

# OVERVIEW OF CONTEMPORARY CIVIL PROCEDURES OF CAMBODIA

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## I. Introduction

The civil justice system in Cambodia is currently governed by the new code of civil procedure which was promulgated on July 06, 2006. This article will offer a rough explanation on history and structure of the Code of Civil Procedures, actions on a civil lawsuit beginning from the trial court proceeding to the high appellate court and other procedures regulated by the Code of Civil Procedures. The actual implementation of the code is not included in this article.

## II. History and structure of Cambodian Code of Civil Procedures

Under the development of Cambodian laws, civil procedures were rewritten into a code called the Code of Civil Procedures which was promulgated on July 06, 2006 with the aim to regulate the procedures related to civil actions<sup>1</sup>. This code is divided into 9 books with 588 articles in total. Book One provides general provisions of civil procedures include purpose and fundamental principles of civil procedures, the courts, parties, litigation cost and security under litigation. Book Two stipulates proceedings at the Court of First Instance which explain a suit, oral argument and preparation thereof, evidence, an interruption and suspension of litigation, judgment, conclusion of action not based on judgment, special provisions regarding small claim matters; date, term and services; and viewing of case record. Book Three covers appeals to the higher courts including general rules of appeal, Uttor Appeal, Satuk Appeal and Chumtoah Appeal. Books Four and Five have a single chapter related to Retrial and Demand Procedures respectively. Book Six

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1 Civil actions are lawsuits related to the legal relationship in civil matters (relationship among properties and among relatives) and having the purpose to let the court solve the civil disputes based on the law to protect the individual right.

establishes compulsory execution procedures including general provisions of compulsory execution, execution of claims having the object of monetary payment, specific rules governing enforcement of security interests, and execution of claim rights of which the subject matter is not money. Book Seven deals with preservative relief which is comprised of general provisions of preservative relief, ruling on preservative relief and execution of preservative relief. Book Eight explains transitional provisions and Book Nine explains the entry into force of the code.

In principle, the Code of Civil Procedures is composed of three types of procedures namely i) litigation proceedings which determine the existence or nonexistence of right or legal relationship between private individuals by rendering a judgment; ii) compulsory execution procedures in which rights are ultimately decided; and iii) procedures of preservative relief which ensures the future exercise of rights when parties win the case. Therefore, the following sections will briefly explain these three main procedures.

## 1. Litigation Proceedings

A civil law suit or civil action is the procedure determining the existence or nonexistence of rights and obligations or legal relationship of substantive laws (civil codes or other substantive laws).

In order to determine the existence or nonexistence of rights and obligations or legal relationship through litigation proceedings, there is a procedure called *Procedure of the Courts of First Instance* or simply called *common proceedings* which are the proceedings at the Courts of the First Instance (Provincial-Municipal Courts). In the case that either party to the law suit is not satisfied with the decision of the Courts of the First Instance, the party can file an appeal complaint which is called an appeal to the Higher Courts (Appeal Court and Supreme Court).

*An appeal* to the higher courts is the filing of an appeal complaint against the court's decision which is not yet final. The Code of Civil Procedures provides three types of appeals such as i) Appeal to the Appellate Court which is called an Uttor Appeal, ii) Appeal to the Supreme Court which is called a Satuk Appeal, and iii) Appeal to the higher courts against the courts' rulings which is called a Chomtoah Appeal. These appeals are governed by procedures which are called Procedures of the Higher Courts. In the case that judgments of the Courts of First Instance or judgments of the Higher Courts become final and have a defect in the proceedings or irregularities on the grounds of those judgments, the interested party or party whose interest is affected may file an appeal against those judgments and demand the competent courts to cancel them and re-examine the case through a procedure called *retrial proceedings*.

## Procedures of the Courts of First Instance

Procedures of the Courts of First Instance are common procedures conducted by the Courts of First Instance, namely the Phnom Penh Capital Court and other Provincial Courts of the Kingdom of Cambodia. This procedure commences with filing of a lawsuit and ends with final judgment. The procedures of the Courts of First Instance comprises three important stages: i) Procedures of Filing a Lawsuit, ii) Preparatory Proceedings for Oral Argument, and iii) Oral Argument. In addition to these proceedings, the Code of Civil Procedures also provides special procedures regarding small claim matters in the value not more than one Million Riels. These special procedures are determined to settle disputes very quickly through summary procedures.

### Procedures for Filing a lawsuit

Filing a lawsuit within the competent court is the first phase of a civil proceeding. According to the Code of Civil Procedures, a civil action shall be filed through a written complaint to a competent court, except for a small claim which can be filed orally<sup>2</sup>. The complaint shall include important matters such as i) the parties and their legal representatives; ii) the content of the main text of the judgment sought by the plaintiff (the content of the claim by the plaintiff); and iii) the facts necessary to specify the claim (the fact which clearly determines the rights or legal relationship thereto)<sup>3</sup>. In addition to the above matters, the plaintiff should provide details in writing on i) the facts necessary to support the claims contained therein (primary fact or facts which determines the rights or legal relationship in point 3 above); ii) key facts related to the facts necessary to support the claims (indirect facts) and evidence relating to such facts<sup>4</sup>. Once the complaint is filed, the judge assigned with it shall check whether the complaint is in correct form as stated in paragraph 2 of article 75; however, the court is not supposed to check whether conditions in the claim are reasonable or not. Furthermore, the court shall check if the plaintiff has paid the tax for filing the suit as stipulated in paragraph 1 of article 61 of the Code of Civil Procedure. After checking, if there are defects in the complaint, the court shall order that the defects giving rise to said violation be cured within a reasonable period of time set by the court<sup>5</sup>. If the plaintiff fails to cure the defect, the court shall dismiss the complaint via ruling. A Chamtoah appeal may be made against the ruling<sup>6</sup>. After checking the complaint, and if it is correct in form set forth in the above paragraph, the court clerk shall service the complaint to the defendant<sup>7</sup>. However, in case that the complaint can not be serviced because the address of the defendant is incorrect or the plaintiff fails to pay the appropriate service fee, the court shall order that the defects be cured or the

<sup>2</sup> Code of Civil Procedures, Article 225.1

<sup>3</sup> Code of Civil Procedures, Article 75.1 (A and B)

<sup>4</sup> Code of Civil Procedures, Article 75.3

<sup>5</sup> Code of Civil Procedures, Article 78.1

<sup>6</sup> Code of Civil Procedures, Article 78.2-3

<sup>7</sup> Code of Civil Procedures, Article 79.1

delivery fee be paid within a reasonable period of time. If the plaintiff fails to cure the defects or pay the delivery fee, the court shall dismiss the complaint via ruling<sup>8</sup>. If the plaintiff can prove that s/he has tried her/his best to find the domicile, residence or other location to serve the complaint, but still cannot find it even after a reasonable attempt, the plaintiff can then submit a request to effect service through publication<sup>9</sup>.

When a complaint is filed, the court shall promptly set a court date for preparatory proceedings for oral argument and summon the parties to appear<sup>10</sup>. The date set shall fall within 30 days of the date of filing of the complaint; on the other hand, in the real practice after checking and receiving the complaint, the court shall determine the date of initial preparatory proceedings for oral argument and effect service along with the summon of defendant to the court within the date set<sup>11</sup>.

### **Preparatory Proceedings for Oral Arguments**

During preparatory proceedings for oral argument, the court shall arrange and organize the allegations and arguments of the parties, clarify the points at issue in the case, and organize the evidence pertaining to points at issue<sup>12</sup>. However, the court shall first seek to effect a compromise settlement, unless the court determines that the parties have no intention to enter into compromise or rights or legal relationship which an objective of the action does not allow to initiate the compromise<sup>13</sup>. In case that the reconciliation does not work, the court shall begin preparatory proceedings by requiring parties to submit preparatory documents setting forth offensive or defensive measures as well as statements in opposition to the offensive or defensive measures of the other party<sup>14</sup>. Offensive and defensive measures shall be advanced at the appropriate time in accordance with the progress of the litigation. Furthermore, the preparatory proceedings for argument shall be recognized as a proper phase for submitting offensive and defensive measures<sup>15</sup>.

Where an offensive or defensive measure is advanced by a party after the proper time through willful intent or gross negligence, the court may dismiss such measures by its ruling upon motion or on its own authority if it determines that the measure would delay the conclusion of the litigation. Where the purpose or effect of the offensive or defensive measure is unclear and in the event the party fails to provide a necessary explanation or fails to appear on the date on which such explanation is to be provided, the court may also dismiss such measures<sup>16</sup>.

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<sup>8</sup> Code of Civil Procedures, Article 79.2,

<sup>9</sup> Code of Civil Procedures, Article 255.1 (A)

<sup>10</sup> Code of Civil Procedures, Article 80.1

<sup>11</sup> Code of Civil Procedures, Article 80.2

<sup>12</sup> Code of Civil Procedures, Article 103

<sup>13</sup> Code of Civil Procedures, Article 104

<sup>14</sup> Code of Civil Procedures, Article 101.1-2

<sup>15</sup> Code of Civil Procedures, Article 93

<sup>16</sup> Code of Civil Procedures, Article 94

Within the proceedings for argument, restriction shall be imposed on some activities such as checking evidence, but in order to organize the allegations of the parties, determine the points at issue in the case, and organize the evidence pertaining to points at issue to be examined during the oral arguments, the court may conduct necessary activities such as issuing a ruling regarding the offering of evidence as stated in article 126, paragraph 1 of article 143 and article 152. Moreover, the court may issue any other ruling as permitted by the code of civil procedure on a date other than the court date for oral argument which includes a ruling permitting or refusing to add or change objectives of complaint. The court may examine documentary evidence to the extent necessary to arrange disputed issues (reading the documents)<sup>17</sup>.

### Oral Arguments

In principle, the court must hold oral argument proceedings before rendering a judgment on the claims (the importance of oral arguments)<sup>18</sup>. The oral argument (hearing) is the form of trial in which the court and parties to a dispute at trial make oral statements and listen to the statements during the publicly open hearing on the date which both parties are able to appear<sup>19</sup>. However, the court can still hold the oral argument and issue a judgment called a *default judgment* when one party to the dispute is absent, except in cases in which the court is not permitted to issue the default judgment as provided in article 202 of the code of civil procedure<sup>20</sup>. The party who receives the default judgment may file a petition to set aside the judgment because of failure to make a timely appearance on the court date due to an unforeseeable or unavoidable reason and the petition shall be made within two weeks from the date of receipt of service of the default judgment<sup>21</sup>.

On the date of initial oral arguments, the parties shall present the results of the preparatory proceedings for oral argument. With this presentation, allegation of facts, evidence offering, result of examination of documentary evidence and result of arranging the disputed issues during the proceedings for oral argument are deemed oral arguments. Therefore, advancing offensive or defensive measures again shall be limited when the advancement is contrary to article 108<sup>22</sup>.

The court shall recognize facts based on evidence in principle and this is called *the Principles of Ruling by Evidence*. However, facts admitted to by a party in court and facts the existence of which is obvious to the court, need not be proven by evidence<sup>23</sup>. After the parties present the result of preparatory proceedings, the court shall examine the evidence offered by the parties. However, for the evidence that has no relevance to the facts

<sup>17</sup> Code of Civil Procedures, Article 106

<sup>18</sup> Code of Civil Procedures, Article 114

<sup>19</sup> Code of Civil Procedures, Article 115

<sup>20</sup> Code of Civil Procedures, Article 202.3

<sup>21</sup> Code of Civil Procedures, Article 204.1-2

<sup>22</sup> Code of Civil Procedures, Article 116.3

<sup>23</sup> Code of Civil Procedures, Article 123.1-2

to be proven and evidence that the court otherwise finds unnecessary or the request to examine the evidence does not fall within the allowed period as provided in article 94 of the Code of Civil Procedure, the court shall dismiss the evidence without examination<sup>24</sup>. The method of examining evidence shall be in line with the types of evidences such as documents, witness testimony, and expert witness testimony. In principle, the examined evidence shall be within the phase of oral argument after the proceedings for oral argument. However, in special cases (such as a witness who is in a life threatening situation or the existence of easily damaged objects), the court may examine the evidence before the date of oral argument. Such arrangement is called preservation of evidence<sup>25</sup>.

After concluding the oral arguments, the court shall determine the date of issuing judgment and the content of judgment<sup>26</sup>. When the judgment becomes final and binding, the action is ended; however, the judgment which is effective in finalizing the action shall be the judgment finalizing the whole action or part of the action. Such judgment is called *final judgment*. On the contrary, an action can also be ended without final judgment in the case of discontinuance of an action, compromise settlement and the abandonment or acknowledgement of the claim. This is called *conclusion of an action by parties*<sup>27</sup>. Where a party's existence is terminated through death or merger, if there is no person that succeeds to the right or obligation comprising the subject matter of the litigation, or if such right or obligation devolves to the same person, the litigation proceedings shall be terminated. In this case, the court shall issue a judgment called *natural termination of litigation proceedings*<sup>28</sup>.

## Procedures for Small Claim Actions

The procedures for small claim actions are special procedures to promptly settle the dispute via easy procedures with small amounts of money. It is also called the *summary procedures of the first trial* and these procedures are provided in the Code of Civil Procedures from article 223 to article 239.

### Conditions

In order to conduct litigation through procedures for small claim actions, the following conditions shall be satisfied:

1. The subject matter of the action is a demand for the payment of money in an amount no greater than 1 million riels (conditions related to the action).
2. An application for a trial and decision based on small claim procedures shall be made when the complaint is filed<sup>29</sup>.

<sup>24</sup> Code of Civil Procedures, Article 126

<sup>25</sup> Code of Civil Procedures, Article 163.1

<sup>26</sup> Code of Civil Procedures, Article 180.1

<sup>27</sup> Code of Civil Procedures, Article 217, Article 220, Article 221 and Article 222

<sup>28</sup> Code of Civil Procedures, Article 174

<sup>29</sup> Code of Civil Procedures, Article 224

### **Dinstinction between common procedures and small claim procedures**

The procedure for small claim actions has distinct features from ordinary procedures as follows:

1. The procedure is easy and quick because the small claim actions let the plaintiff to have an oral institution as provided in article 225 of the code of civil procedure and this procedure isn't within the preparatory proceeding for oral argument. When a [small claim] action is filed, the court shall promptly designate a date for oral argument and summon the parties thereto within 30 days from the date of filing an action<sup>30</sup>. In a small claim action, the court shall conclude the trial on the initial date set for first oral argument (the date for judgment is only once) and this is called *principle of one-day trial*.
2. In special circumstances such as a witness who is unable to appear due to health conditions or in circumstances involving unexpected witnesses or pieces of evidence, the date of oral argument shall be extended<sup>31</sup>. In the procedures for small claim actions, an examination of evidence can be conducted only with regard to evidence that can be examined immediately (initial clarification provided in article 131) and a cross-action may not be filed in a small claim action<sup>32</sup>. However, examination of witness is easy because parties do not need to submit the documents which determine issues to be examined and do not need to take an oath<sup>33</sup>. When the oral argument finishes, in principle the court shall render the judgment immediately on the same day unless the court deems necessary such that the parties wish to try reconciliation.

### **Judgment for Payment Deferment and Installment Payment**

According to the Code, although the court issues a judgment that authorizes a claim, the court may, upon determining it especially necessary in light of the defendant's financial state, establish a time for payment deferment or establish a period for making installment payments within a time frame not to exceed three years from the date of pronouncement of judgment and shall designate a provision regarding the loss of benefit of the term if the loser does not abide by the decision of the court<sup>34</sup>.

### **Prohibition of objection against the judgment**

Parties, who are not satisfied with the final judgment in the small claim actions, cannot file an Uttor or Satuk appeal except that appeal is against the default judgment<sup>35</sup>.

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<sup>30</sup> Code of Civil Procdures, Article 228

<sup>31</sup> Code of Civil Procdures, Article 229.1

<sup>32</sup> Code of Civil Procdures, Article 227 and Article 231

<sup>33</sup> Code of Civil Procdures, Article 232

<sup>34</sup> Code of Civil Procdures, Article 237

<sup>35</sup> Code of Civil Procdures, Article 238

### Execution of Judgment in Small Claim Actions

In principle, the execution of judgment in small claim actions is similar to the one in ordinary proceeding but without any execution clause<sup>36</sup>. Even though the procedure for small claim action is easy, quick and suitable with the objective of the claim, such procedure restricts the fundamental rights of parties, and is less guaranteed than in the ordinary procedure. For example, the judgment shall comply with the one-day trial principle and evidence that can be presented is limited; therefore, the law provides freedom of choices to parties on the claim for judgment and issuing the ruling based on the small claim matters or ordinary case even though the objective of litigation meets the conditions for small claim matters. In this case, the defendant in procedure for small claims action may transfer the action to ordinary procedure by making statements before the oral argument on the first date of oral argument. This is called *a transfer to ordinary procedures pursuant to defendant's statement*<sup>37</sup>. However, although both parties decide to choose the procedure for small claim actions, the action can still be transferred to ordinary procedure pursuant to court ruling with consideration that i) the action cannot become the objective of small claim action, ii) summons to appear on the initial date set for oral argument cannot be made on the defendant by means other than service by publication, and iii) where it is deemed improper by the court to conduct such trial and decision based on small claim procedures<sup>38</sup>.

### Demand Procedure

Demand procedure is the procedure which allows the obligee to quickly and easily receive execution title necessary to advance the compulsory execution for claim for payment of money as recognized as the procedure replacing the action claiming for performance (ordinary action). This procedure begins with a motion called *a motion seeking an issuance of demand ruling and ends with the demand ruling*.

Entitlement to a claim through the demand procedures shall satisfy the requirements of i) a claim in which the objective of the action is the claim for payment of money and ii) the demand ruling service can be done in a manner other than service by publication<sup>39</sup>. Apart from this, the motion seeking an issuance of the demand service shall detail the issues necessary as provided in paragraph 2 of article 75 and the motion shall be submitted to the court of first instance having jurisdiction over the corresponding location as provided in paragraph 1 of article 320 of the civil procedure code<sup>40</sup>. In order to issue the demand ruling, the court shall examine whether a motion seeking issuance of a demand ruling meets the requirement or violates the provisions of article 319 (requirements for

<sup>36</sup> Code of Civil Procedures, Article 354.1(A-B)

<sup>37</sup> Code of Civil Procedures, Article 233

<sup>38</sup> Code of Civil Procedures, Article 234

<sup>39</sup> Code of Civil Procedures, Article 319

<sup>40</sup> Code of Civil Procedures, Article 321



demand ruling) or article 320 (motion seeking issuance of demand ruling) and without grounds for the claim, the court shall dismiss the motion via ruling and the ruling cannot be objected. However, the obligee can advance with the ordinary procedure<sup>41</sup>. In case the motion is accepted, the court shall issue the demand ruling which provides the key issues as stated in article 324 and service the ruling to obligor and obligee. The demand ruling shall take effect when service thereof is made on the obligor<sup>42</sup>. Where an obligor fails to bring an objection to a demand ruling within two (2) weeks of the date of receipt of service thereof, or where a ruling dismissing an objection to issuance of demand ruling brought prior to a declaration of provisional execution becomes final and binding, the court shall make a declaration of provisional execution thereof at its own discretion. The demand ruling with the declaration will become the executable title of execution<sup>43</sup>.

Where a valid objection to issuance of demand ruling is brought by the obligor prior to a declaration of provisional execution and the objection motion is not dismissed, the demand ruling shall lose legal effect to the extent of the objection raised thereto. This makes the declaration of provisional execution impossible and the objection to the demand ruling shall be deemed a title for litigation requiring the demand procedure be transferred to ordinary procedure<sup>44</sup>. However, even if the obligor does not seek to object within 2 weeks and the demand ruling is already declared to be provisionally executed, the obligor still has the title to object to the demand ruling after the declaration of provisional execution if the title of objection is made within 2 weeks after serviced the demand ruling with the declaration of provisional execution<sup>45</sup>. If the obligor does not make a motion of objection to the demand ruling within the given period, the demand ruling shall have the effect of a final and binding judgment<sup>46</sup>.

## 2. Trial procedures at the Higher Courts

The trial procedure at the higher courts is the procedure for the trial and ruling on appeal of the parties to the higher courts to dismiss or change the decisions (a judgment issued by a Court of the First Instance, a judgment issued by higher courts or their rulings) rendered by the lower courts before the decision becomes final and binding. Trials at the higher courts are divided into three types: Trials for Uttor appeal, Satuk appeal and Chomoah appeal.

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<sup>41</sup> Code of Civil Procedures, Article 322

<sup>42</sup> Code of Civil Procedures, Article 325

<sup>43</sup> Code of Civil Procedures, Article 328

<sup>44</sup> Code of Civil Procedures, Article 327

<sup>45</sup> Code of Civil Procedures, Article 329

<sup>46</sup> Code of Civil Procedures, Article 333

## Uttor Appeals

Uttor appeal is the appeal to appellate courts against a judgment of Court of the First Instance that not yet become final<sup>47</sup>. The court which hears the Uttor appeal is called *an Appellate Court* and such a trial is called the second trial. However, in some cases provided in special provisions such as an appeal against a decision of the Bar Association to the appellate court is called the first trial.

### Filing Uttor Appeals

Uttor appeal can be made by the plaintiff or defendant who loses their interest due to judgment of the first trial. The party who loses interests is the party who has interest in filing the Uttor appeal; therefore, in principle the party which completely wins a case in the first trial, is not entitled to appeal because he or she has no interest in appealing. If the winning party files Uttor appeal, the appeal will be dismissed on the grounds of unlawfulness<sup>48</sup>. On the other hand, the right to Uttor appeal may not exist if the parties have agreed not to make an Uttor appeal and have agreed to reserve the right to make a Satuk appeal after the court issues a final judgment or after the right to Uttor appeal exists, the party who makes a statement waives their right. Where the party waives the right to make appeal after making Uttor appeal, the statement of the waiver of right shall be made at the same time as withdrawing the motion of the Uttor appeal<sup>49</sup>. In addition, the right to Uttor appeal is limited by the amount of claim in civil or commercial case tried by court of the first instance and the amount at stake does not exceed 5,000,000 riels<sup>50</sup>.

An Uttor appeal must be filed within one month from the date that service of the written judgment was received or the date that a ruling denying or dismissing a motion to set aside a default judgment<sup>51</sup>. The above period may not be extended; however, if the party with right to Uttor cannot file Uttor appeal based on the grounds that are not the mistake of that party, the party shall advance the litigation within one week after the ground is extinguished<sup>52</sup>.

However, after the judgment of the first trial is declared, despite absence of service or prior to the date of notifying about the ruling refusing or dismissing an objection to the default judgment or the party is entitled to make an objection, waives such right, the Uttor appeal can still be made prior the period of filing the Uttor appeal<sup>53</sup>. Although the right to Uttor appeal is extinguished, (waiver of right to Uttor appeal or after expiry of Uttor appeal period), the Uttor appeal can still be made and such appeal is called *inci-*

<sup>47</sup> Code of Civil Procedures, Article 259.1

<sup>48</sup> Code of Civil Procedures, Article 268

<sup>49</sup> Code of Civil Procedures, Article 260.1 (A), and article 263

<sup>50</sup> Code of Civil Procedures, Article 260.1(B)

<sup>51</sup> Code of Civil Procedures, Article 264.1(1)

<sup>52</sup> Code of Civil Procedures, Article 264.2, and article 245

<sup>53</sup> Code of Civil Procedures, Article 264.2(1)

*dental Uttor appeal*<sup>54</sup>. Incidental Uttor appeal is the appeal filed by the appellee which is incidental to the appellant's Uttor appeal. When the appellant files Uttor appeal, the appellee who is an opponent of the Uttor appeal can file the incidental Uttor appeal in order to amend the part of the original judgment which is not beneficial for the appellee.

An Uttor appeal shall be made with the original court (court of the first trial or first instance)<sup>55</sup>. The written Uttor appeal shall contain identity of the parties and an indication of the judgment of court of the first instance and a statement indicating that an Uttor appeal is being filed with regard to such judgment<sup>56</sup>. The written Uttor appeal should include specific grounds for the dismissal or amendment of the judgment of court of first instance. However, if such grounds are not stated in an appeal, the Uttor appellant can file with the Uttor appellate court a written document containing such grounds within thirty days of the filing of the Uttor appeal. Even though the Uttor appellant did not submit such document, the Uttor appeal cannot be deemed unlawful and shall not be dismissed because the grounds for Uttor appeal are not important points to be written in the motion of Uttor appeal<sup>57</sup>.

When receiving a motion of appeal, the appellate court shall examine the motion. If the motion is found to contain defects (contradiction to paragraph 2 of article 265 or the tax on the motion is not yet collected as provided in paragraph 4 of article 61), the court shall order the cure of defects. If the Uttor appellant does not make any remedy to the defect, the Uttor appellate court shall dismiss the motion of appeal via ruling<sup>58</sup>. In case the motion of appeal is lawful, the court clerk shall service the motion to the Uttor appellate defendant. Where the service cannot be done together with the failure to pay the service fee in advance, the motion of that appeal is deemed incorrect in form<sup>59</sup>.

### **Trial by Appellate Court**

In the trial of Uttor appeal, the appellate court shall consider the reasonableness of an appeal against the original judgment and render a judgment by conducting an oral argument only to the extent necessary to adjudicate a party's demand for amendment of the judgment rendered by the court of first instance<sup>60</sup>. The trial at the Appellate Court is a continuation of an oral argument which was concluded once in the trial by the Court of First Instance, so the actions (a motion for facts, a motion for evidence examination, admission ect.) conducted at the court of first instance shall be given effect at the Uttor appellate review<sup>61</sup>. Moreover, in the trial of Uttor appeal, the parties shall be granted a

<sup>54</sup> Code of Civil Procedures, Article 270.1

<sup>55</sup> Code of Civil Procedures, Article 265.1

<sup>56</sup> Code of Civil Procedures, Article 265.2

<sup>57</sup> Code of Civil Procedures, Article 265.3

<sup>58</sup> Code of Civil Procedures, Article 266.1-2

<sup>59</sup> Code of Civil Procedures, Article 267

<sup>60</sup> Code of Civil Procedures, Article 272.1

<sup>61</sup> Code of Civil Procedures, Article 274

chance to advance offensive or defensive measures which was not advanced in the trial at the court of first instance but the acceptance of the offensive and defensive measure unless in contrast to article 108 and article 94 of the Code of Civil Procedures<sup>62</sup>.

The Appellate court shall issue a final judgment regarding the Uttor appeal and incidental Uttor appeal. Where an Uttor appeal is unlawful and the defects cannot be remedied, the appellate court may dismiss [without prejudice] the Uttor appeal via judgment without hearing oral argument. This is called a *judgment dismissing Uttor appeal*<sup>63</sup>. The appellate court shall deny the Uttor appeal if the judgment made by the court of first instance was appropriate. Even where the judgment of the court of first instance is found inappropriate for the reason given, an Uttor appeal shall be denied if the judgment is appropriate for another reason, which is called a judgment of denial of Uttor appeal<sup>64</sup>.

On the other hand, if the appellate court deems that the judgment of the court of first instance was inappropriate, or a serious procedural error occurred in the trial by the court of first instance, the appellate court shall cancel the judgment of the court of first instance<sup>65</sup>. Where the judgment of the court of first instance was cancelled, the appellate court shall adjudicate the case de novo instead of the court of first instance and in this case, the decision of the appellate court produces two features as follows: reversal of the judgment of the court of first instance, and amendment of the judgment of the court of first instance<sup>66</sup>. The appellate court shall, in cases where it cancels a judgment of the court of first instance which dismissed the unlawful action, return the case to the court of first instance. However, this shall not apply to cases in which no further argument is required<sup>67</sup>. The appellate court may return the case to the court of first instance if further argument is required (in case that there is no consideration of amount of money of the claim etc..)<sup>68</sup>. Where a case is returned to the court of first instance due to a procedural error in the court of first instance, all proceedings previously carried out in such court in regard to that case shall be automatically cancelled<sup>69</sup>.

## Satuk Appeal

A Satuk appeal may be made to the Supreme Court against a final judgment of the Uttor appellate court. Only the *Satuk appellate court* (Supreme Court) has a jurisdiction on the trial of a Satuk appeal called *the final trial*. The Satuk appellate court adjudicates on the merits of final judgment in only legal matters. Since the purpose of Satuk appeal is to protect the party who suffered from damages arose from unfair trial and to achieve a

<sup>62</sup> Code of Civil Procedures, Article 273

<sup>63</sup> Code of Civil Procedures, Article 268

<sup>64</sup> Code of Civil Procedures, Article 277

<sup>65</sup> Code of Civil Procedures, Article 279.1

<sup>66</sup> Code of Civil Procedures, Article 279.2

<sup>67</sup> Code of Civil Procedures, Article 280.1

<sup>68</sup> Code of Civil Procedures, Article 280.2,

<sup>69</sup> Code of Civil Procedures, Article 280.3

common legal interpretation, the party may not file a Satuk appeal on a basis of damages by Uttor judgment as the subject matter of Satuk appeal. Only laws or legal documents are used as the basis for Uttor judgment.

### **Method of filing Satuk appeal**

A Satuk appeal may be made to the Supreme Court against a final judgment of the Uttor appellate court, a final judgment issued the Uttor appellate court in the first trial pursuant to special provisions and a final judgment of the court of first instance in which both parties agree to reserve right to make a Satuk appeal<sup>70</sup>. A Satuk appeal must be filed within one month from the date that service of the written judgment or the original judgment as similarly provided the period for filing an Uttor appeal<sup>71</sup>.

A Satuk appeal shall be brought by submitting a written Satuk appeal to the original court (Uttor appellate court or the court of first instance). In this case, the original court shall promptly send the written Satuk appeal and the record of the case to the Satuk appellate court<sup>72</sup>. Apart from identities of the parties and the notion of judgment of 2nd trial, Satuk appellant shall provide the grounds in Satuk appeal against the judgment<sup>73</sup>.

Where the grounds for Satuk appeal are not provided in the motion, or a written statement of grounds for Satuk appeal is not submitted within 30 days or some defects in Satuk appeal, the Satuk appellate court shall order that such defects be cured within an appropriate period of time, or the Satuk appeal is unlawful and such defects may not be cured, the court shall dismiss the Satuk appeal via a ruling<sup>74</sup>.

### **Trial of Satuk appeal**

The Satuk appellate court shall adjudate on the merits of original judgment or original judgment within the scope of objection only based on the grounds for Satuk appeal legally submitted<sup>75</sup>. In the trial on the merits, the Satuk appellate court shall examine documents such as motion of the appeal, the statement of grounds for Satuk appeal, the initial preparatory document submitted by the appealee and any other documents, and the Satuk appellate court deems that grounds for granting a Satuk appeal do not exist, it may deny the Satuk appeal via judgment without an oral argument<sup>76</sup>. Even if there is an oral argument, the Satuk appellate court shall deny the Satuk appeal if it deems that the grounds for granting a Satuk appeal do not exist. In case, there are appropriate grounds for Satuk appeal, the court shall quash the original judgment, meaning that the Supreme Court cancels the original judgment. After quashing the original judgment, the court shall

<sup>70</sup> Code of Civil Procdures, Article 283.3

<sup>71</sup> Code of Civil Procdures, Article 286.3

<sup>72</sup> Code of Civil Procdures, Article 287.3

<sup>73</sup> Code of Civil Procdures, Article 289.3

<sup>74</sup> Code of Civil Procdures, Article 290 and Article 291.3

<sup>75</sup> Code of Civil Procdures, Article 295

<sup>76</sup> Code of Civil Procdures, Article 294

not examine and recognize again on the facts of the case. The court shall then remand the case to the original court<sup>77</sup>. A court which receives a case via remand shall conduct oral argument again through procedure of trial at the court level. In this case, factual and legal determinations on which the Satuk appellate court based on its reversal shall be binding on the court to which the case is remanded<sup>78</sup>. This means that the original court may not adjudicate with the same result as the previous judgment based on the law which the Satuk appellate court also used to quash the original judgments. Apart from the reversal on the case which is remanded, the Satuk appellate court may adjudicate the case de novo instead of remanding if there are grounds as stipulated in article 300 of the Code of Civil Procedures.

### Chomtoah Appeal

Chomtoah Appeal is a independent and summary process of filing an appeal to the higher courts against a court ruling. The Court ruling is not a judgment of the Courts of First Instance or judgments of the Higher Courts. The Court that conducts the trial of Chomtoah appeal is called a *Chomtoah Appellate court* (It is either an Appeal Court or Supreme Court). The rulings that can be appealed are the one provided in the law including a ruling dismissing a complaint in the case of failure to cure the defects. However, a ruling over Chomtoah appeal can not be appealed by the Chomtoah appeal motion<sup>79</sup>.

A motion and trial of Chomtoah appeal must conform to provisions on Uttor appeal and Uttor appeal proceedings. For the ruling made by the court of first instance as provided in article 263, paragraph 2 of article 265, article 268, article 270, and article 273 can be applied with the Chomtoah appellate court proceedings except to the extent that such provisions are inconsistent with nature of such appeals or procedures<sup>80</sup>. According to the Code of Civil Procedures, provisions on Ottor Appeal or Satuk appeal and its processes respectively shall be applied to Chomtoah appeal<sup>81</sup>.

## 3. Special provisions relation to the litigation proceeding for retrial

Retrial is a method of special objection against a final and binding judgment to request the court to cancel judgment of the courts of first instance or the higher courts and reexamine as well as re-adjudicate the case because of serious defect in the proceedings or irregular defect in the grounds of judgment of the courts of first instance or the higher courts.

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<sup>77</sup> Code of Civil Procedures, Article 299.1

<sup>78</sup> Code of Civil Procedures, Article 299.2 (2)

<sup>79</sup> Code of Civil Procedures, Article 259.2-3

<sup>80</sup> Code of Civil Procedures, Article 304.1

<sup>81</sup> Code of Civil Procedures, Article 304.2

## Motion for retrial

Motion for retrial is made against the final and binding judgments of the courts of first instance or the higher courts, and requests readjudication based on grounds of retrial stipulated in the law. A motion for retrial can only be made if i) judgments become final and binding, ii) the action with grounds provided in article 307 and article 308, and iii) a claim shall be within the period provided in first sentence of paragraph 1, and paragraph 3 of article 311.

## Adjudication and decision on a motion for retrial

Litigation proceeding for retrial is also a type of proceeding; therefore, provisions on litigation proceedings shall be applied to the trial of motion for retrial pursuant to each level of court. This means that if the retrial is conducted on the judgment of the first trial, the provision on the first trial proceeding shall be applied and if the trial is to be conducted on the judgment of the second trial and judgment of the Uttor appellate court, provisions related to the Uttor appellate proceeding shall also be implemented. Furthermore, if the trial is to be conducted on the judgment of the third trial and judgment of the Satuk appellate court, provisions related to the Satuk appellate proceeding shall be implemented<sup>82</sup>.

When a motion for trial is submitted, the court shall check the merits of the motion and if found illegal, the court shall dismiss the motion via ruling or if the motion for retrial does not contain any grounds for retrial, the court shall deny the motion for retrial via a ruling called adjudication and decision on the merits of request for retrial. This ruling can be appealed but in the case of final denial ruling, parties can no longer file a motion for retrial<sup>83</sup>. However, if there are grounds for retrial, the court shall issue a ruling to begin the trial and such ruling can be appealed by the defendant<sup>84</sup>.

When the ruling to begin a retrial becomes final and binding, the court shall adjudicate and decide on the action concluded by the the judgment by the court of first instance or appellate court or the supreme court pertaining to the extent of objection<sup>85</sup>. This trial is called *trial on the merits* which is to retry the previous action. Depending on the result of the adjudication, if it's found that the judgments by the court of first instance or appellate court or the Supreme Court are incorrect, the court shall cancel the judgments in scope of objection and issue another judgment instead<sup>86</sup>. On the other hand, if the judgment is correct, the court shall issue a judgment denying the motion for retrial even though the grounds for retrial exist<sup>87</sup>.

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82 Code of Civil Procdures, Article 310

83 Code of Civil Procdures, Article 314

84 Code of Civil Procdures, Article 315.1

85 Code of Civil Procdures, Article 316.1

86 Code of Civil Procdures, Article 316.3

87 Code of Civil Procdures, Article 316.2

### III. Compulsory Execution

#### 1. Main Forms for Execution

The procedure through execution for an entitlement of right provided by the Civil Code is called *Compulsory Execution*. This procedure aims at achieving a final decision on claim rights of a private individual. Therefore, first of all, the benefits of the creditor in execution shall be considered and protected, and the procedure shall be carried out smoothly and promptly.

The compulsory execution shall be carried out through an organ called *execution organs* as an independent of judicial power, and this organ consists of *an execution court and a bailiff*, both of which have different characteristics in term of subject matter of compulsory execution and type of execution<sup>88</sup>. The execution court has a duty to conduct a compulsory execution and to involve in the proceedings of compulsory execution. The court of first instance shall be determined as an execution court<sup>89</sup>. The bailiff functions within an independent jurisdiction in charge of serving documents issued by the court and carries out the compulsory execution as provided by the law. Apart from the Code of Civil Procedure, the bailiff shall be governed by a separate law<sup>90</sup>.

In the compulsory execution, the party who files a motion for compulsory execution called *Creditor in Execution*, and another party in execution is called *Debtor in Execution*<sup>91</sup>. The debtor in execution consists of the third party who secures the object or right for the debts of the debtor, in case of security interest execution.

Properties as the subject matter of execution are called *Properties in Liabilities*. The property which the debtor shall be liable in compulsory execution is owned or possessed by the debtor. However, in the case of execution against security interests, the property being the subject matter of execution is limited to the subject matter of security interests only. In principle, even though all properties belonging to the debtor in execution become the property in liabilities, in case of special reason, particular objects or rights shall be exempted from the properties in liabilities such as: clothes, foodstuffs, salary or wage etc., whose attachment is prohibited by law<sup>92</sup>. Moreover, the legally transferred property to which the transferee has filled all conditions before the compulsory execution is not the property in liability of the debtor, except the debtor transferred its property in perceiving that the transfer would cause damage to the creditor, the creditor may rescind the transfer in order to make a restitution of the property in liability and advance the property as the subject matter of execution through the right of rescission against acts harming the

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<sup>88</sup> Code of Civil Procedures, Article 336.2

<sup>89</sup> Code of Civil Procedures, Article 336.3

<sup>90</sup> Currently, the prosecutor is empowered to play a role of a bailiff

<sup>91</sup> Code of Civil Procedures, Article 347

<sup>92</sup> Code of Civil Procedures, Article 380 and Article 382



creditor<sup>93</sup>. Besides this, there is a case in which the property in liability is limited in its scope, and the compulsory execution may not be carried out against other properties of the debtor. For example, in a case that the successor (debtor) agrees on succession to a certain extent, the property shall only be in the scope of heritage and the creditor of the deceased may implement on the successor within only the scope of heritage<sup>94</sup>.

Compulsory execution can be conducted in the following conditions:

1. Submit the written motion for execution of the creditor in execution to the competent execution organ (execution court or bailiff) according to the form in article 349 of the Code of Civil Procedure and other points requiring additional writing depending on types of execution procedures such as some certified documents relating to the subject matter of execution provided in article 403, article 417 paragraph 3, and article 455 paragraph 3.
2. Authenticated copy of enforceable title of execution.

The compulsory execution shall be conducted according to the title of execution<sup>95</sup>. The title of execution is the document which certifies the claim rights of delivery of any specific payment determined under the private law, and the document may achieve the claim rights through the compulsory execution. The title of execution consists of a decision of the court (judgment or Uttor or Satuk judgment or ruling) and *other records in the court proceedings which carry the same effect as the court's decision. The notarized documents made by the Notary based on the statement of the party and has fulfilled some conditions of claims and the management of clerk on the final determination of the court fee*<sup>96</sup>. Receiving the title of execution, may not immediately effect the compulsory execution. Instead, the compulsory execution shall be made on the basis of the authenticated copies of the title of execution attached with an execution clause, except in the judgments of small claim actions<sup>97</sup>. The execution clause is the sentence which is additionally written and certified by the clerk or the Notary in the lower part of the authenticated copy of title of execution which certifies officially the existence and meaning of the power of compulsory execution of the title of execution. To obtain an execution clause, the creditor in execution shall file a written motion and write a number of points as stipulated in article 355, paragraph 1. However, if the title of execution is a decision with no effect and is not yet a final decision, the creditor shall attach with the certified finalization of the decision (the certified petition of the final judgment according to article 258 paragraph 1)<sup>98</sup>. On the contrary, if the claim rights determined in the title of execution attached with a suspending condi-

<sup>93</sup> Civil Code, Article 428

<sup>94</sup> Civil Code, Article 1256 and 1258.1

<sup>95</sup> Code of Civil Procedures, Article 350.1

<sup>96</sup> Code of Civil Procedures, Article 350.2

<sup>97</sup> Code of Civil Procedures, Article 354.1

<sup>98</sup> Code of Civil Procedures, Article 355.2

tion or an uncertain time stipulation or the compulsory execution determining the person other than the person in the title of execution to act as the creditor in execution and the debtor in execution, it would then be necessary to have used another execution clause called *Special Execution Clause*<sup>99</sup>. In principle, the execution clause shall be granted only one copy. But in the case that the objective can be fully achieved, only if the execution is implemented in many ways such as execution on many places or against movable and immovable properties based on one title of execution. The creditor is necessary to ask for many execution clauses<sup>100</sup>. So, to apply the compulsory execution, it is necessary to file a motion for the compulsory execution attached with the authenticated copies of enforceable title of execution which have an effect to apply (authentic documents attached with the execution clause).

## 2. Types of Execution

There are 2 types of Compulsory Execution: execution of claims for monetary payment (this type includes the execution of security interests), and execution of claim right of non-monetary objects. Methods of execution of claim rights include: direct execution, substituted execution and indirect enforcement.

### Execution of claims for monetary payment

The compulsory execution to collect money from the properties of the debtor to achieve the claim rights are called *execution of claims for monetary payment*. The flow of proceedings of execution of claims for monetary payment is attachment, change into money, and allocation. To achieve the execution of claims for monetary payment, the compulsory execution against the property of debtor includes the movable properties, immovable properties and the right on debt or the right on other properties and vessel. On the other hand, in this guide book, the compulsory execution against vessel is not mentioned.

1. Compulsory execution against movable properties is provided from article 384 to article 401, and method of execution is applied through attachment by the bailiff. The attached object shall be sold by means of putting up on sale (face to face or by envelope) with proceeds allocated to the creditor and for procedural fees. The rest of the money shall be handed over to the debtor in execution<sup>101</sup>.
2. Compulsory execution against the claims or right on other properties is the execution to achieve a claim right for monetary payment of the creditor by means of attachment in claims for money (bank account or income from the house rent) are called *collection*

<sup>99</sup> Code of Civil Procedures, Article 356.1-3

<sup>100</sup> Code of Civil Procedures, Article 358

<sup>101</sup> Code of Civil Procedures, Article 398 and Article 399

*suits* or handover of movable properties of the debtor possessed by the third party<sup>102</sup>. The compulsory execution against claims is provided from articles 402 to 416 of the Code of Civil Procedure; the method of execution shall be complied with a ruling of attachment of the execution court. Where a ruling of attachment becomes effective, the debtor in execution may not collect rights on the debt under attachment or clearance, or other managements such as transfer, exemption, or payment etc.. the third party debtor shall be forbidden from paying off the debt to the debtor in execution. In case the third party debtor has paid the debtor in execution without caring about the effect of a ruling of attachment, the third party debtor shall pay again if the creditor in execution demands later to collect claims under attachment<sup>103</sup>. Normally, the claims which were attached, the execution court shall allocate to the person without putting on sale, but in a particular case, the court may order the bailiff to sell the claims which have been attached upon a motion of the creditor in execution<sup>104</sup>.

3. The execution against immovable properties is a complicated proceeding and is provided from article 417 to article 453 of Civil Procedure Code. The compulsory execution against immovable properties shall be made by means of compulsory sale; in such the execution court makes an attachment of immovable properties of the debtor in execution, and sell the immovable properties to pay for the claims. Compulsory sale shall commence with a ruling of compulsory sale rendered by the execution court upon a motion of the creditor in execution, and then the execution court shall make an attachment of the immovable properties<sup>105</sup>. After the attachment, the court shall determine the means of sale, date and the place of sale, and order the bailiff to carry out the sale procedure and determine a request of purchase with an offer at a minimum price<sup>106</sup>. Then the court shall render a ruling to permit for sale or no sale, and when the ruling becomes final and binding, the execution court shall determine the date which the buyer is to make payment. After receiving the payment, the execution court shall determine the date for allocation<sup>107</sup>.

### **Execution against security interest**

Execution against security interest is regarded as a kind of compulsory execution of claims for monetary payment which, in principle, shall comply with general provisions of compulsory execution provided in chapter 1, book 6 of Civil Procedure Code. Similarly, compulsory execution shall be based on the title of execution as stipulated in article 350, but the execution against security interest shall be based on the title of execution (1) the first trial judgment or final Uttor or Satuk judgment which certifies the existence of se-

<sup>102</sup> Code of Civil Procedures, Article 402.1

<sup>103</sup> Code of Civil Procedures, Article 403.5

<sup>104</sup> Code of Civil Procedures, Article 413

<sup>105</sup> Code of Civil Procedures, Article 419.1

<sup>106</sup> Code of Civil Procedures, Article 436 and Article 439

<sup>107</sup> Code of Civil Procedures, Article 440 and Article 447

curity interests (the judgment granting a complaint of a claim for an action claiming the existence of security interests) or the petitions carrying the same effect as the first trial judgment or the final Uttor or Satuk judgment (the record acknowledging a claim for an existence of mortgage) and (2) the notarized document has been made by the notary certifying the existence of security interests (mortgage agreement)<sup>108</sup>. Determination of procedure of execution against security interests shall depend on specific kinds of property which is the subject matter of security interests and this includes the execution of security interests against movable properties, claims and rights on other properties including the execution of security interests against immovable properties.

### **Enforcement of Security Interests against Movable Properties**

According to the Code of Civil Procedures, the security interests against movable properties as a subject matter include statutory lien on movable properties and pledge. The procedures of execution of security interests against movable properties shall commence with attachment of movable properties which is the subject matter of execution by the bailiff similar to the procedure of compulsory execution against movable properties (the sale of movable and allocation). But regarding the pledged movable, the law specially provides a simple procedure for enforcement meaning that the owner of pledged movable may file a motion to the court of first instance at the place of execution to render a ruling to permit and take the pledged properties as a payment owed by the pledgee at once, the obligation of this enforcement called summary enforcement of pledge<sup>109</sup>.

### **Execution of Security Interests against Claims and Other Properties**

Execution of Security Interests against claims refers to the right on debt (claims) requiring monetary payment or handover of movable properties as determined in paragraph 1 of article 402 and there are special provisions on the execution of claims by subrogation. The execution by subrogation means that a person with security interests may exercise their rights on money or other things which the debtor receives from selling or renting instead of the original subject matter of security interests pursuant to the provisions in articles 782, 817 and 849 of the Civil Code<sup>110</sup>. Execution of Security Interests against claims and other properties and the subrogation shall commence with a ruling of attachment by the execution court as the compulsory execution against claims in paragraph 4 of article 403<sup>111</sup>. In the procedure of converting the claims and other properties into money and the subrogation which have been attached shall comply with the same procedures as the compulsory execution against claims. On the contrary, the subrogation may be applied by means of changing claim rights of handover into money as provided

<sup>108</sup> Code of Civil Procedures, Article 496

<sup>109</sup> Code of Civil Procedures, Article 504

<sup>110</sup> Code of Civil Procedures, Article 506

<sup>111</sup> Code of Civil Procedures, Article 508

in article 414 or ordering for sale in article 413 according to types of rights which is the subject matter of subrogation.

### **Enforcement of Security Interests against Immovable Properties**

Security Interests against immovable properties refers to mortgage, pledge of immovable, and statutory lien on immovable properties or general statutory lien effective on immovable properties. The enforcement of security interests shall be applied by means of compulsory sale against immovable properties, except in the special provisions. In the method of compulsory sale of the immovable, if registered, such as real right to usage and outcome together with the immovable as the subject matter, the issue shall be what to do. In such case, the right to usage and production which may clash with (the first class creditor of mortgage) the security interests of the creditor in execution shall continue its existence after the compulsory sale. Other rights together with the immovable may not be encountered (the second class creditor of mortgage) with security interests of the creditor in execution shall terminate after the compulsory sale<sup>112</sup>. On the other hand, in the case where there is a motion for compulsory sale applied on the overlapped security interests, and if the court accepts the motion for the enforcement of security interests, then the court shall render a new ruling of commencement of compulsory sale<sup>113</sup>. Based on the Civil Code, when any immovable properties are attached to enforce the security interests, the effect of security interests against the immovable shall be active on the produces from the attachment date thereof<sup>114</sup>. Therefore, the Civil Procedure Code has provided the supplementary procedure of compulsory sale, and the procedure which the owner of security interests may achieve the effect of right. This means that the immovable which is the subject matter of security interests has been leased. The law permits the creditor in execution to file a motion for attachment of the income from the rent as stated in article 516, and after the attachment, the creditor may receive payment by a priority and the income from the rent.

### **Execution of Claim Rights of Which the Subject Matter Is Not Money**

The content of execution of claim rights of which the subject matter is not money refers to the compulsory execution of claim rights of the handover of a tangible object (movable and immovable) which is the transfer of the direct possession to the creditor or the third party and the compulsory execution against claim rights to act or not to act. Through the compulsory execution against claim rights, the handover of a tangible object shall comply with the direct enforcement, whereas the compulsory execution against claim rights to act or not to act shall comply with an indirect enforcement or a substituted execution.

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112 Code of Civil Procedures, Article 510

113 Code of Civil Procedures, Article 512

114 Code of Civil Procedures, Article 848

### **Compulsory execution of right to claim for tangible objects**

Compulsory execution of right to claim for tangible objects refers to an execution through delivering (transferring the direct possession) of movable or immovable properties of the debtor in execution called the *direct execution*. In the compulsory execution against the immovables, the bailiff shall dispossess the debtor of execution of the subject matter and have the creditor in execution take possession thereof. However, in order to achieve this objective, the bailiff shall order the debtor to leave and in case the debtor does not agree to leave, the bailiff may use force or request the assistance of police if necessary as stipulated in article 338, paragraph 1<sup>115</sup>. Where the compulsory execution against the movables shall be made by the bailiff and the movable properties from the debtor shall be confiscated and handed over to the creditor in execution<sup>116</sup>. If a third party is in possession of the subject matter of the execution set fourth in the title of execution in possession, the compulsory execution based on the execution title may not be carried out against the persons other than the debtor in execution, except the title of execution has effect on the third party as stipulated in article 351. Though in such case, if the third party (possessor or third party debtor) holding the property which is the subject matter of the compulsory execution and in a case that the object shall be handed over to the debtor in execution, compulsory execution of delivery may be made through the method of withdrawing rights to delivery of the debtor in execution against the third party and permit the creditor in execution to exercise the said right to demand delivery. In contrast, even if the creditor made a claim, the third party refuses not to deliver, the creditor in execution may file a claim for the handover of the object which the third party is the defendant through the suit regarding a collection of debts as stipulated in article 412 and in article 524 and 525 regarding the compulsory execution by using a judgment of the Courts of First Instance or higher courts, where the creditor in execution win, as the title of execution<sup>117</sup>.

### **The compulsory execution of claim rights to act**

The compulsory execution of claim rights to act such as: the dismantlement of building and constructions on the land may be made through the method of substituted execution. The substituted execution is a method which permits the creditor or the third party to achieve the substituted payment of the debtor and collect fee from the debtor. This method may be applied with only the obligations of substituted execution. The claim rights to act through the substituted execution refer to the claim rights in which an activity which is the objective of payments can be satisfied by other persons. Such activities include cutting trees, destruction of the building, or goods delivery. Nevertheless, some cases may not be made through the substituted execution such as film performances or drawings so there is only compulsory execution which uses the indirect enforcement.

115 Code of Civil Procdures, Article 524.1,

116 Code of Civil Procdures, Article 527.1,

117 Code of Civil Procdures, Article 526.1,

Upon motion by the creditor in execution, substituted execution be effected by the execution court's making a ruling permitting the said creditor to have the act performed by a third party in lieu of the debtor in execution, at the expense of said debtor<sup>118</sup>. This ruling is called *a ruling for authorization* and when the court issues this ruling, the competent court may order the debtor in execution to make payment in advance to the creditor in execution of the costs of performing the act prescribed in the ruling<sup>119</sup>.

### **The compulsory execution of claim rights not to act**

The compulsory execution of claim rights not to act shall comply with the indirect enforcement. The indirect enforcement is a method which puts psychological pressures on the debtor to force implementing their obligations through a motion by the creditor in execution to the court to issue a ruling of indirect enforcement based on the title of execution in effect, specifying the claim rights to act which can not be substituted, or not to act. If the court accepts the motion, the court shall issue a ruling ordering the debtor in execution to pay the specified amount of money to the creditor in execution in lieu of the date or month of being late for payment, or to pay the specified amount of money at once if the debtor in execution has not acted properly within the time set by the court<sup>120</sup>. For instance, the debtor in execution does not agree to carry out the obligations in starring or drawing etc. The debtor shall pay the creditor in execution in amount of money \$ 100 per day.

## **IV. Preservative Relief**

Preservative relief is the proceedings in purpose of preserving the present situation through using state's power to protect any person's rights if there is an apprehension that the compulsory execution will become impossible or extremely difficult by reason of alteration of the state of the property of the debtor in execution, or that significant damage or imminent risk will arise affecting the status of one of the parties in relation to the right in dispute<sup>121</sup>. The preservative relief is the disposition through provisional attachment and provisional disposition (provisional disposition of subject matter of dispute and provisional disposition establishing a provisional status). There are two stages in the procedure of preservative relief such as: the ruling of preservative relief and the execution of preservative relief.

118 Code of Civil Procedures, Article 527.1

119 Code of Civil Procedures, Article 527

120 Code of Civil Procedures, Article 527

121 Code of Civil Procedures, Article 530

# 1. Types of Preservative Relief

## Provisional attachment

The provisional attachment may be made through the ruling of provisional attachment by the court upon a motion of the issuance of the ruling of preservative relief against a claim having as its subject matter the payment of money even in cases where the claim is subject to a condition or determined period, the court may issue a ruling of provisional attachment as well (the guarantor's claim right of future payment)<sup>122</sup>.

## Provisional disposition

There are two types of provisional disposition: provisional disposition of subject matter of dispute and provisional disposition establishing a provisional status<sup>123</sup>. i) The provisional disposition is a method in which the court orders the debtor to act as determined by the court or prohibits not to act (ordering the removal of construction, the prohibition of building, or the prohibition of sale etc.), ii) Ordering the debtor to grant payments which is the ordering to act through direct enforcement, such as handover or payment of the monetary amount, and iii) Ordering for maintenance of the status quo of the subject matter of the dispute (transferring the possession of an object of the subject matter of the dispute from the debtor in execution to the custodian)<sup>124</sup>.

# 2. Flow of the Proceedings of Preservative Relief

## Ruling of Preservative Relief

The proceedings of preservative relief shall be conducted with a motion called *a motion for a ruling of preservative relief*<sup>125</sup>. The motion shall include the particular points as stipulated in article 541 attaching with the certificate of preservation needs and right or the legal relationship to be preserved, and the motion shall be submitted to the competent court as stipulated in article 540. When the motion for a ruling of the preservative relief is submitted, the court shall review the motion for a ruling of preservative relief, but the ruling of preservative relief may be rendered without the prior oral argument except for the rulings of preservative relief in dispositions establishing a provisional status<sup>126</sup>. If the court deems that the motion is appropriate, the court shall render a ruling of preservative relief and serve a ruling to the party<sup>127</sup> but if the motion is inappropriate, the court shall dismiss the motion for a ruling of preservative relief.

<sup>122</sup> Code of Civil Procedures, Article 545

<sup>123</sup> Code of Civil Procedures, Article 531

<sup>124</sup> Code of Civil Procedures, Article 549

<sup>125</sup> Code of Civil Procedures, Article 534

<sup>126</sup> Code of Civil Procedures, Article 548

<sup>127</sup> Code of Civil Procedures, Article 543



For this ruling, the creditor may make a Chomtoah appeal against a decision to dismiss a motion for preservative relief within two weeks of receiving notice thereof<sup>128</sup>. The ruling of preservative relief may not be subject to an immediate Chomtoah appeal. However, a motion of objection may be filed with the court that has rendered the ruling at any time without being subject to a statute of limitation<sup>129</sup>. Even if there is a motion of objection, the motion may not postpone the effect of a ruling of preservative relief automatically. There shall be another provisional ruling ordering a suspension of the execution of preservative relief, or cancellation of the preservation relief<sup>130</sup>. In the trial on the motion of objection, the court shall make an oral argument or inquire both parties about appearing in court and the court shall decide the date to conclude a trial within a proper period. However, the court may declare instantly that the conclusion of a trial at the date of an oral argument or the date of inquiry on both parties who can appear<sup>131</sup>. The court shall decide on the motion of petition by recognizing the alteration and cancellation of the ruling of preservative relief. This means that if the court deems that the ruling of preservative relief is appropriate, the court shall render a ruling to recognize that ruling; if not, the court shall alter any part of the ruling and render a ruling of alteration or the court shall cancel the ruling of preservative relief<sup>132</sup>. The ruling cancelling a preservative relief ruling shall have no effect until it becomes final and binding, and if necessary the court may declare the ruling to have an immediate effect<sup>133</sup>. Besides cancellation of a ruling upon an objection, the ruling of preservative relief shall be cancelled in cases where: i) cancellation of ruling of preservative relief due to failure to file suit in the principal case, ii) cancellation of preservative relief due to change of circumstances, and iii) cancellation of ruling of provisional disposition due to special circumstances as stipulated in article 557, article 558 and article 559.

### **The execution of preservative relief**

The ruling of preservative relief shall have immediate effect. Therefore, the execution of preservative relief may be made with no execution clause but if the execution of preservative relief is against another person rather than the person prescribed in the ruling of preservative relief, an execution clause (Special Execution Clause) shall be separately attached<sup>134</sup>. The execution of preservative relief shall be carried out in the same manner as the compulsory execution, except in contravention with the execution of preservative relief<sup>135</sup>.

128 Code of Civil Procedures, Article 544

129 Code of Civil Procedures, Article 550

130 Code of Civil Procedures, Article 551

131 Code of Civil Procedures, Article 552

132 Code of Civil Procedures, Article 554

133 Code of Civil Procedures, Article 556

134 Code of Civil Procedures, Article 562

135 Code of Civil Procedures, Article 564

## V. Conclusion

In conclusion, the Code of Civil Procedures has set out three basic frameworks for civil case processes in Cambodia which can be considered to be the most modern civil procedure in this century. These three processes include i) litigation proceedings which determine the existence or nonexistence of right or legal relationship between private individuals by rendering a judgment; ii) compulsory execution procedures in which rights are ultimately decided; and iii) procedures of preservative relief which ensure the future exercise of rights when parties win the case.

However, since the code is new and complicated to a certain extent, particularly in terms of terminology and legal procedures, problems of implementation cannot be avoided. Therefore, there is a need to conduct an assessment study to identify the best practices and challenges in order to strengthen and improve the law's implementation and its enforcement.