. Consequently, it is advisable to seek professional assistance to avoid causing any delay in meeting the completion deadline under the EP and construction contracts.

### **Practical Issue 2: Securing Approvals for Changing Investors**

Changing the investors or shareholders of a project is more than simply changing the names on the company’s books. First of all, the project documents need to be reviewed to determine whether there are any restrictions or approvals required to change the shareholders of the project company. Typically, the concession agreement will contain a requirement for government approval of such change

in clauses about “**change in control**” or “**assignment**”. Secondly, lenders’ approval is also required when it provides so in the financing documents, or shares of the project company have been pledged to the lenders as security. Shareholders will need lenders’ approval to temporarily release the share pledge in order to facilitate the share transfer to the new investor.

Thirdly and often missed, approval from the contractor under the EPC contract should be obtained. Whether it is expressly required in the EPC contract or not, it is worth noting that Article 387 of the Civil Code of Cambodia provides the defense of insecurity. That is, if the contractor does not feel sure that the new investor will have sufficient money to pay them afterwards, the contractor can raise this defense and stop working immediately. To avoid any delay caused by such insecurity, the parties should communicate in advance to ensure that the contractor is comfortable working with the new investor.

### **Practical Issue 3: Maintaining Licenses and Permits**

A good practice for the new investor is to look at the checklist under the EPC contract to see what licenses and permits the contractor and the employer are each responsible for having. If any licenses have not been obtained or properly renewed, the new investor, the project company, and the contractor should coordinate to ensure all required licenses and permits are obtained and up to date.

Under the Law on Construction of Cambodia and Sub-Decree No. 224 ANKr.BK on Building Permits, the following licenses and permits are typically required:

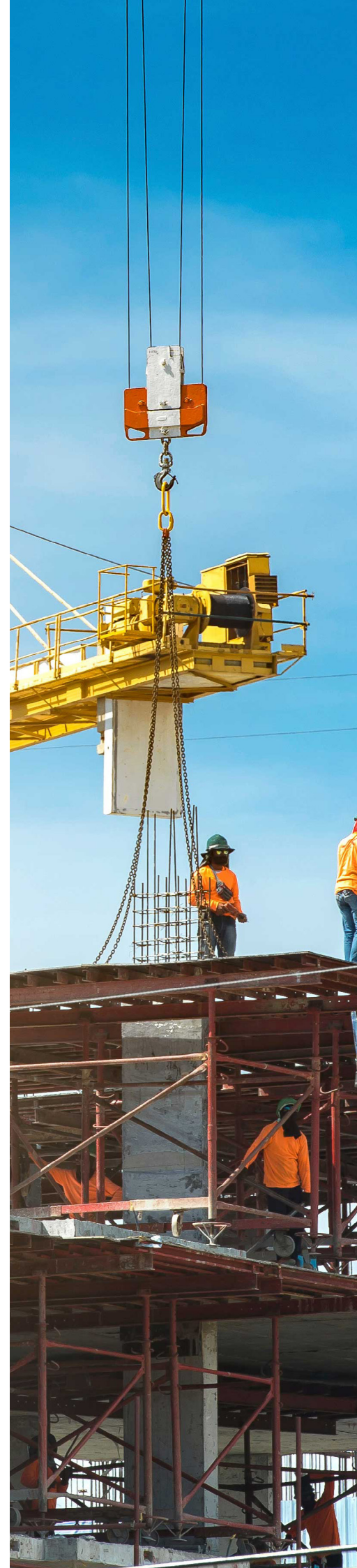
- License issued by the Ministry of Land Management, Urban Planning, and Construction for the construction business entity
- Registration of the architects, engineers, and other construction professionals with the Board of Architects and Engineers of Cambodia, as well as licenses for such professionals from the Ministry of Land Management, Urban Planning, and Construction
- Building permit/repair permit/demolition permit
- Construction opening site permit
- Construction closing site permit
- Certificate of occupancy

### **Practical Issue 4: Changing the Representative**

The EPC contract will specify a representative of the employer (usually the chief engineer), who will oversee the on-site implementation of the works. When changing the employer representative, new investors need to make sure that the proper procedures are followed and that the contractor is duly notified. The employer representative is usually authorized to sign documents and acknowledgments on behalf of the employer, and the contractor can hold the employer liable for these documents. Hence the last thing the new employer wants is for the representative of the last employer to have signed a document without its knowledge that the contractor can then claim as binding if the procedure to change the employer representative was not done properly.

### **Other Tips**

Other than the issues discussed above, it is good practice for the parties under the EPC contract to be aware of the following issues, to ensure the contract’s proper performance:

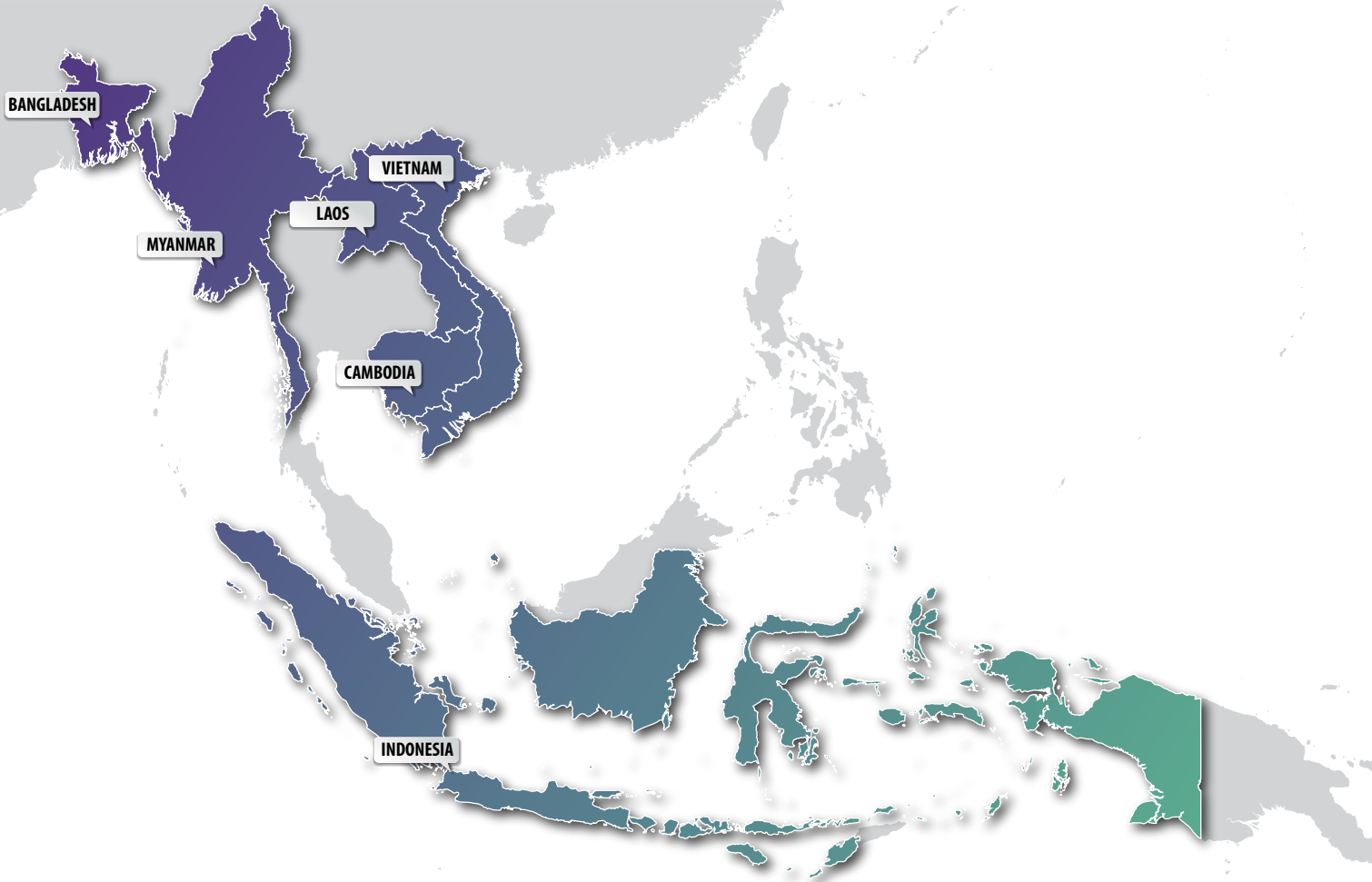






- Be sure to look at the performance bond and other guarantees under the EPC contract. They are usually provided in the annex or by a separate document. The parties should check that the terms of coverage, period, and conditions to exercise are satisfactory to them. In particular, a beneficiary of the bond or guarantee would like it to be purely “on demand”—that is, the beneficiary can withdraw the money under the bond or guarantee on demand and without showing evidence of default of the obligor. On the contrary, the obligor would like to insert some exercising conditions in the guarantee to prevent it from being easily cashed.
- Article 71 of the Law on Construction provides statutory warranty periods for construction works, and the parties cannot shorten such periods by agreement in a contract. The warranty periods are 10 years for the structure, five years for exterior parts, such as walls and doors, and two years for the electrical, plumbing, and mechanical works.
- It is advisable to align the governing law and dispute resolution clauses across all project documents so that if any dispute arises, it can be adjudicated in the same forum to avoid conflicting procedures or decisions.
- Enforcement of foreign arbitration decisions is possible in Cambodia since Cambodia is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- On the other hand, it is a risky choice for the parties to refer the dispute to a foreign court and to try to enforce a foreign court judgment in Cambodia. Article 199 of the Code of Civil Procedure provides that a final and binding judgment of a foreign court may only be recognized by a Cambodian court where there is a guarantee of reciprocity between Cambodia and the foreign country in which the foreign court is based. At present, we are not aware that Cambodia has any bilateral agreements with any other country for such guarantee of reciprocity.

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