
Cambodia's Labor Migration

Analysis of the
legal framework

April 2011



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The Asia Foundation

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Contents

Definitions/Acronyms	3
Executive Summary	4
1. Introduction.....	8
2. Licensing Recruitment Agencies (RAs).....	10
3. Contracting/Recruiting Workers	15
4. Training/Accommodation/Transport	26
5. Transit to/Arrival in Receiving Country	31
6. Conditions of Work in Receiving Country	35
7. Repatriation to Cambodia	43
8. Claim: Procedure/Remedies.....	47
9. Conclusion & Recommendations.....	50
10. Legal Framework: Flowchart & Table of Legislation	53
Bibliography	62
Appendices.....	69
Appendix A: Synopsis of Domestic, Regional & International Law.....	69

Definitions/Acronyms

The following definitions and acronyms are used in this Report, listed in alphabetical order:

ACRA	Association of Cambodian Recruitment Agents
ASEAN	Association of South East Asian Nations
ADHOC	Cambodian Human Rights and Development Association
CARAM	Coordination of Action Research on AIDS and Mobility
CEDAW	UN Convention on the Elimination of all forms of Discrimination against Women
CMW	UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
COMMIT	The Coordinated Mekong Ministerial Initiative against Trafficking
Constitution	Constitution of the Kingdom of Cambodia
CRC	UN Convention on the Rights of the Child
GMS	Greater Mekong Sub-Region
HRW	Human Rights Watch
ICCPR	UN International Convention on Civil and Political Rights
ILO	International Labor Organization
IOM	International Organization for Migration
LSHTSE	Law on Suppression of Human Trafficking and Sexual Exploitation, 2008
MoLVT	Ministry of Labor and Vocational Training
MoU	Memorandum of Understanding
NPA	Cambodia's National Plan of Action
Palermo Protocol	UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Palermo Convention
RA	Recruitment Agencies
RGC	Royal Government of Cambodia
TIP	Trafficking in Persons
UNIAP	United Nations Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-Region

Executive Summary

Section 1: Introduction

The Royal Government of Cambodia (RGC) continues to develop policies concerning the migration of the Cambodian workforce overseas as a way of increasing domestic economic growth and combating unemployment. The primary destinations for Cambodian workers are South Korea, Malaysia and Thailand. As regular migration for labor increases so does irregular migration.¹The Report focuses on the migration of women to Malaysia (for domestic work) and men to Thailand (to work in agribusiness), analyzing the rules that govern regular migration while identifying legislation that can be employed to protect those who become victims during irregular migration and be used against those who perpetrate and profit from it. The stories of Samneang (a Khmer man migrating to Thailand) and Sopheap (a woman recruited to work in Malaysia) are used to illustrate different processes of labor migration and how the relevant laws can be applied in these contexts. The characters have been created to serve the purposes of the report and, while based on the experiences of actual migrants, do not refer directly to specific individuals.

Section 2: Licensing Recruitment Agencies (RAs)

In Section 2 the requirements for regulation and licensing of Recruitment Agencies by the Ministry of Labor and Vocational Training (MoLVT) are considered. Sub-decree 57 (on the Export of Khmer Labor to Work Overseas, 1995) is the primary source for licensing requirements. This Section concludes that it is reasonable to conclude that brokers who are employed by or operating under the auspices of an RA, create civil liabilities under the RA's license (in the event that the broker is not independently licensed) and that, in any event, when a crime is committed by a broker, liability may fall to both the individual broker and the RA.

Section 3: Contracting/Recruiting Workers

This section is split into two parts, the first of which identifies the laws that apply to the contracting and recruiting of regular migrants through licensed RAs (however, the Report's case study also looks at the subject with the added element of recruiting underage workers). Section 3, Part 1 finds that where a contract is drafted with an illegal premise at its heart, e.g where the worker is not yet 18 (as required by Sub-decree 57), the contract can be considered void from inception (under Sub-decree 38 on the Law Referring to Contracts and other Liabilities, 1988). There are also other arguments that

¹ Art. 5 (a) International Convention on Migrant Workers: Regular workers are, "considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party".

can assist a worker in voiding illegal, fraudulent or impossible contractual terms, including the argument that a provision that contractually binds a person to confinement, should be considered illegal and void. Article 3, Sub-decree 57 requires that all candidates for working overseas be at least 18 years of age. In the circumstances where a minor is removed from their parents' (or other guardians') legal custody (by an RA or broker) without legal justification or in a manner considered unlawful, the perpetrator may be liable to criminal charges under the Law on Suppression of Human Trafficking and Sexual Exploitation (2008) (LSHTSE) or Penal Code (2009).

The second part of Section 3 considers Samneang's story and considers the point at which a voluntarily irregular migrant can be considered a victim of Trafficking in Persons (TIP), concluding that a worker's knowledge and intention to enter into the irregular migrant workforce does not preclude them from pursuing a TIP prosecution when the exploitation becomes clear at a later date. The relevant LSHTSE articles are considered in this section.

Section 4: Training/Accommodation/Transport

Section 4 considers the laws applicable to the training, accommodation and transport of regular and irregular migrant workers. The section identifies the provisions of Sub-decree 57 and Prakas 108 (2006) that state the RA is responsible for training workers on the work system, customs and traditions, and basic laws of the country in which they will be working, as well as health issues, safe migration and labor rights. The section also shows that where a worker has their freedom of movement restricted (during training for example), the perpetrator of the restriction may be guilty of the crime of confinement under the Penal Code. In addition, and in Samneang's case, the LSHTSE criminalizing the act of harboring or transporting victims of TIP. In the event, therefore, that a guesthouse owner or driver can be shown to have known of the trafficked nature of the worker or the ultimate exploitative employment, they may be criminally liable.

Section 5: Transit to/Arrival in Receiving Country

This section identifies the criminal laws that may be employed in the event that a worker migrates using a forged or fraudulently obtained passport. The section also looks at the domestic laws and those in receiving countries that provide a framework for labor migration, e.g. Sub-decree 39 (2009), which provides that all labor migrants in Cambodia are eligible for a fast-track passport. Even with the correct documents, many migrants choose irregular methods of migrating in order to avoid the costs associated with official channels. Ultimately, however, for those migrants who have travelled via irregular means and/or those with illegitimate documents, they will arrive in the receiving countries on the wrong side of the immigration laws. This may lead to arrest, detention and even punishment (which can include caning in Malaysia) and eventually deportation (often at the expense of the arrested party).

Section 6: Conditions of Work in Receiving Country

Section 6 considers the conditions of work in the receiving countries, in particular as the Cambodian Labor Law (1997) does not apply to domestic workers in Cambodia or protect Cambodian migrant workers. Sub-decree 57 provides some terms that should be included in an employment contract, but there are very few minimum standards applied and little monitoring of conditions in receiving countries. The section goes on to consider that there may be civil and criminal claims that the worker can pursue against the RA in the event that the conditions of employment in the receiving country are significantly worse than those represented by the RA and there is evidence that the RA was aware of the actual conditions.

Section 7: Repatriation to Cambodia

Section 7 looks at repatriation of workers to Cambodia, primarily considering who is obliged to pay for repatriation in different scenarios. In the case of regular migration, the RA is obligated to notify the MoLVT 45 days before the worker is to return and the cost is to be borne by the RA or employer (albeit ultimately deducted from the worker's wages). However, whether the worker initially migrated through irregular channels or left regular employment (voluntarily or not), there are large numbers of undocumented migrants who are arrested and detained as illegal immigrants under the laws of the receiving countries. Little is done to identify undocumented workers who are victims of TIP, and while there are an increasing number of domestic and bilateral commitments designed to protect victims of TIP, most only assist women and children, who are broadly identified as being the most vulnerable of victims.

Section 8: Claim: Procedure/Remedies

Section 8 considers the different paths that a claim may take, including a claim for compensation from the \$100,000 surety under Sub-decree 57. The section also considers the reality that many workers with valid claims are dissuaded from pursuing their claims (whether criminal or civil), as the RAs argue that the workers (or their families) had knowledge of, or were complicit in, an element of the irregularity, e.g. providing false identification documents. The RAs will also often allege that because the families still owe them money, it is the RAs that have the claim for compensation. This section looks at the criminal and civil laws that may be employed to counter these arguments in cases where the worker has genuinely suffered a loss and/or where the vulnerability of them/their family can be shown to have been exploited by the RA.

Section 9: Conclusion

The legal framework in Cambodia is struggling to keep up with the rapid evolution of labor migration trends, leaving thousands of migrant workers without the critical protections that robust monitoring

and regulation should provide. As such, people are increasingly taking advantage of the growing space in which irregular migration can be pursued with little or no risk. For those workers keen to pursue this perceived path to economic stability, the lack of information and hidden pitfalls mean that few migrants are able to take steps to comprehensively protect themselves from dangerous situations or exploitation.

The RGC has promised a new Sub-decree on migrant work (draft forthcoming), which is likely to enter the statute books shortly and the new Civil Code (2007) recently became enforceable. These two pieces of legislation will have a great impact on the protection of migrant workers. The Sub-decree is hoped to standardize the recruitment of migrants, in providing standard contract terms, training requirements and complaints procedures; the Civil Law will introduce the tort of negligence, which may be employed against those whose negligent recruiting or training causes harm to migrant workers. Stronger bilateral agreements with receiving countries and more coherent structures of monitoring and evaluation would also ensure that Cambodian workers are treated fairly and properly once they have left the country.

Section 10: Legal Framework – Flowchart & Table of Legislation

Each section of the Report starts with a flowchart showing the variables and activities that occur within that stage of the migration process, while identifying the various laws (civil, criminal and international) applicable thereto. Section 10 contains a master flowchart, which brings all of the section specific flowcharts together. The table that follows includes further information about each of the laws cited in the Flowchart. The table and flowchart are intended to create a quick guide for those readers looking to identify which laws may be applicable to scenarios at different stages in the migration process. Appendix B contains a A3 version of the master flowchart for further use in this regard.

1. Introduction

1.1.1. The 2008 census recorded the population of Cambodia as 13.4 million with a projection to reach 19 million by 2020.² A large proportion of the Cambodian population are young people, the product of Cambodia's baby boom in the 1980s. As such, Cambodia is currently facing an influx of an estimated 250,000 new workers into the job market annually in the coming years.³ In response to the large numbers of Cambodians entering the labor market and the fact that job creation cannot keep up with those entering the market, the Royal Government of Cambodia (RGC) is increasingly reliant on the migration of Cambodian workers overseas. This has increased the need for policies that facilitate safe migration and more effective protection of the rights of migrant workers.

1.1.2. The primary countries of destination for Cambodian migrant workers are Malaysia for domestic work, Thailand for work in the agribusiness industries, and South Korea for work in manufacturing, construction and agriculture. The United Nations Inter-Agency Project on Human Trafficking (UNIAP) published Ministry of Labor and Vocational Training (MoLVT) figures recording that in 2009, 14,912 workers left Cambodia through regular channels to work in the three primary destination countries.⁴ Figures released by the Association of Cambodian Recruitment Agencies (ACRA) for 2010 appear to have more than doubled, with 30,511 Cambodians having left for Malaysia and Thailand in the first 10 months alone (22,425 to Malaysia and 8,086 to Thailand).⁵

1.1.3. The numbers of those migrating and the demand for migrant workers is increasing; if the estimated requirement for 30,000 workers a year in Malaysia and 50,000 in Thailand is correct, the economic opportunities for Cambodia will also continue to grow. However, where there is regular migration (that which occurs within the norms and practices established by states to manage the orderly flow of labor migration), there is an equal and increasing amount of irregular migration. The cost, bureaucracy and time associated with regular migration can prove too big a barrier to those seeking to earn money to rise out of poverty. Similarly, the lack of substantial joined-up legal framework and regulation of regular recruitment has meant that

² Kingdom of Cambodia, *Policy on Labor Migration for Cambodia*, (MoLVT/ILO June 2010), p.9

³ Ibid, p. 9

⁴ UNIAP Strategic Information Response Network (SIREN), *The Mekong Region Country Datasheets on Human Trafficking*, (September 2010), available at: www.no-trafficking.org/story_2010ht_datasheets.html accessed on 20 November 2010

⁵ May Kunmakara, "Soaring Demand for Labour", *The Phnom Penh Post* (26 November 2010)

commercial recruitment companies are able to run their businesses without adequate protection of workers' rights. As a result of limited regulation and oversight of labor recruitment, and the strong demand overseas, those seeking to migrate for work are vulnerable to being exploited, trafficked and, in the worst case scenario, smuggled across borders and sold into slavery.

1.1.4. Migration of Cambodian workers to Malaysia increased significantly in recent years. This is particularly as a result of Indonesia's 2009 moratorium on sending workers to Malaysia, a decision made due to the bad working conditions experienced there.⁶ Currently, the main problems identified with migration to Malaysia are that workers are being exploited by Cambodian recruitment agencies (RAs) that are (or purport to be) legitimate and licensed, and being sent into poor quality working conditions in Malaysia with little or no support. Thailand on the other hand shares a border with Cambodia and, as such, many of the cases of irregular migration are associated with illegal crossing of the border (both voluntarily involuntarily).

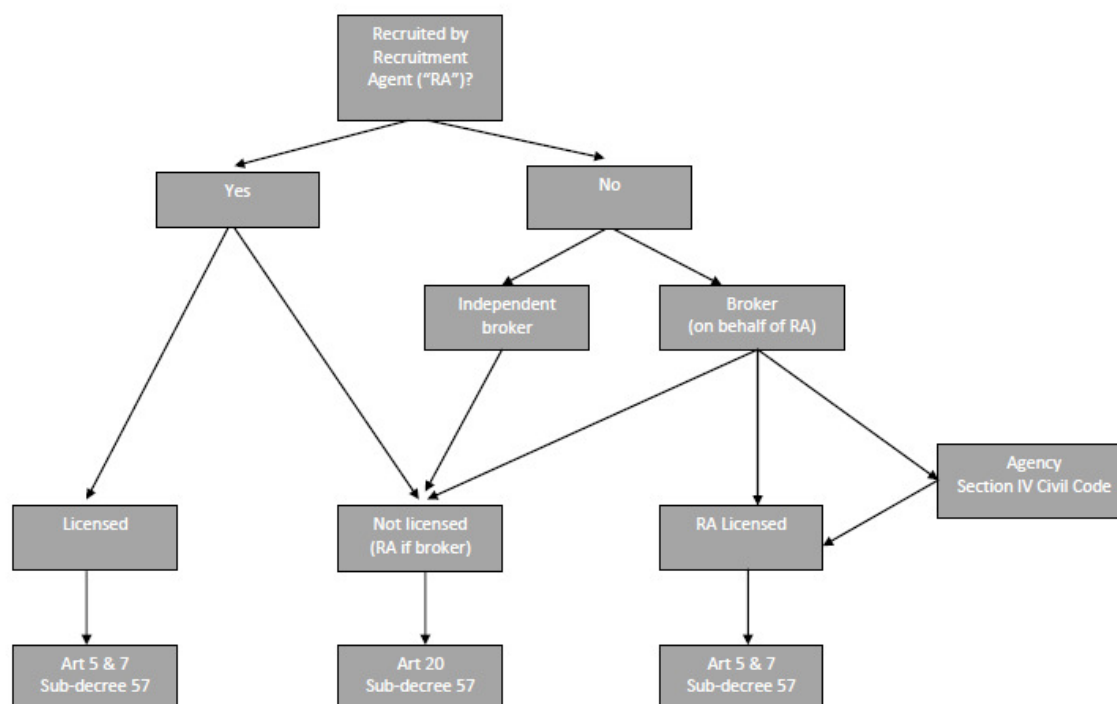
1.1.5. This Report seeks to identify and analyze the domestic, regional and international laws relevant to Cambodian migration for labor. In so doing, the Report aims to highlight the laws that govern regular migration for labor as well as the civil and criminal laws being breached by those who stray into the irregular channels. The Report does not deal with internal migration for labor or non-cross-border trafficking activities.

1.1.6. In order to illustrate the legal framework concerning migration for labor, the Report focuses on two different migration stories, those of Samneang (a man recruited into the fishing industry in Thailand) and Sopheap (a young girl recruited into domestic service in Malaysia). These stories are created to serve the purposes of the report and, while based on real stories, are not based on real people. The Report also uses Flowcharts to show each stage of migration, the different variables and activities involved in each stage and the laws that can be employed to protect victims and prosecute perpetrators of irregular migration and exploitation.

1.1.7. The Report discusses how criminal and non-criminal law can be employed to protect victims (and punish perpetrators) of exploitation. It also looks briefly at the labor standards employed in Malaysia and Thailand. The Report finds that as the domestic and regional legal framework is underdeveloped, RAs are able to work with little regulation, and victims of exploitation experience difficulties in prosecuting perpetrators.

⁶ "No Firm Agreement Yet on Indonesian Migrant Workers in Malaysia", *The Jakarta Globe* (19 May 2010), available at: <http://www.thejakartaglobe.com/home/no-firm-agreement-yet-on-indonesian-migrant-workers-in-malaysia/375755>

2. Licensing Recruitment Agencies (RAs)



2.1.1. The process of enabling labor migration from Cambodia is governed and regulated by the MoLVT and set out in Sub-decree No. 57 (1995). All companies that export Cambodian labor overseas must be licensed with the MoLVT and comply with the terms of the Sub-decree, which creates a quasi-contractual relationship between the MoLVT (the “Providing party”) and the RAs (the “Receiving party”).⁷ As of November 2010, the MoLVT has licensed 32 recruitment agencies.⁸

2.1.2. In order to successfully obtain a license from the MoLVT, an RA must submit a written request. The request must include details of the work that they are seeking to recruit employees for, the location of the work, the numbers of workers required, salaries and transport arrangements.⁹ The MoLVT provides their authorization to the RA based on the information provided or asks to discuss the matter further. Once the MoLVT has issued official authorization to the RA, the RA has seven days in which to deposit a surety fund of

⁷ RAs are also required to be registered with the Ministry of Commerce

⁸ List of recruitment agencies licensed for Thailand, Malaysia, Japan and/or Arabia/Kuwait/Libya issued by the MoLVT Department of Employment and Manpower (2010)

⁹ Article 5, Sub-decree No. 57 on the Export of Khmer Workers Overseas (1995)

USD100,000 with the MoLVT to be used in the event that an employee has a legitimate claim for compensation.¹⁰

2.1.3. The RAs are then unilaterally responsible for the worker from recruitment to the commencement of their employment, which includes transporting the workers to pre-departure training and overseas, and providing food and accommodation during training. Of course, RAs are profit-driven companies with an incentive to immediately earn enough to cover the cost of the surety. As such, it is in their interests to ensure that the costs of transport, training and accommodation are as low as possible in order to maximize the profit. In addition, this sector of Cambodian industry is largely not regulated or supervised, and there is ample space available within the system to employ exploitative practices.

2.1.4. The Sub-decree provides that anybody found sending Cambodian workers overseas in

Sopheap's Story #1

Sopheap is 14. She comes from a small village in the provinces. She lives with her Mother, Father and three younger siblings. Her older sister lives in the same village; she is 18 and married with her own children. Sopheap's family struggle to earn enough money to survive and it is clear that the younger children need to start earning money.

The family are approached by a woman known in the village to work for Malabour Recruitment Group Ltd. She is a local recruitment agent who receives \$50 for each girl she recruits. The agent tells Sopheap's parents that **Sopheap will be able to earn around \$2,000 to \$3,000 over the course of two years working as a domestic maid in Malaysia.** Malabour would take care of all of the transport and training costs, which would be deducted from Sopheap's first six months' salary; they would also provide the family with a financial loan and sacks of rice. At 14, Sopheap is too young to be recruited by the agent. On the agent's suggestion, however, **Sopheap's Mother agrees that Sopheap should use her sister's birth certificate to register.**

¹⁰ Article 7, *ibid.*

contravention of the provisions of the Sub-decree can be punished under the law.¹¹ The MoLVT also has the power to revoke a license in the event that an RA breaches the provisions of the Sub-decree. It is unclear, however, the type of activity that would be considered sufficient grounds to take a RA's license away. Non-payment of the USD100,000 surety has been seen to be sufficient cause for the revocation of a license, as seen in 2006 when the MoLVT revoked 30 licenses on this basis.¹² In 2010, the firm VC Manpower was barred temporarily from recruiting potential workers after it was found that 24 of the girls that they had recruited were underage. This action was taken following raids of both VC Manpower and Champa Manpower training facilities, where the living quarters of Champa Manpower were compared to "*duck or chicken cages*".¹³ The bar on VC Manpower was lifted after the agency argued that the girls had presented forged identity documents.¹⁴ There are, as yet, no examples of the MoLVT revoking licenses due to exploitative practices or sub-standard training conditions.

2.1.5. The ACRA Codes of Conduct (2009) provides for certain minimum requirements in the activities of RAs, including at 3.4 the requirement that all employees have a standard employment contract. This, however, is not a formal method of regulation and is, instead, a list of requirements set by ACRA and self-regulated.

2.1.6. The Policy on Labor Migration has included the need for regulation of recruitment through a licensing system in which responsibilities for recruiters and penalties for violation of the law and performance guarantees are clearly defined.¹⁵

The Broker

2.1.7. While there is a legal requirement for the RAs to be licensed, it is often not the RAs themselves who are in rural provinces recruiting the workers. The RAs often use brokers who are based in the provinces and who receive a set amount of money for each person recruited. The legal status of these brokers is unclear. There is often no formal written contractual relationship between the broker and the recruited person, and in the absence of being independently registered or licensed with the MoLVT, the broker holds themselves out as a representative of the RA.

¹¹ Article 20, *ibid*

¹² Chen Chen Lee, "Exploitative Labor Brokerage Practices in Cambodia: The Role and Practices of Private Recruitment Agencies" (2007, ILO IPEC-TICW)

¹³ "Parents Accepted Cash from Labour Agency", *The Phnom Penh Post*, (27 July 2010) available at: <http://cambodia.world.countries.net/archives/25000>

¹⁴ "Trainee Hurt Fleeing Labour Firm", *The Phnom Penh Post*, (6 September 2010), available at: <http://www.cam111.com/photonews/2010/09/06/46333.html> accessed on 11 November 2010

¹⁵ Kingdom of Cambodia, *Policy on Labor Migration for Cambodia*, (MoLVT/ILO June 2010)

2.1.8. In the event that a broker purports to be representing an RA with a valid license (under an implied contract), it is reasonable that the RA should be held accountable for the actions of the broker and that the broker should act within the terms of the license. In the event that the broker's activity brings about grounds for a civil claim (for example by misrepresenting the terms of a contract) the civil claim ought to be issued against the RA. If, however, the broker commits a criminal act, both the broker and the RA may both be criminally liable.¹⁶

2.1.9. In circumstances where the broker enters into a contract with the worker stating that they are acting on behalf of the RA, it could be that the broker would legally be identified as an agent of the RA. The new Civil Code includes a section on the rules of agency.¹⁷ The rules of agency provide that the principal (in this case the RA) are bound by the contracts made by the agent or that, in the event that the agent acts outside of their authority, the agent is liable to fulfil the contract or pay damages in the event that they cannot.

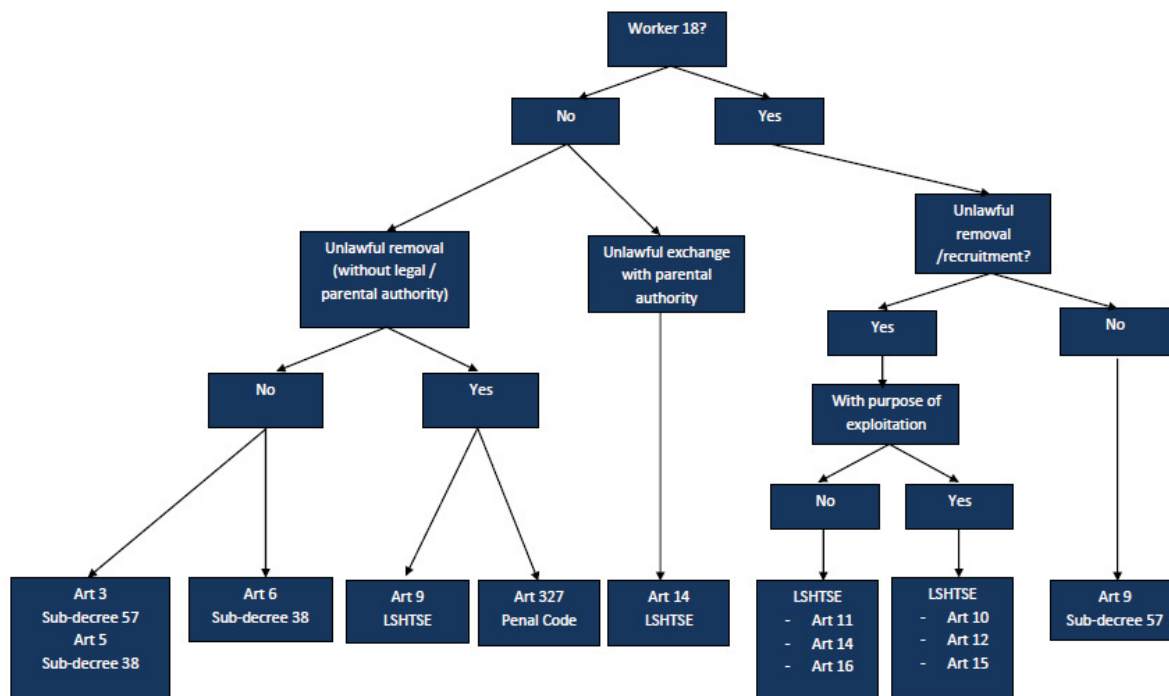
2.1.10. If, however, the broker is acting independently or for an unlicensed RA, the MoLVT should be notified. While the MoLVT may be able to take action against the unlicensed RA/broker, the nature of their unofficial status may mean it is difficult to track them down.

2.1.11. In the absence of any official and legitimate status within the recruitment process, the broker can often be used as the weak link in the chain of recruitment. RAs are able to scapegoat the broker and attach the blame for any illegitimate practices on them. As such, it would be desirable to bring brokers into the licensing framework to ensure that they/the RAs are fully accountable for the broker's actions.

¹⁶ Article 42, Penal Code (2009)

¹⁷ Section IV, Civil Code (2007), Unofficial English Translation (Sept 2008), entered into force on 6 April 2011 with the passing of implementing legislation by the National Assembly, as reported in *The Cambodia Daily*, 7 April 2011.

3. Contracting/Recruiting Workers



3.1. Sopheap's Story

The Recruitment

3.1.1. Article 3 of Sub-decree 57 provides that RAs must only recruit people over 18. In recruiting Sopheap, the broker is in breach of the RA's agreement with the MoLVT. This matter should be referred to the MoLVT and, if proven, should affect the validity of the RA's license. The fact that Sopheap's parents are complicit in the change of Sopheap's age, however, may cause evidential problems if a charge on this ground is brought. The RA may argue that Sopheap was purporting to be 18 when the broker approached her family. The vague nature of Sub-decree 57 does not provide any guidance in this scenario. If the words are taken as read, however, the Sub-decree provides that RAs only recruit people who are 18 or over. As this is the RA's legal duty, the implication is that it is the RAs who are under a duty to ensure that they comply with this requirement by carrying out the appropriate background checks. In the event that the RA (or the broker acting as agent of the RA) recruits a person under 18 without carrying out reasonable checks to verify her age, they should be held in breach of Sub-decree 57.

3.1.2. Family books are a good resource for brokers and RAs to cross reference the identities of family members against ID cards and birth certificates. Notwithstanding the fact that many identity frauds are instigated by the broker, they have little excuse for accepting on face value

that a 14-year-old is 18 on the basis of a sibling's identity documents, as it is highly likely that a relatively small amount of investigation would have uncovered her true age.

3.1.3. Dependent on the circumstances of the recruitment, the broker's activity at this stage could be considered a criminal act. Article 327 of the Penal Code (2009) provides for the crime of "Taking Away a Minor"; this being the act of illegal taking away a minor child from the person who has a legitimate care.¹⁸ In order to make out this case it would be necessary to prove the broker's knowledge of Sopheap's true age (it may be sufficient to show that the broker reasonably should have been aware of her true age). The broker may also be liable for prosecution under the Law on the Suppression of Human Trafficking and Sexual Exploitation (LSHTSE).¹⁹ Successful prosecution in this regard would depend on the level of deception used by the broker and the level of exploitation that Sopheap would face at the ultimate destination.

Sopheap's Story #2

Sopheap's parents provide their thumb print agreement to two contracts: **(1) Consent and Guarantee Agreement**, which provides that Sopheap will be trained for three months in a center in Phnom Penh, she will not be allowed out and her parents will only be able to visit once a week. The agreement also provides that **Sopheap's parents will be responsible for paying back all of the expenses associated with Sopheap's recruitment** should she fail to complete her training or not complete her work contract before Malabour are paid back; **(2) Loan Agreement**, in which Sopheap's parents agree to pay back the entirety of the financial loan with interest in the event that Sopheap does not complete her contract. Sopheap provides her thumb print agreement to a third document, **(3) Work Contract**, in which she agrees to working conditions in Malaysia, agreeing also to pay back all of Malabour's expenses whether or not she completes the contract. **Sopheap's parents are given \$150 and 50kg of rice** with the promise of a further \$150 and 50kg of rice when Sopheap completes her training.

¹⁸ Punishable by an imprisonment of between 1 (one) month and 1 (one) year and a fine of between 100,000 (one hundred thousand) Riels and 2,000,000 (two million) Riels.

¹⁹ For example, Article 12, LSHTSE (2008), Unlawful Recruitment for Exploitation

This Report discusses the dynamic between legitimate recruitment and trafficking below in *paragraph 3.2*. In the event that the exchange of Sopheap is considered to be unlawfully delivering “*the control over a person to another...in exchange for anything of value including any services and human beings*,” the broker and parents may be criminally liable under Section 14 LSHTSE, which criminalizes the act of selling, buying or exchanging a human being.²⁰

Changing Sopheap’s Age

3.1.4. The practice of increasing a minor’s age so that they may be eligible for employment is sufficiently widespread to have been addressed in Cambodia’s National Plan of Action on the Worst Forms of Child Labor as signed by Prime Minister Hun Sen, and which provides that changing a child’s identity to increase their age is in direct violation of the Plan of Action and the RGC’s goal of reducing child labor in Cambodia.²¹

3.1.5. Sub-decree 38 (and the unofficial translation of the new Civil Code) provides that a contract shall be deemed void where it is “*illegal, and not consistent with public order or good customs*.”²² Article 3 of Sub-decree 57 specifies that workers need to be 18 to be a candidate for working overseas. Accordingly, any contract for work overseas, where the work is to be completed by a person under 18, ought to reasonably be deemed illegal as it is in direct contravention of Sub-decree 57. The benefit of using this argument is two-fold:

3.1.5.1. A contract that is illegal is considered void as opposed to avoidable. This distinction means that the validity of the contract is not determined by the intentions (or actions of the parties). Where a contract can be avoided, one or both parties must proactively seek to avoid it. Where a contract is considered void, however, it is as if the contract were never formed.

3.1.5.2. It should not be sufficient for a party to argue that the contract ought not be considered void on the basis that they reasonably considered the worker to be 18 (relying on falsified identity documents, for example). That a party considered the worker to be 18 does not change the fact that they are under 18 and that it is illegal to employ them for work overseas.

²⁰ Article 14, LSHTSE (2008)

²¹ Kingdom of Cambodia, *National Plan of Action on the Elimination of the Worst Forms of Child Labor (2008-2012)*, (16 June 2008)

²² Article 5 Sub-decree 38 on the Law referring to Contracts and other Liabilities (1988), Article 354 Civil Code (2007)

3.1.6. Article 7 of Sub-decree 38 provides that if a contract is the result of mistake, duress or fraud (including misrepresentation without which one party would not have entered the contract) it is not valid. Article 10 goes on to say that fraud is a ground for voiding the contract when there are acts of deception, dishonesty, or misrepresentation committed by one party to the contract without which the other party would not have entered into the contract. In Sopheap's case, both parties were aware of and complicit with the change of Sopheap's age. Indeed, in the event that the family tried to avoid the contract on the basis of fraud, they may find that the RA is in a stronger position in terms of being able to argue that they did not know of the age change and were relying on the documents provided by the family. In addition, in order to successfully avoid a contract for fraud, the party seeking to avoid should do so as soon as they discover the fraud—any delay will increase the likelihood that the parties are deemed to have ratified their contractual obligations by continuing to act under the contract in the knowledge of the fraud.

The Employment Contract

3.1.7. Sub-decree 57 provides at Article 9 the requirements of the employment contract between the RA and the worker. These requirements are set out in the text box below. In the event that the employment contract does not contain all of the elements required by the Sub-decree, the RA should be referred to the MoLVT and their license should be reconsidered.

3.1.8. As discussed above, there is a good argument that Sopheap being under 18 renders the contract void, as if it never existed. The effect of this is discussed later in *Section 8*.

3.1.9. Another argument available to Sopheap is that, as a minor, she has no legal capacity to sign contracts. Article 6 of Sub-decree No. 38 provides that a contract shall be deemed voidable when one party does not have legal capacity. Article 15, however, states that a minor under 18 years of age can enter into a contract with consent from his/her legal guardian.²³ Sopheap's parents have consented to her signing the contract, but she is purporting to sign as a person with legal capacity, i.e. 18 years of age, and so does not need their consent. Accordingly, it is arguable that the employment contract signed by Sopheap is avoidable, as it has been signed by a minor (under the age of 18). This is a difficult argument to maintain because of the parental compliance with the fraud.

²³ In the absence of any expression that such consent should be in writing, it would be sufficient for the consent to be verbal; this may cause evidential problems if there is any subsequent dispute about the existence of such consent.

Guarantee Agreement

3.1.10. In the case of Sopheap, her parents signed a Guarantee Agreement that binds Sopheap to complying with the conditions of the training center and provides that her parents are responsible for repaying the RA's expenses in the event that Sopheap does not complete her training. On the face of the contract, it is not clear that Sopheap is in agreement with it, as she is not party to it, although this is not uncommon in Cambodia where parents are expected to determine the course of their children's lives without consultation with the child.²⁴ In the event that this was a contract that recognized Sopheap's true age, it is feasible that her parents would be the parties to it and not her. However, the contracts are being formulated on the basis of a misrepresentation that Sopheap is 18 and has legal capacity. Accordingly, there is no legitimate reason for her parents to be agreeing its terms.

3.1.11. Article 3 of Sub-decree 38 provides that a contract is valid where it has a subject that is certain, possible to perform, lawful and consistent with public order and good customs. Article 5 goes on to confirm that a contract is void where the subject matter is impossible to perform and/or it is contrary to social interests or violates social ethics. A contract that is signed by two parties that dictates the obligations and working conditions of a third party (who is not party to the contract) is arguably going to lack the elements of certainty that creates a valid contract. In addition and, as discussed in *Section 5* later in this Report, confinement without legitimate authority is illegal, and as such, this element of the contract would be deemed void (under Article 3 Sub-decree 38) to the extent that it is purporting to create a contractual obligation to comply with a criminal act.²⁵

The Loan Agreement

²⁴ Kirst-Ashman, K *Human Behavior, Communities, Organizations and Groups In the Macrosocial Environment*, (2008, Thomson Learning Inc), p.188

²⁵ Article 253 Penal Code (2009)

Article 9 Sub-decree 57: Requirement for the Employment Contract:

- Name & Address;
- Start and termination date;
- Location and nature of work;
- Skills of labor;
- Salaries and remuneration;
- Portion of the salary to be sent to worker's family;
- Working hours, weekends and holidays;
- Lodging, food, clothing, medical care;
- Insurance premium for each labor;
- Mode of delivery of workers to and from work location;
- Expenses of transport to and from;
- Provisions for repatriating workers.

3.1.12. Contracts will be deemed void when contrary to social interests and in violation of social ethics.²⁶ Depending on the individual circumstances, it is reasonable to suggest that it is contrary to social interests and in violation of social ethics, to contractually bind a person to labor for the payment of another's debt. If it is deemed that such a practice is contrary to social interests, it does not matter if the individuals concerned are, at the commencement of the contract, voluntary parties.

3.1.13. The UN Convention on the Abolition of Slavery defines debt bondage as, "*The condition arising out of a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.*"²⁷ Article 1 (d) requires state parties to prohibit any practice whereby a child under 18 is delivered, whether for a reward or not, with a view to the exploitation of the child for labor. Article 2 (1) of ILO Convention No.29 on Forced Labor provides that forced labor is any work or service which is exacted from a person under the menace of any penalty and for which the person has not offered himself voluntarily.²⁸ In addition to this, the Guidance on the Recruitment, training, transfer and management of the Cambodian Worker to Work Abroad provides that forced labor and work to repay debts is prohibited.²⁹

3.1.14. Accordingly, whether the Loan Agreement is evidence of debt bondage or a less severe practice that is not covered by the international conventions, it is still clearly a practice that the MoLVT have determined is prohibited and, as such, in violation of social interests and ethics. For this reason, it is reasonable to argue that such agreements can be deemed void.

²⁶ Article 5, Sub-decree 38 (1988)

²⁷ Article 1 (a) UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery

²⁸ ILO Forced Labor Convention No. 29 (1930)

²⁹ Paragraph 6: Seng Sakda, "Report of the Meeting held on August 20, 2010 at the meeting hall of the MoLVT on the Guidance of the Cambodian Labor Recruitment to Work Abroad", (25 August 2010)

Negligence

3.1.15. The recently enforceable Civil Code (2007)³⁰ includes elements that may be employed as against the RAs. One example is the tort of negligence. Article 742 provides that a negligence is caused when someone, commits an act with respect to which, “(i) a person having the same profession or experience as the actor could have foreseen that a particular result would normally occur from the act, but the actor failed to foresee the result due to an absence of care, and (ii) the actor owes a duty to avoid the occurrence of such result but neglected to fulfil such duty.” The tort of negligence means that in addition to criminal and contractual recourse against the RAs, in the event that an RA acts unreasonably in the course of recruitment and it is foreseeable that their unreasonable behavior will cause harm, they would be liable for damages arising from that harm. This may include the negligent act of recruiting a person who is clearly unable to understand what they are agreeing to under contract.

Conclusion

3.1.16. In the event that it can be shown that the broker was taking advantage of Sopheap’s family’s lack of education/illiteracy, this could be a criminal offence under Article 383 of the Penal Code (2009), “Taking Advantages from Weaknesses.” Similarly, the Civil Code includes a provision at Article 349 for Abuse of Circumstance, providing that where one party uses their economic or social position so that the other party cannot contest the contract formulation, the latter party may rescind the contract. These points are discussed later in *Section 9*.

Samneang’s Story #1

Samneang is 21. He works as a manual laborer and earns \$1.5/day. He is introduced by a friend to a broker who says that he can find Samneang employment in a fish processing plant in Thailand where he can earn up to \$250/month. Samneang does not have a passport but is told by the broker that he does not need one. Samneang travels to a town on the Thai border where he stays in a guesthouse with a group of eight other men who have been picked up by the same broker. The next morning he pays the broker \$100, is put on a motorbike by the broker and driven to the Thai border, where he crosses by foot. He is met the other side by a truck and taken to a guesthouse in a nearby town.

³⁰ The Implementing Act for the Civil Code was approved by the Council of Ministers in November 2010 and the Civil Code came into force on 6 April 2011 (see n17 above).

3.2. Samneang's Story

The Recruitment

3.2.1. There are different levels of legitimacy in the recruitment of men for agribusiness work in Thailand. Some RAs are fully licensed and comply completely with the requirements for training, legal transport and Thai visa requirements. However, Samneang's story is being used to illustrate the criminality of the exploitative practices employed by illegitimate labor recruiters.

3.2.2. Samneang's story shows how quickly migration for labor turns into the criminal act of human trafficking. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (200) (the "Palermo Protocol") provides that state parties shall criminalize the act of recruitment and transportation by means of deception for the purpose of exploitation. Cambodia enshrined this requirement in the LSHTSE which criminalizes acts of human trafficking (see sidebar).

3.2.3. There are difficulties, however, in making out criminal claims for trafficking in such circumstances. The primary difficulty is that many of the people involved in the irregular labor migration between Cambodia and Thailand are based in Thailand. Those recruited will only come into contact with one or two people who can be prosecuted within the jurisdiction of Cambodia.³¹ This is not assisted by the Memorandum of Understanding (MoU) with Thailand which applies only to the trafficking of women and children.³² As such, by the time the trafficked man is back in Cambodia, the likelihood that he can track down the broker who recruited him is very slim.

³¹ There is a Treaty between the Kingdom of Cambodia and the Kingdom of Thailand on Extradition (1998).

³² MoU between Government of the Kingdom of Cambodia and Government of the Kingdom of Thailand in Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003).

LSHTSE 2008:

Article 8: Definition of Unlawful Removal:

Removing a person from their normal place of residence to a place under the actor's control by means of force, threat, deception, abuse of power or enticement;

Article 11: Unlawful Removal for Cross Border Transfer:

For the purpose of delivering or transferring that person outside of Cambodia;

Article 12: Unlawful Recruitment for Exploitation:

To induce, hire or employ a person to engage in any form of exploitation with the use of deception, abuse of power, confinement, force, threat or any coercive means;

Article 13/14: Act of Buying, Selling or Exchanging a Human Being:

Unlawfully delivering control of one person to another;

Article 15/16: The Act of Buying, Selling with Purpose /For Cross Border Transfer.

Article 17/18: Transportation/Cross-Border Transportation with Purpose.

3.2.4. Another difficulty in pursuing such criminal claims is the wording of the articles in the LSHTSE. For a crime of trafficking to be made out, all of the law’s main articles require some element of unlawful behavior—unlawful recruitment, unlawful removal and/or unlawfully delivering control of a person. Within the definition of Unlawful Removal at Article 8 LSHTSE is the requirement that the removal be by means of “*force, threat, deception, abuse of power or enticement*.” It is, seemingly, these elements that make an activity unlawful for the purposes of the LSHTSE. In Samneang’s case, however, until the point that he was drugged in Thailand (see Samneang’s story #2 on page 20), he was voluntarily pursuing his illegal and illegitimate migration. At what point does a voluntary illegal migration turn into a criminal act of trafficking? Chen Chen Lee illustrates this question in the following diagram.³³

Illegal	Good outcome of smuggling/trafficking	Labor exploitation, victim of trafficking
	Forged documents Possible coercion/deception Wages given Decent work/living Freedom of movement	Forged/no documents Coercion or deception Forced labor
Legal	Safe, orderly migration	Bad outcome of legal migration, labor exploitation, victim of trafficking
	Proper documents Wages given Decent work/living Freedom of movement	Proper documents Possible deception Forced labor
	Non-Harm	Harm (Exploitative)

3.2.5. Samneang’s story would fall into the “Illegal” and “Exploitative” category. While it is true that he is voluntarily pursuing employment in Thailand, it is unlikely that he would continue to do so if he were to find out that he will end up on a fishing boat working for no wages. In this regard, the deception can relate to the type of work that will be undertaken and the conditions of that work.³⁴ It is this element of deception on behalf of the broker that turns their actions into a crime of trafficking. Accordingly, this deception is sufficient within the definition of Unlawful Removal, which requires that a person be removed from their normal place of residence by means of deception (among others) and placed under the actor (or third party’s)

³³ Commit, “A Study into Exploitative Labor Brokerage Practices in Cambodia”, (March 2007)

³⁴ Lara Fergus, ACSSA Briefing No. 5, “Trafficking in Women for Sexual Exploitation” (5 June 2005), pg.6

control.³⁵ Article 10 LSHTSE penalizes such acts with imprisonment of between 7 and 15 years when the crime is committed with the purpose of exploiting the victim. Similarly, in proving the deception, Samneang will be able to make out the crime of Unlawful Removal for Cross Border Transfer.³⁶ A more appropriate article in this instance would be Article 12, Unlawful Recruitment for Exploitation, which is made out by evidencing that the perpetrator recruited the victim to engage in exploitation by means of deception.

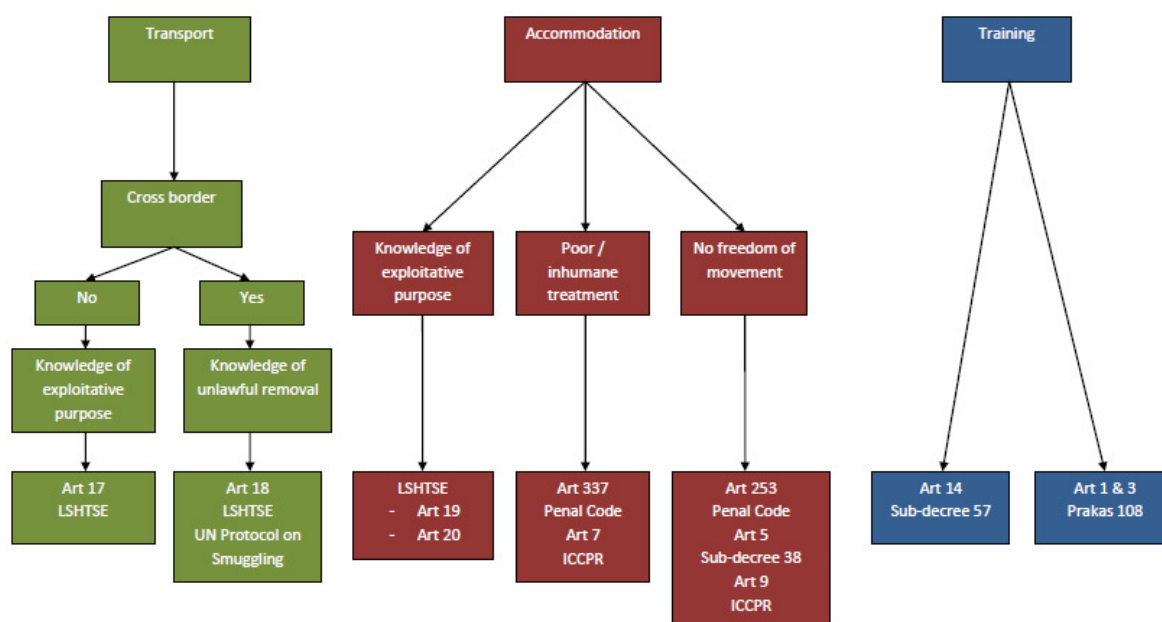
Sopheap's Story #3

Sopheap is taken by the agent to the training center in Phnom Penh with other girls who have been recruited. In the training center she is taught the skills she will need for domestic service as well as some English. She is provided with very little food and is kept locked in a hangar with 300 other girls. ***She is not allowed out and her parents do not come to visit;*** she is told they cannot afford the transport to Phnom Penh. She is not allowed to call them. Sopheap hears stories from other girls that the conditions in Malaysia are very bad. She talks to her teacher, who provides Sopheap with the number for the Cambodian Embassy in Malaysia. The teacher says Sopheap should call them if she ever needs help. The teacher never returns to work. Sopheap sees that, after three months of training, some girls go to work in the teacher's houses. She hears stories that others have to work as prostitutes until they are found employment in Malaysia. ***Sopheap wants to leave but is told that her parents will have to pay \$500 to the agent if she does.*** Sopheap knows her parents will not be able to afford this.

³⁵ Article 8 LSHTSE (2008)

³⁶ Article 11, *ibid*

4. Training/Accommodation/Transport



4.1. Sopheap's Story

Confinement in Training Center

4.1.1. Sopheap is in the training center for three months without being allowed out. A lot of the time the RAs/training centers will argue that it is dangerous to let the girls out on their own, as it is their first time in the capital and they do not know Phnom Penh. The RAs may also refer to contractual terms that provide that the girl will not be allowed to leave the center. The informed presumption, however, is that the primary motivation for keeping the girls confined is so that the RAs can protect their investment. If the girls were allowed to leave, they may not return and the RAs will have lost the money spent on their training, accommodation and migration paperwork up to that point.

4.1.2. Article 9 of the UN International Covenant on Civil and Political Rights (ICCPR)³⁷ guarantees, “Everyone has the right to liberty and security of person. ... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” This is further repeated in Article 16 (4) UN International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW), which states that migrant workers shall not be deprived of their liberty.³⁸ These provisions from international conventions were originally written into domestic law in Article 21 LSHTSE. Since the

³⁷ UN International Covenant on Civil and Political Rights (1966), ratified by Cambodia in May 1992

³⁸ UN Convention on the Protection on the Rights of all Migrant Workers and Members of their Families (1990), signed by Cambodia in September 2004

introduction of the Penal Code, confinement is now most likely to be dealt with in Article 253. This Article provides, “*Any person who arrests, detains or confines other persons without order from the legitimate authorities or except for the cases provided by the law*” will be punished. There is nothing in the Penal Code or the wording of this article that indicates that a contractual term can be considered as “*legitimate authority*” or “*provided by the law*” or that it is a sufficient defense to this crime. As such, a party with legal capacity who willingly enters into a contract that provides for a period of confinement cannot be bound by that term; confinement is an unlawful act and, as such, a contractual term that provides for confinement is invalid.³⁹

4.1.3. Notwithstanding that this international obligation has been written into the domestic laws in Cambodia, it should be noted that ratified international treaties are directly applicable and can be relied on in Cambodian Courts without there having to be a related piece of domestic legislation. As such, where an international treaty is ratified by Cambodia, a breach of an article can be relied upon by the victim of such breach.⁴⁰

4.1.4. In considering the confinement of workers during their training, it is important to separate out contractual obligations with criminal acts. There is no legitimate defense for confinement during training for work overseas. All trainees have a right to their liberty. In the event that a trainee wishes to leave the training center (temporarily or permanently) they should be at liberty to do so. If, in so doing, the trainee breaches their contract with the RA, the RA will have a contractual claim against the trainee. The RA, however, cannot illegally confine the trainee in order to prevent a breach of contract.⁴¹

4.1.5. As Sopheap is a minor, the RA and those keeping her confined in the training center could also face prosecution under Article 337 of the Penal Code (2009) by committed an “Act of Depriving Food or Care for Minors of Less Than 15 Years of Age.” In order to make out this crime, Sopheap’s health would need to be endangered by her conditions. There is no equivalent law on the Cambodian statute books that applies to the treatment of adults. As such, a trainee facing inhumane treatment could have recourse against the RA using international law, e.g. the ICCPR which provides, “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”.⁴²

³⁹ Article 3, Sub-decree 38 (1988)

⁴⁰ Constitutional Council of the Kingdom of Cambodia, *decision No. 092/003/2007* (10 July 2007)

⁴¹ Article 20, CMW (1990): “*No migrant worker...shall be imprisoned merely on the ground of failure to fulfil a contractual obligation.*”

⁴² Article 7, ICCPR (1966)

4.1.6. In circumstances where the training center is not run by a RA but is sub-contracted (either formally and in writing, or otherwise) to another person or enterprise to run, it may be the case that the criminal prosecution would have to be pursued as against those running the training center and not the RA themselves. This is another reason why the victims of irregular migration would benefit from the strengthening of the agency laws and licensing of third parties involved in recruitment.

Training

4.1.7. At present there are no international or domestic minimum standards for the training centers. In particular, there is no standard curriculum governing the substance of the training, nor are there standards for the conditions of training centers. The only provisions are within Sub-decree No. 57 and Prakas No. 108, which provide that the RA is responsible for training workers on the work system, customs and traditions, and basic laws of the country in which they will be working;⁴³ and that the workers shall be trained on health issues, safe migration and labor rights.⁴⁴ Sub-decree 57 provides that both the MoLVT and the RA are responsible for the training of the worker.⁴⁵ In practice, however, the RA is responsible for the training and the MoLVT conducts occasional inspections. This is also as set out in Article 5, Prakas 108, which provides that inspection officials from the Department of Manpower and other relevant departments of the MoLVT will conduct inspections to ensure RAs comply with the training requirements.

4.1.8. The findings of this Report, however, are that the inspectors will give notice to the training centers of their intended arrival and, as such, it is unclear whether the training and conditions found by the inspectors are that which is typical on a day-to-day basis. Prakas 108, while being the more detailed of the legislation on training of workers who are going overseas, fails to make a connection between the RAs' licensing and the training requirements. Sub-decree 57 merely makes reference to those who send Cambodian workers overseas in violation of the Sub-decree being punished by existing laws.⁴⁶ As such, it is unclear when an RA's training activities/standards would be considered as falling below the requirements of the Prakas or Sub-decree. Nor is it clear what penalty an RA would face in the event that it was considered that standards were not met (fine, suspension of license, restrictions of license) or, indeed, what action an RA would need to take in order to address from any identified failures.

⁴³ Article 14, Sub-decree 57 (1995)

⁴⁴ Article 3, Prakas No. 108 (2006)

⁴⁵ Article 14, Sub-decree 57 (1995)

⁴⁶ Article 20, *ibid*

4.2. Samneang's Story

Accommodation in the Guesthouse

4.2.1. As well as the broker, there are other actors who may be guilty of a criminal act in their contact with Samneang. Article 19 LSHTSE provides that a person who harbors another person who has been unlawfully removed or transported for the purposes of exploitation, shall be punished with imprisonment of between 7 and 15 years. This article may apply to those who are running guesthouses on the Cambodian side of the border and are knowingly harboring victims of trafficking. In order to make out this crime, however, evidence would be required to show that the person running the guesthouse knew of the intended exploitation. It would not be sufficient to prove that they knew of Samneang's intention to cross the border to find work.

Transport to the Border

4.2.2. In essence, the ultimate destination for Samneang is into slavery on the Thai fishing boat. Accordingly, the practice is covered by the UN's Supplementary Convention on the Abolition of Slavery,⁴⁷ which provides that state parties shall criminalize the act of conveying slaves from one country to another by means of transport, or being an accessory thereto.

4.2.3. In addition, the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (2000)⁴⁸ requires that state parties criminalize the smuggling of migrants, which is defined as, "*The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State*

⁴⁷ UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), ratified by Cambodia in June 1957

⁴⁸ Ratified by Cambodia in December 2005

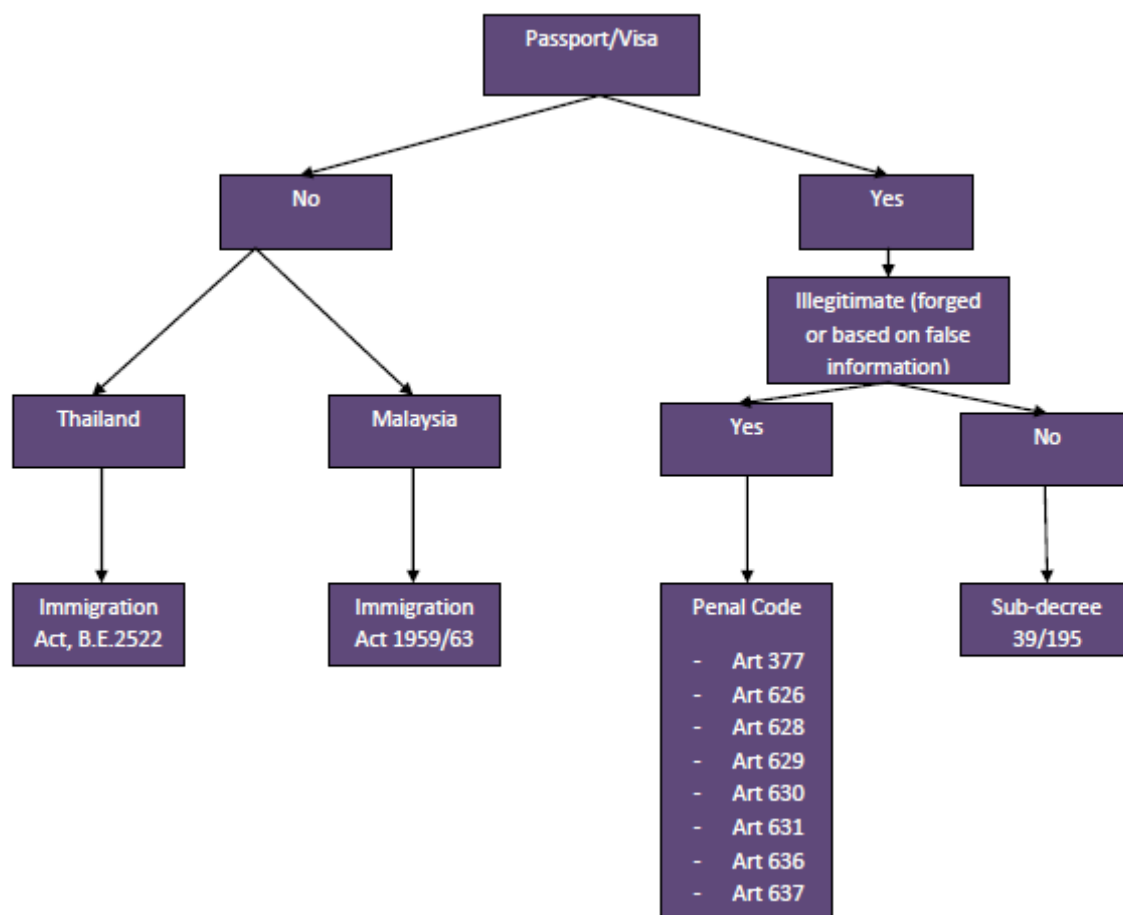
Samneang's Story #2

Samneang is drugged in the Thai guesthouse and wakes up on a Thai fishing vessel out at sea. He is forced to work 21 hours a day and told that he will be killed if he does not. He is on the boat with 40 other Cambodian men who have been recruited in the same way. Samneang has no documents and no money. When the boat docks in a harbor, the men are locked in a cabin below deck. They are fed with measly rations of watery soup and rice. One of the men gets sick. When it becomes clear that he is not getting better, he is thrown overboard in the middle of the night. Samneang believes the only option is to escape.

Party of which the person is not a national or a permanent resident.”

4.2.4. Notwithstanding the smuggling and slavery element, Article 17 LSHTSE “Transportation with Purpose” criminalizes the act of transporting another person knowing that the individual has been unlawfully removed or transported for the purpose of exploitation. In the event that there is evidence that the motorbike driver knew of the deception and intended exploitation of Samneang, a criminal prosecution may be pursued under this article. In practice, however, it has been seen in cases that evidence of the act of transportation alone has been enough to result in conviction under this article. This is not necessarily a desirable outcome in many cases, as the motorbike driver’s conviction may be used as a consolation prize for a lack of prosecutions against more significant actors in the trafficking.

5. Transit to/Arrival in Receiving Country



5.1. Sopheap's Story

Falsifying Documents to Increase Sopheap's age to 21

5.1.1. In order to be eligible to be recruited in Cambodia for work overseas, the worker has to be 18.⁴⁹

In order to work as a domestic worker in Malaysia, however, a worker must be 21.⁵⁰ As such, had Sopheap been old enough to be recruited in Cambodia, i.e. 18, she would still not be eligible for employment in Malaysia. It has been seen in a number of case studies collected by various NGOs working in Cambodia, that when presented with a girl under 21, the RAs response is to falsify their identity documents and obtain passports and visas on the basis of the false information.

⁴⁹ Sub-decree 57 (1995)

⁵⁰ Application for Foreign Domestic Helper, Procedures and Conditions, paragraph 8, available at: <http://www.imi.gov.my/index.php/en/services/employer/373-pra>

5.1.2. The Palermo Protocol places a requirement on party states to ensure that travel and identity documents are of such good quality they cannot be misused or falsified.⁵¹ In the cases reviewed by this Report, it is often the case that underlying identity documentation is being falsified in order to obtain passports and visas on a legitimate basis. As such, the passports and visas themselves are legitimate documents. In the event that neither the worker nor her family is aware of the change in her identity and passport, the RAs could face criminal charges as per those set out in the text box below. In addition, the new Anti-Corruption Law will provide articles complementary to those in the Penal Code, e.g. Article 34, Bribing of Foreign Public Officials; Article 43, Petty Corruption; Article 45, Accessory Penalty Applicable to Corruption Offence. The problem, however, comes when the worker and/or her family knows and/or has been in some way involved in the change. Indeed, this Report has identified that in the majority of cases, the RAs ensure that the workers and/or their family are aware of the fraud/forgery, so as to implicate them in the event of any criminal prosecution. The options available to the

Penal Code (2009) Fraud/Forgery

- Article 377: Definition of Fraud

Fraud is an act of deceiving any natural person or a legal entity by using false name, by claiming false status or by abusing true status.

- Article 626: Elements of Forgery

A forgery is an intentional act to harm facts expressed through letters or other means of expression of opinion, if all the following conditions are fulfilled: the harm has subject or may have power as evidence of a right or an act which has judicial consequence; the harm may cause a damage.

- Article 628: Use of Forged Documents
- Article 629: Forgery of Public Documents
- Article 630: Use of Forged Public Documents
- Article 631: Fraudulent Delivery of Documents

The act of fraudulently delivering other persons documents.

- Article 636: Use of a Falsified or Forged Certificate
- Article 637: Briberies Taken by an Authorized Person to Issue Forged Documents
- Article 638: Briberies Given to an Authorized Person to Issue Forged Document

⁵¹ Article 12, Palermo Protocol (2000)

workers/families in this situation are discussed in *Section 8, Claim: Procedure/Remedies* below.

Passports & Visa

5.1.3. Sub-decree 39 (2009) provided that the cost of passports for migrant workers would be reduced to \$20 and that issuance would be expedited to 20 days.⁵² The reality, however, is that there are only around 75 officials working in the Bureau of Passports under the Department of Statistics and Passports and, as such, the reality of a 20 day turnaround for a \$20 passport is very slim. Accordingly, the majority of the RAs will pay more to the Bureau in order to ensure expedition of the applications (often up to \$150). This cost is ultimately passed on to the worker in terms of the money that they pay back to the RA.

Transit into Malaysia

5.1.4. Article 11 of the Palermo Protocol provides that state parties strengthen border controls to prevent trafficking. At present, the Malaysian authorities have been defending the entry of minors on falsified passports by saying they cannot be accountable as the passports themselves are legitimate. In the absence of any MoU or Bilateral Agreement between Cambodia and Malaysia, it is difficult to impose accepted international obligations on them. This, however, would clearly be an area appropriate for inclusion in such an agreement, as the reports from NGOs indicate that a growing number of girls in their mid-teens are successfully getting through Malaysia immigration on the basis of falsified passports that have their ages as 21 or over.

5.1.5. Article 2.4 of the Procedures for Cambodian National for Employment in Malaysia (1999) provide that the Employer (in Malaysia) pays for the worker's ticket from the Cambodian exit point to the entry point in Malaysia and that the employer reimburses the worker's transportation costs from the place of origin to the exit point. This document, however, does not apply to domestic workers who make up the majority of migrant workers in Malaysia.

5.2. Samneang's Story

Legitimate Migration to Thailand

5.2.1. One of the primary reasons that there is such scope for trafficking and smuggling of persons across the border to Thailand is that the legitimate route to migration for labor proves to be difficult and expensive.

⁵² Sub-decree No. 39 modifying Sub-decree 195 (2008) on the Granting of Normal Passport to Cambodian Laborers to Legally Working Abroad (2009)

5.2.2. In order to work in Thailand, a worker must obtain a passport and a visa. The average cost of sending a migrant worker to Thailand through legitimate means is around \$700; this is compared with around \$100 for an illegitimate migration.⁵³ In addition, the viability of the border is inconsistent and there are various places that can be used as illegitimate crossing points. This means that many workers decide to pay out \$100 to take the illegitimate route, rather than risk their wages by going down the route that is more costly.

5.2.3. There has also been unsubstantiated criticism of the passports issued to migrant workers, which are purported to have very few pages, which in turn means that renewal passports are required more often. This is particularly a problem for workers going to Thailand where renewal visas are required every 6 months.⁵⁴

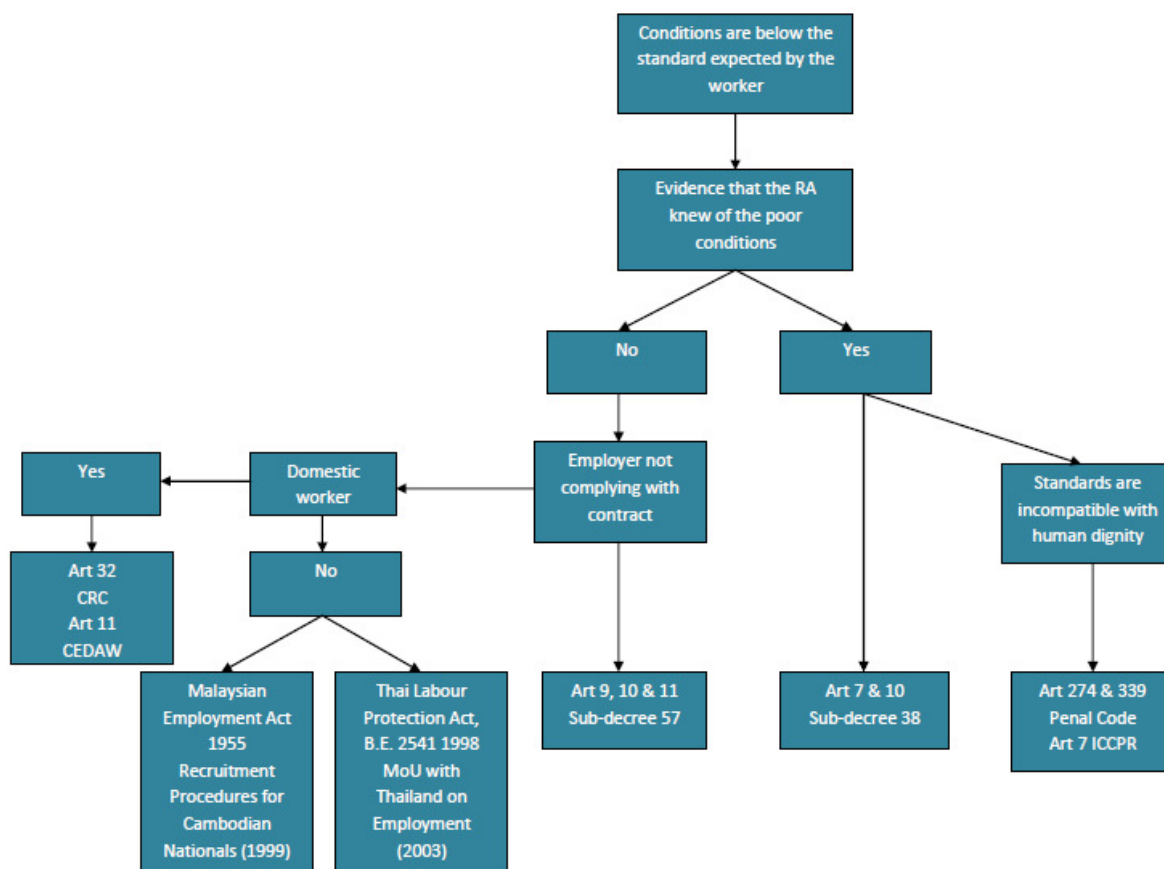
5.3. Conclusion

5.3.1. Migrants who travel via irregular channels and/or those with illegitimate documents will end up in the receiving country on the wrong end of immigration laws. In Thailand the relevant law is the Immigration Act, B.E. 2522 and in Malaysia it is the Immigration Act, 1959/63, both of which prohibit entry into the countries without legitimate authority. Arrest under these acts may lead to detention, punishment (including caning in Malaysia) and ultimately deportation (often at the expense of the arrested party).

⁵³ Chan Sopha, ILO Regional Office for Asia and the Pacific, *Review of Labor Migration Management Policies and Legal Framework in Cambodia*, (May 2009)

⁵⁴ Anonymous, "Skimpy Cambodian Passport Caused Grief to Cambodian Migrant Workers in Thailand", (16 November 2010), available at: <http://ki-media.blogspot.com/2010/11/skimpy-cambodian-passport-caused-grief.html> accessed on 16 November 2010

6. Conditions of Work in Receiving Country



6.1. General

6.1.1. There is no international minimum standard for employment contracts for migrant workers and, while Cambodia has signed the UN Convention on Migrant Workers, neither Thailand nor Malaysia has done so.⁵⁵ The ILO conventions on Migration for Employment (Revised) Convention (1949), Migrant Workers (Supplementary) Convention (1975) and Migrant Workers Recommendation (1975) make recommendations as to employment conditions. However, none of these have been signed by Cambodia or the two main receiving countries. As such, the workers are bound by the terms of their contracts and the labor laws in the receiving countries.

6.1.2. Sub-decree 57 provides that the employment contract shall not exceed two years,⁵⁶ provides that workers be entitled to 1.5 days of holiday per month at the RAs expense⁵⁷ and sets out

⁵⁵ Had they done so, they would be obliged under Article 25 CMW to ensure that the migrant workers enjoyed treatment no less favorable than that which applies to nationals.

⁵⁶ Article 11, Sub-decree 57 (1995)

⁵⁷ Article 10, *ibid*

specific terms for the contracts.⁵⁸ This, however, is the limit of the Cambodian law in relation to contracts for migrant workers. In addition, in the event that an RA fails to provide a contract that complies with Sub-decree 57, it is not clear what penalty (if any) the RA will face from the MoLVT. It is equally unclear how the monthly holiday is intended to be enforced.

6.1.3. Cambodia has ratified the CMW but this primarily assists migrants into Cambodia as opposed to Cambodians migrating abroad. Article 37, however, does oblige the country of origin to fully inform the migrants of the conditions of their migration and the requirements they must satisfy in the state of employment. It does not oblige the country of origin to set minimum standards or monitor their migrants abroad.

6.1.4. In the event that the conditions of employment in the receiving country are different (of a lower standard) to those represented by the RA and there is evidence that the RA was aware that the conditions would be different, the worker may sue the RA to rescind a contract on the basis of misrepresentation (and possibly fraud) under Article 7 and/or 10 of Sub-decree 38.⁵⁹ Article 7 provides that an agreement that is the result of mistake, duress or fraud is not a valid agreement.

Sopheap's Story #4

After three months training, ***Sopheap is put on a plane to Malaysia. She is given her passport and told to say that she is 21.*** Her sister's age is 18; she does not know how her passport says she is 21. She goes to work for a couple as their maid. She has been working for five months and has not received any payment. ***She is not allowed access to her passport; she is not allowed out and does not have a phone.*** She often works 21 hours a day and has no days off. Sopheap's Father calls Malabour, he has heard bad stories about conditions in Malaysia and wants his daughter to come home. Two weeks after his call ***Malabour produce a document signed by Sopheap saying she is happy and that conditions are fine*** and that Sopheap's ***Father must pay Malabour a total of \$800 if he wants Sopheap home.*** He does not have this money.

⁵⁸ Article 9, *ibid*

⁵⁹ Sub-decree 38 (1988)

Article 10 goes on to provide that fraud is grounds for voiding a contract where there are acts of deception, dishonesty or misrepresentation committed by one party without which the other would not have entered into the contract. As such, if there is evidence that the RA lied about the conditions in the receiving country, the worker may be able to sue to rescind their contract under this article. It may prove difficult to prove the RA's knowledge of specific conditions in the receiving country. However, when considering a known standard contractual term (for example, hours worked per day), it is reasonable to imply the RA would be aware of standard conditions in the receiving country. In turn, this implied knowledge may provide sufficient grounds on which to pursue a contractual claim should the work requirements in the receiving country differ significantly to the worker's contract.

6.1.5. In the event that the worker can sue to rescind their contract with the RA, they are still likely to be under a separate contract with the employer in the receiving country. Voiding one contract will not mean that subsequent contracts are rendered void. However, if the worker has a strong argument to rescind their contracts with the RA (the terms of which the RA will be reliant on to recover any expenses paid out) this may be the leverage required to convince the RA to assist the worker in improving their working conditions or changing employer. This argument could apply, for example, in cases where a RA agrees to a wage for a worker that is significantly lower than the standard wage for that work in the receiving country.

6.1.6. In addition, in the event that it can be evidenced that brokers/RAs knew that the working conditions in the receiving country were going to be unacceptable and detrimental to the worker's health, they could face criminal charges under the Penal Code (2009). Article 339 criminalizes the act of placing a minor in working conditions which endanger his/her health and Article 274 criminalizes the act of submitting a person to working conditions incompatible with human dignity. To make out this latter crime, evidence must be produced that the person was submitted to working conditions incompatible with human dignity. There is no further explanation as to the definition of "human dignity." In the event that a broker/RA knew that a worker was going to be faced with physical or mental abuse in the receiving country, it is reasonable to suggest that this would fall within the category of being incompatible with human dignity or detrimental to the worker's health. Similarly and additionally, for those workers who are under 18, the absence of access to formal education could be considered a factor in the pursuance of prosecution in this regard.

6.1.7. The MoU for the Greater Mekong Region at section IV, paragraph 26 encourages destination countries to effectively enforce labor laws in order to reduce acceptance of exploitation. In

Malaysia the relevant law is the Employment Act, 1955; in Thailand it is the Labor Protection Act, B.E. 2541, 1998.

6.1.8. For migrants to Korea, they get registered under the Korean Employment Permit System (EPS). Workers registered with the EPS then get the same rights as national workers, such as equal pay, benefits and labor rights.⁶⁰ The introduction and implementation of this system is widely considered to be the reason why migration to Korea does not suffer from the same issues as migration to Malaysia or Thailand.

6.2. Malaysia

6.2.1. The working conditions in Malaysia are publically known for being poor, particularly for domestic workers. For many years Indonesia was the main exporter of labor to Malaysia. After a number of high profile cases of abuse, however, they suspended the sending of workers to Malaysia. While Indonesia has tried to secure a bilateral agreement with Malaysia on the rights of migrant workers, Malaysia has simply started recruiting workers from elsewhere—primarily Cambodia—rather than working towards improving conditions.

6.2.2. The fact that the conditions for migrant workers in Malaysia have not been improved means that rights groups and NGOs in Cambodia are now receiving an increasing number of reports of abuse. The Cambodian Human Rights and Development Association (ADHOC) alone has confirmed that in the first ten months of 2010 they received 28 complaints from women who claimed to have been abused while working as domestic servants, most of whom were based in Malaysia.⁶¹

⁶⁰ Memorandum of Understanding between the Ministry of Labor and Vocational Training of the Kingdom of Cambodia and the Ministry of Labor of the Republic of Korea on the Sending of Workers to the Republic of Korea under the EPS

⁶¹ Brooke Lewis and Mon Kunthea, “Staff Rush for Malaysia”, *The Phnom Penh Post* (4 October 2010), available at: <http://new.asiaviews.org/?content=153499ym32ddd4&headline=20101021150200&month=10&year=2010> accessed on 15 November 2010

6.2.3. In a study undertaken by Coordination of Action Research on AIDS and Mobility (CARAM) Cambodia (an organization who provides pre-departure training for female migrant workers to Malaysia) the common problems the women face include communication problems with their employers, long working hours with little time for rest, a discriminating environment, no free weekends/annual leave, and a deep sense of loneliness and homesickness.⁶²

6.2.4. As with Cambodia's Labor Law (1997), the primary labor law in Malaysia (Employment Act 1955) specifically does not cover domestic workers. Accordingly, domestic workers in Malaysia do not benefit from provisions relating to maternity leave, rest days and working hours.

6.2.5. In addition, the agreement made between Malaysia and Cambodia on the standard of conditions for migrant workers, "Recruitment Procedures for Cambodian National for Employment in Malaysia," (specifics detailed in the sidebar on page 40) also does not apply to domestic workers.

6.2.6. Unprotected by Malaysian law and with no means of enforcing the agreements made in Cambodia, migrant domestic workers face long working hours (often working around 18 hours a day, seven days per week) and are expected to complete arduous lists of daily tasks with inconsistent payment. They very rarely are allowed out of the home and it is common for the employer to keep hold of the worker's passport. This restriction on freedom of movement is in contravention of both national and international laws, albeit still not something that can form the subject of a civil claim issued in Cambodia.

Recruitment Procedures for Cambodian National for Employment in Malaysia (Not applicable to domestic workers)

2.2. The employer shall not pay for any recruitment costs other than transportation;

2.3 Salary shall be the employer's prerogative;

2.8 The employer shall be required to provide suitable accommodation;

2.12 The terms of the contract must be clear and explained to the worker during selection;

2.13 A copy of the employment contract shall be given to the workers;

2.17 The employer shall be responsible for the safe keeping of the worker's passport;

2.18 The workers shall not bring their family or marry in Malaysia;

2.19 The workers should be between 21 and 40 years.

Contract:

- Term of not more than three years;*
- Description of job to be specified (air-conditioned factory, dusty heavy/dirty work, work in heat, etc)*
- Clearly stated basic salary.*

⁶² UNIFEM, Regional Program on Empowering Women Migrant Workers in Asia, "Cambodian Women Migrant Workers: Findings from a Migration Mapping Study", (Phnom Penh, June 2006)

Samneang's Story #3

6.2.7. It is evident that Cambodian domestic workers get paid less than those from Malaysia or the Philippines. This was previously the case when Indonesian workers fulfilled Malaysia's requirement for domestic staff. Human Rights Watch (HRW) reported that Indonesian maids were earning on average USD133/month whereas the Filipino maids were taking home USD400/month.⁶³ This gap remains true now that Indonesian maids have been replaced with Cambodians, with the average Cambodian monthly earning in Malaysia being around USD150-USD180.⁶⁴ This practice appears discriminatory and could be addressed in an MoU between the two countries.

6.2.8. In the absence of domestic laws to regulate the conditions of migrant domestic workers in Malaysia, regional and international agreements must be considered. Malaysia is a member of the Association of Southeast Asian Nations (ASEAN) and a signatory to the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007). As such, Malaysia has agreed to implement measures in order to protect and promote the rights of migrant workers, including improving regulation of recruitment and training.

6.2.9. While having not ratified the ICCPR, Malaysia has ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)⁶⁵ and the Convention on the Rights of the Child (CRC).⁶⁶ Article 11 of CEDAW provides that

One night, when the boat is moored off shore, Samneang and three other men escape the locked room and jump overboard. Once ashore they are met by a man who speaks Thai and explains that they are in Malaysia. He offers Samneang and the others work in a neighboring town, explaining that this is the only way that they will be able to afford to fly back to Cambodia. The men go with him but Samneang refuses and continues to travel by foot through the jungle. After three days he is arrested by the Malaysian police. He is sent to an immigration detention center where it is explained to him that he has been arrested for being an undocumented migrant worker.

⁶³ HRW, "Indonesia/Malaysia: End Wage Exploitation of Domestic Workers," <http://www.hrw.org/en/news/2010/05/10/indonesiamalaysia-end-wage-exploitation>

⁶⁴ "Indonesians out, Cambodians in" (13 January 2010) available at: <http://www.hrw.org/en/news/2010/01/13/indonesians-out-cambodians-in>

⁶⁵ UN Convention on the Elimination of all Forms of Discrimination against Women (1979)

⁶⁶ UN Convention on the Rights of the Child (1989)

Malaysia must take all appropriate measures to eliminate discrimination against women in the field of employment, including the right to equal remuneration and the right to protection of health and to safety in the workplace. Article 32 of the CRC provides that Malaysia is obliged to recognize the right of the child to be protected from economic exploitation (child is defined in Article 1 as a person under 18 years).

6.2.10. Accordingly, in the absence of any specific domestic legislation to protect migrant domestic workers, Malaysia is still obliged under international law to treat them fairly.

6.3. Thailand

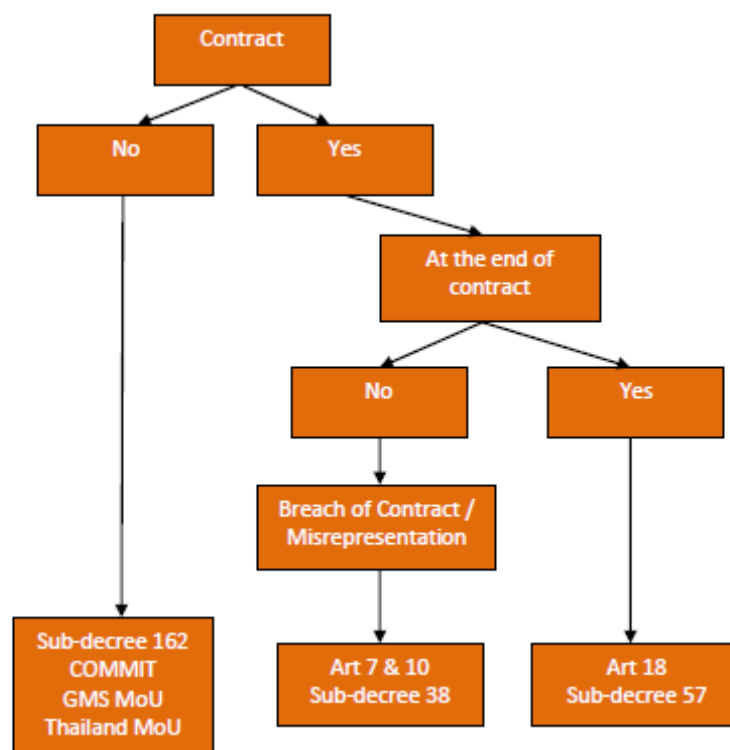
6.3.1. While there is an MoU between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Cooperation in the Employment of Workers (2003), it does not specify the minimum conditions of employment for workers. As such, workers in Thailand are subject to the Thai employment laws.⁶⁷ In reality, however, most workers are unable to access information about their employment rights and, as such, are unaware of the basic conditions that their employers are obliged to provide.

6.3.2. In addition, there is little systematic monitoring of the working conditions of Cambodian migrant workers in Thailand (either from the Thai or Cambodian governments), the cost of such monitoring leading both governments to rely on the RAs to monitor standards.⁶⁸

⁶⁷ Labor Protection Act, B.E. 2541 (1998)

⁶⁸ Chan Sophal, “Review of Labor Migration Management, Policies and Legal Framework in Cambodia”, ILO Asia-Pacific Working Paper Series (May 2009, ILO Japan)

7. Repatriation to Cambodia



7.1. Sopheap's Story

7.1.1. In Sopheap's case, she is working in Malaysia under contract through regular means, having been sent by a licensed RA. As such, the RA is under a duty to inform the MoLVT 45 days before she is due to come back to Cambodia.⁶⁹ In a scenario where a worker returns within the terms of (or at the end of) their contract, the costs of their repatriation are likely to be borne by the employer or RA (although this may be included in the expenses deducted from the worker's wages).

7.1.2. If Sopheap were able to evidence a breach of contract on the part of the RA, or fraudulent misrepresentation of contract terms (see paragraph 6.1.4 above), she may be able to recover the cost of repatriation to Cambodia from the RA within any compensation/damages. It is unrealistic, however, to expect such damages to be recovered before Sopheap leaves Malaysia. As such, even if Sopheap had a valid claim that the RA has breached a contractual term or had misrepresented a substantial condition, it is unlikely that she would have sufficient leverage in Malaysia to pursue a claim. This means that she would have to either stay where she was or breach her own employment contract by leaving her employer.

⁶⁹ Article 18, Sub-decree 57 (1995)

7.1.3. Not only would Sopheap face the possibility of a claim for contractual breach if she leaves her employ early, Malaysia's Immigration Act also gives employers the right to apply for the termination and cancellation of work permits.⁷⁰ This in turn means that the worker is criminalized for being in the country without a permit, a crime which Malaysia has treated through increasingly punitive measures including caning and up to five years in prison.⁷¹ In July 2007 alone, 10,000 undocumented migrants were rounded up in Malaysia with little attention paid to whether the migrants were in need of international protection or not.⁷² HRW concluded that the increasingly routine arrests and detention of undocumented workers (regardless of the reasons for their undocumented status) means that migrant workers in abusive situations are less likely to attempt to escape.⁷³ This clearly creates an unattractive scenario wherein workers in exploitative and abusive conditions are deterred from escaping due to the threat of being arrested and/or re-victimized.

7.1.4. Notwithstanding the above, the Malaysian law also provides that any person residing in Malaysia who is not a citizen may apply to be repatriated to their own country by reason of being unable to pay the cost of their own passage back.⁷⁴ The research carried out in preparation for this Report found no cases of workers being returned following application under this Article. Indeed, much of the repatriation of workers to Cambodia is funded privately, often by families and/or NGOs.

7.1.5. For Cambodians in Malaysia who are not working in domestic service, the Recruitment Procedures for Cambodian National for Employment in Malaysia (1999) makes specific provisions as to the person who bears the cost of repatriation in different scenarios. In the event of death of worker, the employer is obliged to pay for the remains to be sent back. Where a contract of employment is completed, or if the employer terminates the contract (without contractual reason), the employer is responsible for repatriation costs; these costs must be borne by the employee, however, where they resign or if there is evidence of misconduct.

⁷⁰ Article 14 (3) Immigration Act (1959/63) provides that any immigrant who falls within the category of "prohibited" within the validity of their permit, may have their permit cancelled. Article 8 (3) provides that a person who cannot provide for himself, e.g. has no work and no money, is classified as a "prohibited immigrant."

⁷¹ HRW, World Report, (2008)

⁷² *ibid*

⁷³ HRW, "Help Wanted: Abuses against Female Migrant Domestic Workers in Indonesia and Malaysia", (July 2004 Vol. 16, No. 9 (B))

⁷⁴ Article 46 (1) (c) Immigration Act (1959/63)

7.2. Samneang's Story

7.2.1. Samneang's case ends with him as an undocumented and unemployed illegal immigrant in Malaysia. His story could equally have ended with him in the same situation in Thailand. However, while the domestic laws of the receiving countries often deal with identified illegal immigrants through their criminal law systems, a number of bilateral and regional agreements have been signed (and are being negotiated) that purport to commit signatory states to the identification and protection of the victims of TIP. Cambodia's latest commitment to the victims of TIP comes in the form of Sub-decree 162, which set up the National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation of Women and Children. However, as with the MoU between Cambodia and Thailand, the commitments made are only towards women and children, identified as the most vulnerable victims.⁷⁵ The recent amendment in the scope of the MoU between Cambodia and Vietnam, however, means that men are now covered by the agreement. This is an encouraging move in terms of the inclusion of men within the prevention and protection remit of bilateral agreements.

7.2.2. One commitment that may assist Samneang is the MoU on Cooperation against TIP in the Greater Mekong Sub-Region (GMS).⁷⁶ This MoU was developed as part of the effort to reduce TIP activities in the GMS, and established the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT). As part of this initiative, countries including Cambodia and Thailand have signed

⁷⁵ MoU between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand in Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003)

⁷⁶ MoU on Cooperation against TIP in the Greater Mekong Sub-Region (GMS) (2004)

Samneang's Story #4

Samneang is sentenced to three months in prison. He is routinely beaten by the prison guards and subject to caning. In the detention center, Samneang is introduced to a man who offers to help him get back to Cambodia. To do so, the man will contact Samneang's family and arrange for them to pay \$300 to get him home. Samneang knows that his family does not have this money and that to ask them to do this will mean financial ruin. He contacts the Cambodian Embassy. They are able to help with his documents but do not have funds to fly him home. Samneang gets hold of the name of an NGO who may be able to help him. The NGO, however, are not allowed into the detention center.

this MoU agreeing to cooperate against trafficking, including the strengthening of cross-border cooperation in law enforcement on trafficking and the protection of all identified victims of trafficking. Section III, paragraph 16 of the MoU provides that states ensure that persons identified as trafficked are not held in detention; paragraph 19 specifies that states strengthen the capacity of their embassies to ensure they can effectively assist trafficked persons. In addition, the COMMIT Regional Guidelines on Victim Protection provides that countries assess the best interests of the victims when determining reintegration, and provide return and reintegration services.⁷⁷ Malaysia, however, is not a party to the GMS MoU or COMMIT and, as such, this initiative does not assist victims of TIP that end up in Malaysia.

7.2.3. There is currently no MoU or bilateral arrangement between Cambodia and Malaysia dealing with migrant workers or the protection and repatriation of victims of TIP. An MoU is being negotiated. However, this process has been ongoing for some years and there is no indication as to when such an agreement will be finalized.

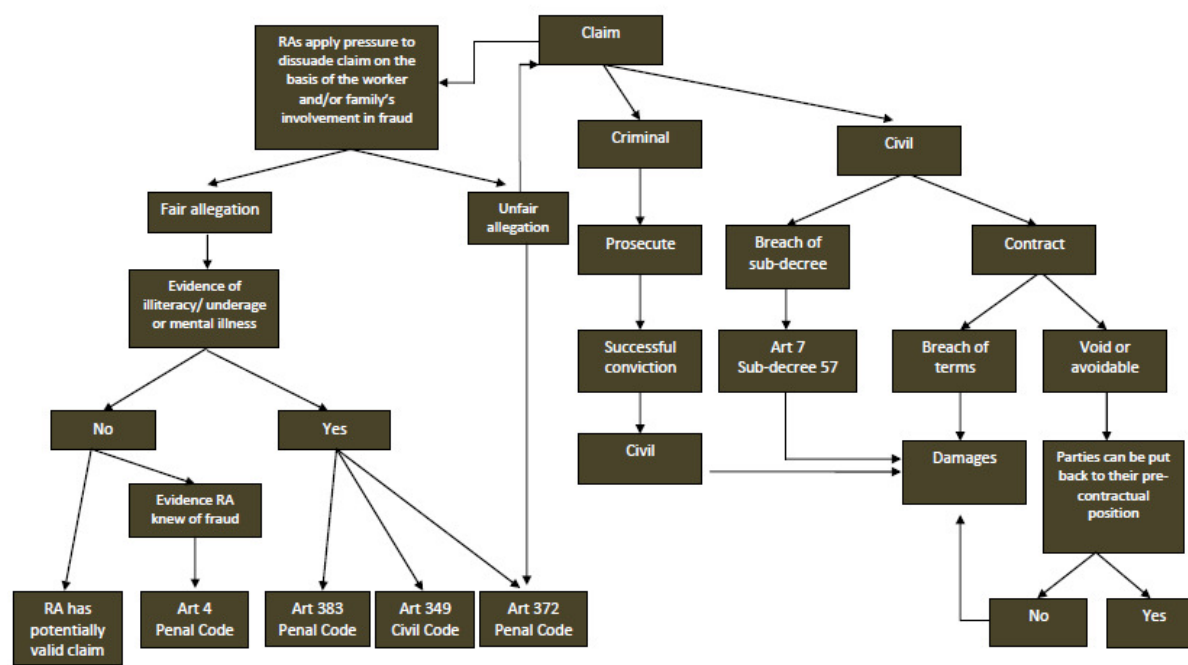
7.2.4. Although overseas workers contribute a great deal to Thailand's economy, they have made significant moves in recent years to strengthen their abilities to identify and deport overseas workers. The Nationality Verification Process (implemented 28 Feb 2010) entailed that overseas workers register with the relevant authority or risk arrest and deportation. For workers to enlist in the process, however, often costs as much as two or three months' salary. In June 2010 a new series of policies were approved (entering into force in October 2010) establishing a center to "suppress, arrest and prosecute alien workers."⁷⁸ It is intended that the center will serve as an administrative center for resolving the problem of alien workers working underground in Thailand. While it is too early to say how the policy will work, the fear is that the authorities will fail to discriminate between irregular or illegal migrants and victims of TIP in its implementation.

7.2.5. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000) (the "Palermo Protocol"), ratified by Cambodia in July 2007, provides in Article 8 that the state of which the victim is a national shall facilitate the return of the victim. In the absence of any assistance from receiving countries in the identification and repatriation of victims of TIP, this provision effectively places the onus on Cambodia to ensure the safe repatriation of Samneang from Malaysia.

⁷⁷ COMMIT Regional Guidelines on Human Trafficking (2004)

⁷⁸ Order No. 282/2553 revoking (15 October 2010) Order of the Prime Minister's Office No. 269/2553: Re: Establishment of the Center to suppress arrest and prosecute alien workers who are working underground and human trafficking process "sor por ror tor."

8. Claim: Procedure/Remedies



8.1. Civil Claims

Claim for compensation under Sub-decree 57

8.1.1. Technically, a worker can seek legal recourse under Article 7 of Sub-decree 57, which indicates that the security fund deposited by the RA can be used to compensate workers in the event that the recruitment agency fails to implement any provisions of the work contract. However, as of September 2010, the security fund has yet to be used for compensating a worker.⁷⁹

8.1.2. Article 20 of Sub-decree 57 stipulates that any individual who sends Cambodian labor to work overseas in violation of the provisions of the Sub-decree shall be punished in accordance with the existing law in force. Note, however, that this relates to individuals and not to the RA. It is unclear, but it may mean that the punishment will be pursued against the owners of the RA.

8.1.3. The Sub-decree goes on to provide that a contract may be annulled under Article 21 if any of the contract provisions are found to be contrary to it. However, as has been discussed above, the requirements for the contract provisions are brief, containing only two identifiable minimum terms. As such, it is highly plausible that a contract could comply with the Sub-decree but fall below acceptable employment standards in any event.

⁷⁹ UNIAP research into Cambodian Recruitment Agencies (2010)

Void/voidable contracts

- 8.1.4. In circumstances where a contract is void or can be avoided (in which case one party has to successfully rescind the contract), the contract is treated as if it never existed and the parties are to be put back into the position they were in before the contract was entered into, e.g. under a sale of goods contract, the goods would be returned to the seller and the money to the purchaser.
- 8.1.5. In the event that the parties cannot be put back into their original position due to the complexity of the contractual arrangement or the extent to which the contract has been performed, one party may sue the other for damages.
- 8.1.6. The problem that arises is that the RAs have often lent/given money to the worker's family and/or spent money on the worker's training. In the event of a successful claim that a contract is void, is there a risk that it is the worker and/or worker's family that will need to pay the RA?
- 8.1.7. Section 401 of the Civil Code provides some guidance on the discretion of the courts in this scenario, providing that, in the event that the contractual claim arises out of the RA's bad faith conduct, the court may order that the RA pay to the worker as damages any profit or benefit obtained by the RA.
- 8.1.8. Similarly, in the event that it is the RA seeking damages from the worker, Article 402 provides guidance on the grounds for reducing damages, providing that where the RA claimant's negligence or fault contributed to the damages, the court may reduce the damages to be paid to the respondent to the extent that the claimant's fault contributed to them.

8.2. Criminal

- 8.2.1. Following a successful criminal prosecution, a worker/claimant will be eligible to pursue a civil claim for damages/compensation against the perpetrator of the crime.⁸⁰

8.3. Arguments used by RAs to avoid claims

- 8.3.1. In cases where the worker and/or their family has been complicit in the changing of the worker's identity or other illegal acts, the RA may threaten to proceed with counter claims as a method of dissuading any legal action. In these circumstances the worker and/or family's vulnerability and

⁸⁰ Article 13 & 14 Code of Criminal Procedure of the Kingdom of Cambodia (2007); Article 46 LSHTSE (1997)

lack of criminal intention may provide a defense for their actions and/or a further criminal/civil action against the RA.

Intention to Commit a Criminal Offence

8.3.2. In the event that Sopheap's family considered pursuing criminal charges against the RA for obtaining a passport on the basis of falsified identification documents, the RA may respond by threatening to make a similar claim against the family for letting Sopheap rely on her sister's identification document. Article 4 of the Penal Code (2009) provides, however, that there is no criminal offence if there is no intention to commit a criminal offence. As such, arguably Sopheap's family would be able to defend any criminal action pursue against them if they could successfully show that they are ignorant of the law and had not intended to commit a criminal fraud/forgery related crime but were merely doing as they were instructed in order to help their daughter.

RA's Continued Exploitation

8.3.3. In the event that it can be shown that the broker was taking advantage of Sopheap's family's lack of education/illiteracy, this could be a criminal offence under Article 383 of the Penal Code (2009), "Taking Advantages from Weaknesses," which criminalizes the act of knowingly abusing either the ignorance or the weakness of a person because of her pregnancy or his/her sickness or disability in order to constrain this person to act or to abstain at his/her own grave expense. This case would need to be tested, but there is scope that a person's illiteracy could be defined as a "disability" causing "ignorance" or "weakness," which when exploited by an RA is criminal offence.

8.3.4. Similarly, the Civil Code includes a provision at Article 349 for Abuse of Circumstance, providing that when a party uses their economic or social position so that the other party cannot contest the contract formulation, the latter party may rescind the contract.

8.3.5. In using threats to dissuade the worker/worker's family from claiming, the RA may also be guilty of blackmail. Article 372 of the Penal Code criminalizes blackmail, being the "*act of obtaining, by means of threatening to disclose or to impute facts so as knowingly to ruin a person's honor or friendship: a signature; a commitment... .*"

8.3.6. It would be beneficial to explore the laws available for use against RA's who use intimidation, as this is seen to be the most common way of deterring workers and their families from pursuing claims.

9. Conclusion & Recommendations

Conclusion

The LSHTSE and Penal Code together create a sufficient criminal legal framework in which those workers who are exposed to trafficking and other criminal behavior can have recourse against the perpetrators. However, in practice, evidential burdens make prosecutions difficult and, as such, civil remedies must also be explored as a way of deterring those who profit from exploitation.

The RGC has promised a new Sub-decree on migrant working (as yet to be released in draft) that is likely to enter the statute books shortly and the Civil Code (2007) recently became enforceable⁸¹. These two pieces of legislation will have a great impact on the protection of migrant workers and give them the legal tools with which to potentially avoid exploitative and illegal contractual terms. This, however, does not address the problems that workers and their families face when bringing claims against RAs. In order to make RAs change their behavior and increase their standards of recruitment and training, more claims against them will first need to succeed. In this regard, workers and their families would benefit from greater support and protection during the course of pursuing claims against the RAs.

In order to ensure that the protection of workers continues once they leave Cambodia, however, the RGC must demand stronger bilateral agreements with receiving countries and implement structures of monitoring and evaluation to ensure that their workers are treated fairly and properly while overseas. In particular, the vulnerability of domestic workers in Malaysia is very real, with no domestic protection and little assistance from the few regional and international treaties that Malaysia is party to. Malaysia has an increasing need for domestic workers and this could be a lucrative market for Cambodia. It must, however, be a market in which employment standards can be enforced and where exploited workers can have legal rights of recourse against their employers.

It is clear that the RGC policy to increase the amount of workers who migrate abroad is an important policy. The policy not only has the benefit of improving the economic situation of the country, but of the individual workers who might otherwise be destined to a life of poverty. At present, however, the success of the concept of migration has overtaken the development of a legal framework in Cambodia that would regulate, monitor and, ultimately, protect migrant workers. As such, people are increasingly taking advantage of the growing space in which irregular migration can be pursued with little or no risk. For those workers keen to tap into this new source of wealth, the lack of information

⁸¹ See n17 above

and variety of pitfalls means that they will not know if they are one of the unlucky ones until it is too late.

Recommendations

As such, this Report offers the following recommendations:

Law

- 1) Amend the scope of the Labor Law so that it includes domestic workers;
- 2) Amend the scope of the Labor Law so that it covers recruitment and training within Cambodia, regardless of where the employment contract is to be performed;
- 3) Produce an updated Sub-decree on migrant workers for consultation to include:
 - a. Standard employment contract templates for RAs;
 - b. Requirements that RAs provide detailed advanced expenditure for travel and other expenses to potential migrants to improve transparency;
 - c. Clarifying that RAs are responsible for verifying the age of the worker pre-recruitment;
 - d. Provisions on accepted recruitment practice, e.g. prohibiting misleading advertising; ensuring that the worker completely understands the terms of the contract; not allowing the workers to enter into contracts that would be a lower standard of employment than in Cambodia;
 - e. Confirmation on the measures to be taken against RAs when the Sub-decree is not complied with;
 - f. Specific provisions as to the use of the USD100,000 surety;

Licensing RAs

- 4) Legitimize the role of brokers and third parties in the recruitment process by way of direct licensing or through compulsory contractual relations;

Contracting/Recruiting Workers

- 5) Pursue criminal prosecutions against those RAs recruiting underage workers and/or engaged in identification document fraud and/or forgery;

Training/Accommodation/Transport

- 6) Introduce an official curriculum for the pre-transit training of migrant workers that is industry- and country-specific;
- 7) Introduce minimum standards for the transport and accommodation of migrant workers;

Transit to/Arrival in Receiving Country

- 8) Empower and train airport officials, border guards, immigration police and customs agents to be able to act when they have a reasonable suspicion that a worker is under 18;

Conditions of Work in Receiving Country

- 9) Expedite the process of agreeing to an MoU with Malaysia, to include obligations on the Malaysian border to assess the age of migrant workers and to include provisions on the conditions of work and standardization of wages;
- 10) Use the Korean Employment Permit System as the advocacy basis for negotiations on bilateral agreements on migrant work;
- 11) Apply pressure to the receiving countries to increase labor standards by refusing to send workers until standards are agreed;
- 12) Appoint labor attaches who can be affiliated with the receiving countries and be responsible for monitoring the working conditions of Cambodians abroad, as well as assisting on the improvement of such conditions;

Repatriation to Cambodia

- 13) Train the Cambodian embassies in receiving countries to respond appropriately to requests for assistance from workers and/or to assist the Cambodians who are arrested and detained as illegal immigrants;
- 14) Renegotiate MoUs on the trafficking of persons so that they also prevent and protect male victims of trafficking.

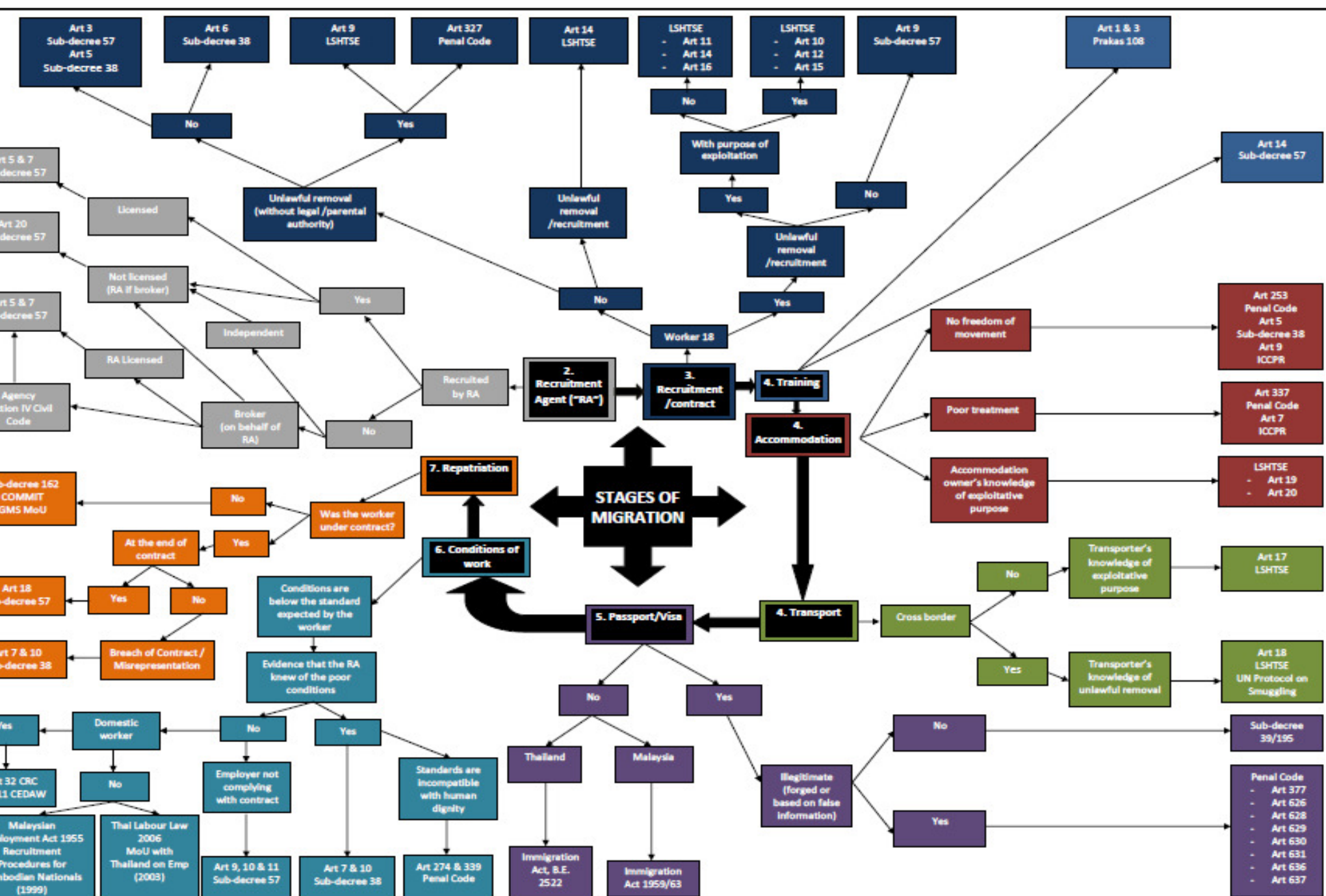
Claims

- 15) Increase the protection of those workers and their families who decide to pursue legal action against RAs.

10. Legal Framework: Flowchart & Table of Legislation

The Flowchart in this Section identifies each stage of migration and its variables/activities (correlating with the Sections in this Report), concluding with the laws (civil and criminal) that may be employed to prevent, protect and prosecute victims/perpetrators of irregular migration and exploitation. Claims can be made at each stage.

The Table that follows includes further information about each of the laws cited in the Flowchart.



Stage of Recruitment/Migration	Criminal Law	Civil Law
Licensing RAs	-	- Article 5, Sub-decree No.57, provides the requirements of the RA's application for a license from the MoLVT - Article 7, Sub-decree No. 57, \$100,000 surety to compensate workers in the event that RA fails to implement any provisions of the contract - Article 20, Sub-decree No. 57, any individual who sends a Cambodian worker overseas in violation of the Sub-decree shall be punished in accordance with the law - Section IV Civil Code, the rules of Agency
Contracting/Recruiting Workers	- Article 9, LSHTSE, Unlawful Removal inter alia a Minor - Article 10, LSHTSE, Unlawful Removal with Purpose - Article 11, LSHTSE, Unlawful Removal for Cross Border Transfer - Article 12, LSHTSE, Unlawful Recruitment for Exploitation - Article 14, LSHTSE, Act of Buying, Selling or Exchanging a Human Being	- Article 3, Sub-decree No. 57, RAs must only recruit people over 18 - Article 9, Sub-decree No. 57, The requirements of the employment contract between the RA and the worker - Article 3, Sub-decree No. 38, A contract is valid where it has a subject that is certain, possible to perform, lawful and consistent with public order and good customs - Article 5, Sub-decree No.38, Contracts will be deemed void when illegal, contrary to social interests and in violation of social ethics - Article 6, Sub-decree No. 38, A contract shall be deemed voidable when one party does not have legal capacity

Stage of Recruitment/Migration	Criminal Law	Civil Law
	- Article 15, LSHTSE, The Act of Buying, Selling or Exchanging a Human Being with Purpose - Article 16, LSHTSE, The Act of Buying, Selling or Exchanging a Human Being for Cross Border Transfer - Article 327, Penal Code, Taking Away a Minor	
Training/Accommodation /Transport	- Article 17, LSHTSE, Transportation with Purpose - Article 18, LSHTSE, Cross Border Transportation (the act of bringing a person cross border) - Article 19, LSHTSE, Receipt of Person with Purpose - Article 20, LSHTSE, Receipt of Person for the Purpose of Assisting the Offender - Article 253, Penal Code, Illegal Arrest,	- Article 14, Sub-decree No. 57, RA will be in charge of training workers on the work systems, customs and traditions and basic laws of receiving party - Article 3, Sub-decree 38, A contract is valid where it has a subject that is certain, possible to perform, lawful and consistent with public order and good customs - Article 5, Sub-decree No.38, Contracts will be deemed void when illegal - Article 1 & 3, Prakas No. 108, RA is responsible for training workers on the work system, customs and traditions and basic laws of country in which they will be working - Article 9 ICCPR, Everyone has the right to liberty and security - Article 7 ICCPR, No one shall be subjected to torture or degrading treatment

Stage of Recruitment/Migration	Criminal Law	Civil Law
	Detention or Confinement (was Article 21, LSHTSE) - Article 337, Penal Code, Act of Depriving Food or Care for Minors of Less Than 15 Years of Age	
Transit to/Arrival in Receiving Country	- Article 377, Penal Code, Definition of Fraud - Article 626, Penal Code, Elements of Forgery - Article 628, Penal Code, Use of Forged Documents - Article 629, Penal Code, Forgery of Public Documents - Article 630, Penal Code, Use of Forged Public Documents - Article 631, Penal Code, Fraudulent Delivery of Documents - Article 636, Penal Code, Use of a Falsified or Forged Certificate - Article 637, Penal Code, Briberies Taken by an Authorized Person to	- Sub-decree 39 (2009) Passports for Migrant Workers - Thailand: Immigration Act, B.E. 2522 - Malaysia: Immigration Act 1959/63

Stage of Recruitment/Migration	Criminal Law	Civil Law
	Issue Forged Documents -	
Conditions of work in Receiving Country	- Article 274, Penal Code, Submission under Working Conditions Incompatible with Human Dignity - Article 339, Penal Code, Placing a Minor to Working Conditions which Endanger his/her Health	- Article 9, Sub-decree 57, Specifics of employment contract - Article 10, Sub-decree 57, Workers must be entitled to 1.5 days of holiday per month at the RAs expense - Article 11, Sub-decree 57, The employment contract shall not exceed two years - Article 7, Sub-decree No. 38, If a contract is the result of mistake, duress or fraud it is not valid - Article 10, Sub-decree No. 38, Fraud is a ground for voiding the contract when there are acts of deception, dishonesty, or misrepresentation committed by one party to the contract without which the other party would not have entered into the contract - Thailand: Labor Protection Act, B.E. 2541 - MoU with Thailand on the Cooperation on the Employment of Workers (2003) - Malaysia: Employment Act 1955 - Recruitment Procedures for Cambodian Nationals for Employment in Malaysia (1999)

Repatriation to Cambodia		- Article 18, Sub-decree 57, The RA will notify the Ministry 45 days before the worker is to return and the RA and Ministry shall arrange the date for repatriation. - Article 7, Sub-decree No. 38, If a contract is the result of mistake, duress or fraud it is not valid - Article 10, Sub-decree No. 38, Fraud is a ground for voiding the contract when there are acts of deception, dishonesty, or misrepresentation committed by one party to the contract without which the other party would not have entered into the contract - Sub-decree 162, National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation of Women and Children - MoU on Cooperation against TIP in the GMS (2004)
Claim: Procedure/Remedies	- Article 4, Penal Code, Principles of Individual Criminal Responsibility - Article 372, Penal Code, Blackmail - Article 383, Penal Code, Taking Advantages from Weaknesses	- Article 7, Sub-decree No. 57, \$100k surety to compensate workers in the event that RA fails to implement any provisions of the contract - Article 20, Sub-decree No. 57, RAs who undertake to send Cambodian labor overseas in violation of Sub-decree shall be punished in accordance with the law in force - Article 19, Sub-decree No. 38, After notification, the aggrieved party or any person having a lawful interest in the claim can sue to rescind the contract within a maximum period of 12 months - Art 349 Civil Code - Abuse of Circumstance: where a party uses their economic or

		social position so that the other party cannot contest the contract formulation, the latter party may rescind the contract
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Bibliography

INTERNATIONAL LAW

International Treaties and Agreements

United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948

United Nations General Assembly, *International Convention for the Elimination of all Racial Discrimination against Women*, 18 December 1979

United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966

United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966)

United Nations General Assembly, *Convention against Transnational Organized Crime* (15 November 2000)

United Nations General Assembly, *Convention on the Rights of the Child* (20 November 1989)

United Nations General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime* (2000)

United Nations General Assembly, *Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* (18 December 1990)

United Nations General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air* (2000)

United Nations General Assembly, *Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography* (25 March 2000)

United Nations General Assembly, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956)

International Labor Organization, *Forced Labor Convention* (No. 29)

International Labor Organization, *Abolition of Forced Labor Convention* (No. 105)

International Labor Organization *Minimum Age Convention* (No. 138)

International Labor Organization, *Worst Forms of Child Labor Convention* (No. 182)

REGIONAL/BI-LATERAL LAW

ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007)

MoU on Cooperation against TIP in the Greater Mekong Sub-Region (2004)

ASEAN Declaration against TIP Particularly Women and Children (2004)

MoU between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand in Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003).

MoU between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia and on Cooperation in the Employment of Workers (2003)

Treaty between the Kingdom of Cambodia and the Kingdom of Thailand on Extradition (1998)

Recruitment Procedures for Cambodian Nationals for Employment in Malaysia (1999)

CAMBODIAN LAW

Constitution of the Kingdom of Cambodia (1993, as amended).

Labor Law (1997)

Code on the Criminal Procedure of the Kingdom of Cambodia (2007)

Law on the Suppression of Human Trafficking and Sexual Exploitation (2008)

Penal Code of the Kingdom of Cambodia (2009)

Sub-decree No. 38 on the Law Referring to Contracts and other Liabilities (1988)

Sub-decree No. 57 on the Export of Khmer Labor to Work Overseas (1995)

Sub-decree No. 70 on the Creation of a Manpower Training and Overseas Sending Board (2006)

Sub-decree No. 195 on the Issuing of Passports for Khmer Migrant Workers (2008)

Sub-decree 162 on the Creation of a National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation of Women and Children (2009)

Sub-decree No. 67 on the Creation and Putting into Operation of the National Agency for Occupations and Labor (2009)

Sub-decree No. 39 on the Granting Normal Passport to Cambodian Laborers to Legally Working Abroad (2009)

Proclamation/Prakas No. 108 on Education of HIV/AIDS, Safe Migration, and Labor Rights for Cambodian Workers Abroad (2006)

Proclamation/Prakas No. 012 on the Creation of a Labor Migration Taskforce (2007)

Cambodian Law: Guidelines, Policies and Instructions

Cambodia's National Poverty Reduction Strategy (2002)

Constitutional Council of the Kingdom of Cambodia, *decision No. 092/003/2007*, 10 July 2007

Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in cases of Human Trafficking (6 February 2007)

Kingdom of Cambodia, *National Plan of Action on the Elimination of the Worst Forms of Child Labor (2008-2012)*, (16 June 2008)

Ministry of Social Affairs, Veterans and Youth Rehabilitation, *Policy and Minimum Standards for Protection of the Rights of Victims of Human Trafficking*, (31 August 2009) Policy No. 062 S.V.Y, Phnom Penh

Ministry of Interior, *Instruction on the Implementation of Conducting Rescue of Victims of Human Trafficking and/or Sexual Exploitation at Identified Locations*, (11 August 2010) Instruction No. 009G, Phnom Penh

Kingdom of Cambodia, *Policy on Labor Migration for Cambodia*, (MoLVT/ILO June 2010)

Letter to the Director of the Cambodian Recruitment Agencies from Seng Sakda (No. 2647) Guidance on the Recruitment, Training, Transfer and Management of the Cambodian Worker to Work Abroad (2010)

NON-CAMBODIAN LAW

Thai Law

Immigration Act, B.E. 2522

Labor Protection Act, B.E. 2541 (1998)

Order No. 282/2553 revoking (15 October 2010) Order of the Prime Minister's Office No. 269/2553: Re: Establishment of the Center to suppress arrest and prosecute alien workers who are working underground and human trafficking process “sor por ror tor”

Malaysian Law

Employment Act (1955)

Immigration Act (1959/63)

BOOKS

Cambodian Society of Comparative Law, *Cambodian Yearbook of Comparative Legal Studies*, (March 2010) IL Virtue Unions Publisher, Hong Kong

Kirst-Ashman, K, *Human Behavior, Communities, Organisations and Groups in the Macro-social Environment*, (2008) Thomson Learning Inc

United Nations Economic and Social Commission for Asia and the Pacific, *Combating Human Trafficking in Asia: a resource guide to international and regional legal instruments*, (2003) United Nations Publication

REPORTS

Chan Sophal, “Review of Labor Migration Management, Policies and Legal Framework in Cambodia,” ILO Asia-Pacific Working Paper Series (May 2009, ILO Japan)

Chen Chen Lee, “Exploitative Labor Brokerage Practices in Cambodia: The Role and Practices of Private Recruitment Agencies” (2007, ILO IPEC-TICW)

Commit, “A Study into Exploitative Labor Brokerage Practices in Cambodia” (March 2007)

HRW, “Help Wanted: Abuses against Female Migrant Domestic Workers in Indonesia and Malaysia” (July 2004 Vol. 16, No. 9 (B))

HRW, World Report, (2008)

HRW, “Indonesia/Malaysia: End Wage Exploitation of Domestic Workers” (10 May 2010), available at: <http://www.hrw.org/en/news/2010/05/10/indonesiamalaysia-end-wage-exploitation-domestic-workers>

Lara Fergus, ACSSA Briefing No. 5, “Trafficking in Women for Sexual Exploitation” (5 June 2005), pg.6

UNIAP Strategic Information Response Network (SIREN), *The Mekong Region Country Datasheets on Human Trafficking* (September 2010), available at: www.no-trafficking.org/story_2010ht_datasheets.html accessed on 20 November 2010

UNIFEM, Regional Program on Empowering Women Migrant Workers in Asia, “Cambodian Women Migrant Workers: Findings from a Migration Mapping Study” (Phnom Penh, June 2006)

NEWS ARTICLES

“No Firm Agreement Yet on Indonesian Migrant Workers in Malaysia”, The Jakarta Globe (19 May 2010), available at: <http://www.thejakartaglobe.com/home/no-firm-agreement-yet-on-indonesian-migrant-workers-in-malaysia/375755>

Brooke Lewis and Mom Kunthear, “Staff Rush for Malaysia,” The Phnom Penh Post (4 October 2010), available at: <http://new.asiaviews.org/?content=153499ym32ddd4&headline=20101021150200&month=10&year=2010> accessed on 15 November 2010

May Kunmakara, “Soaring Demand for Labor,” The Phnom Penh Post (26 November 2010)

Post Staff, “Trainee Hurt Fleeing Labor Firm,” The Phnom Penh Post (6 September 2010), available at: <http://www.cam111.com/photonews/2010/09/06/46333.html> accessed on 11 November 2010

“Parents Accepted Cash from Labor Agency,” The Phnom Penh Post (27 July 2010), available at: <http://cambodia.world.countries.net/archives/25000>

Anonymous, “Skimpy Cambodian Passport Caused Grief to Cambodian Migrant Workers in Thailand” (16 November 2010), available at: <http://ki-media.blogspot.com/2010/11/skimpy-cambodian-passport-caused-grief.html> accessed on 16 November 2010

“Indonesians out, Cambodians in” (13 January 2010), available at: <http://www.mmail.com.my/content/24542-indonesians-out-cambodians>

MISCELLANEOUS

List of recruitment agencies licensed for Thailand, Malaysia, Japan and/or Arabia/Kuwait/Libya issued by the MoLVT Department of Employment and Manpower (2010)

Application for Foreign Domestic Helper, Procedures and Conditions, paragraph 8, available at:
<http://www.imi.gov.my/index.php/en/services/employer/373-pra>

Appendices

Appendix A: Synopsis of Domestic, Regional & International Law

There are a number of international, regional and domestic laws that together create the legal framework applicable to migration for labor in Cambodia. These are listed below, along with a short description.

Domestic

Constitution of the Kingdom of Cambodia (as amended 1999) (the “Constitution”)

Article 31 of the Constitution provides that the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women’s and children’s rights. Article 32 provides that Cambodian citizens residing abroad shall receive the protection of the state. Article 38 states that the detention of a person shall not be done unless in accordance with the law.

Labor Law (1997)

The Labor Law provides the legal framework applicable to employment contracts covering work carried out in Cambodia. The Law does not, however, cover domestic work or work carried out abroad.

Civil Code (2007), entered into force 6 April 2011

The Civil Code is intended to be a comprehensive book of civil law, which includes general provisions for all private legal relations as well as expanding the current law on contracts and civil law liabilities.

Law on the Suppression of Human Trafficking and Sexual Exploitation (2008) (LSHTSE)

The LSHTSE is intended to be the comprehensive law addressing TIP and sexual exploitation crimes in Cambodia in compliance with Cambodia’s obligations under the Palermo Protocol. It provides the definitions and sentences applicable to unlawful recruitment, cross-border transfer of persons and the act of buying, selling or exchanging a human being for the purposes of exploitation.

Penal Code (2009)

The Penal Code is a new book of criminal law that came into force in Cambodia in December 2010. Included in the Penal Code are articles that address the unlawful confinement of people as well as forgery of official documents, bribery of officials and identity fraud.

Sub-decree No. 38 on the Law Referring to Contracts and other Liabilities (1988)

This Sub-decree provides the basic provisions for contract law in Cambodia, including the conditions under which a contract can be deemed invalid, void or voidable, i.e. where an agreement is the result of fraud.

Sub-decree No. 57 on the Export of Khmer Labor to Work Overseas (1995)

This Sub-decree was intended to provide the legal framework applicable to all stages of migration for labor. It sets out the requirements for recruitment agents to be licensed and basic provisions for employment contracts. There is a new Sub-decree anticipated and this will replace the old one.

Sub-decree No. 70 on the Creation of a Manpower Training and Overseas Sending Board (2006)

This Sub-decree defines the guidelines for the implementation of a public recruitment system, which will coexist with the private agencies. This Sub-decree was designed specifically in relation to sending workers to South Korea.

Sub-decree No. 195 on the issuing of Passports for Khmer Migrant Workers (2008)

Provides that legal migrant workers can receive their passport within 20 days of application, at the cost of the Royal Government of Cambodia (RGC).

Sub-decree No. 67 on the Creation and Putting into Operation of the National Agency for Occupations and Labor (2009)

Deals with investment- and business-related laws and regulations.

Sub-decree No. 39 on the Granting Normal Passport to Cambodian Laborers to Legally Working Abroad (2009)

Modification of Sub-decree No. 195.

Proclamation/Prakas No. 108 on Education of HIV/AIDS, Safe Migration, and Labor Rights for Cambodian Workers Abroad (2006)

Implemented to encourage ministries and recruitment agencies to administer pre-, during- and post-departure training on healthcare (particularly in relation to HIV/AIDS) and human rights for Cambodian migrant workers and their families.

Proclamation/Prakas No. 012 on the Creation of a Labor Migration Taskforce (2007)

Developed to implement policies and action plans under the Labor Migration Section of the MoLVT.

Letter to the Director of the Cambodian Recruitment Agencies from Seng Sakda (No. 2647) Guidance on the Recruitment, Training, Transfer and Management of the Cambodian Worker to Work Abroad (2010)

Providing further guidelines for legitimate recruitment of Cambodian workers to work abroad; including the prohibition of pre-departure loans and the punishment for forging official documents.

Agreement on Guidelines for Practices and Cooperation between relevant government institution and victim support in cases of TIP (2007)

This Agreement provides for victim protection from the time of the identification of the crime, victim rescue and through the judicial process.

Ministry of Social Affairs, Veterans and Youth Rehabilitation, Policy and Minimum Standards for Protection of the Rights of Victims of Human Trafficking (31 August 2009)

Intended to result in a continuity of care for victims, who often engage with multiple service providers, from shelters to counselors to prosecution authorities.

Cambodia's National Poverty Reduction Strategy (2002)

The RGC's policy is to encourage official labor exports to increase welfare, enhance skills, reduce unemployment and increase state revenues. The RGC's goal is to develop appropriate policies and regulations and bilateral arrangements that do not prohibitively raise the costs yet adequately protect the interests of export workers.

Regional/Bilateral

Treaty between the Kingdom of Cambodia and the Kingdom of Thailand on Extradition (1998)

The parties undertake to extradite to each other, persons found in the territory of one of the parties who are wanted for prosecution or trial in the territory of the other party for an offence which is punishable by imprisonment for a period of more than one year.

Recruitment Procedures for Cambodian Nationals for Employment in Malaysia (1999)

Provides specific contractual provisions between employer and employee and includes obligations to pay for transport and repatriation and a skeleton contract format. Does not apply to domestic workers.

Memorandum of Understanding (MoU) between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand in Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003).

The parties agreed to undertake necessary legal reform and make best effort to prevent recruitment, transportation, transfer and receipt of persons under the age of 18 by means of coercion for the purpose of exploitation (including practices similar to slavery).

MoU between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Cooperation in the Employment of Workers (2003)

The MoU addresses four main areas: proper employment procedures, collaboration or effective repatriation of workers, due protection of workers, and prevention and affective action against illegal border crossing, trafficking and illegal employment.

MoU on Cooperation against TIP in the Greater Mekong Sub-Region (GMS) (2004)

Part of the effort to reduce TIP activities in the GMS is the establishment of the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT). As part of this initiative countries including Cambodia and Thailand have signed this MoU agreeing to cooperate against trafficking including the strengthening of cross-border cooperation in law enforcement on trafficking and the protection of all identified victims of trafficking.

ASEAN Declaration against TIP Particularly Women and Children (2004)

Declaration by ASEAN countries (including Cambodia, Thailand and Malaysia) to make a concerted effort to address trafficking, in particular to adopt measure to protect the integrity of passports, identity documents and travel documents from fraud. The countries also agree to distinguish victims of TIP and to ensure that victims are treated humanely.

Agreement between the Royal Government of Cambodia and the Government of the Socialist Republic of Viet Nam on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking (2005)

The bilateral cooperation agreement signed in 2003 by the Government of Cambodia and the Government of Viet Nam commits the two States to undertake joint training and to share information and evidence. Article 7 of the agreement states that the competent authorities in the two countries shall work in close cooperation, especially at the border, with respect to both domestic and cross-border trafficking of women and children.

ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007)

In being a signatory to this declaration, Cambodia has agreed to enhance measures in order to protect and promote the rights of migrant workers, including increasing regulation of recruitment and training.

Cooperation Agreement on Standard Operating Procedures (SOP) for the Identification and Repatriation of Trafficked Victims, between the Government of Cambodia and the Government of Vietnam (2009)

The Task Force is created to implement the agreement for cooperation between the Royal Government of the Kingdom of Cambodia and the Government of the Socialist Republic of Vietnam regarding the standard operating procedures for determining identification and repatriation of victims of trafficking.

MoU between the Ministry of Labor and Vocational Training of the Kingdom of Cambodia and the Ministry of Labor of the Republic of Korea on the Sending of Workers to the Republic of Korea under the Employment Permit System (EPS)

This MoU sets out the particulars for sending Cambodian workers to South Korea, who then benefit from the EPS, which gives migrant workers the same rights as national workers, such as equal pay, benefits and labor rights.

MoU on the Field of Exchange of Manpower between the Royal Government of Cambodia and the Government of the State of Kuwait

Creating relations between Cambodia and Kuwait on the sending of migrant workers to Kuwait.

MoU between the Kingdom of Cambodia and Malaysia on Migrant Workers (Proposed)

An MoU between Cambodia and Malaysia has been on the table since 2005. There is, however, as yet no proposed draft in circulation

International

UN Convention on the Elimination of all Forms of Discrimination against Women (1979) (CEDAW)

Described as the Bill of Rights for women, CEDAW, ratified by Cambodia in 1992, defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

UN Convention on the Rights of the Child (1989) (CRC)

In October 1992, Cambodia ratified the CRC, which provides for protection of children against all forms of discrimination and specifies that in all circumstances the best interests of the child shall have primary consideration.

UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990) (CMW)

Signed by Cambodia in September in 2004 (although not yet ratified),⁸² this Convention was developed to provide international protection for migrant workers and their families throughout the entire migration process from preparation through to transit, remuneration and return.

UN International Covenant on Civil and Political Rights (1996) (ICCPR)

One of the UN's more fundamental Conventions, state parties to the ICCPR undertake to protect basic rights and freedoms, including the right to liberty, freedom of movement and the right not to be held in slavery or servitude. Cambodia ratified the ICCPR in May 1992.

UN International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR provides that state parties undertake to recognize rights of fair employment, including safe and healthy working conditions.

UN Convention against Transnational Organized Crime (2000) (the “Palermo Convention”)

The Palermo Convention was ratified by Cambodia in December 2005 and provides for the criminalization of the participation in organized crime and money laundering the proceeds of crime. Trafficking in Persons (TIP) activities are considered as falling within such crimes.

⁸² The act of a state party signing an international treaty is their confirmation that they are assuming the obligation to submit the treaty to the proper organs of state for examination with a view to ratification. This obligation extends to the agreement that the state party will refrain from any act which is in contravention of the terms of the treaty. Ratification is the act whereby the state finally approves the treaty as binding.

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000) (the “Palermo Protocol”)

Further to the Palermo Convention, the Palermo Protocol provides specific provisions in relation to the prevention of TIP activities and the protection of its victims. This Protocol was ratified by Cambodia in July 2007.

UN Protocol against the Smuggling of Migrants by Land, Sea and Air (2000)

Supplementing the Palermo Convention and ratified by Cambodia in December 2005, the purpose of this Protocol is to prevent and combat the smuggling of migrants, to promote cooperation among States Parties and to protect the rights of smuggled migrants.

UN Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000)

This Optional Protocol, ratified by Cambodia in May 2002, provides that state parties shall prohibit the transfer of children for consideration for the purpose of engagement of the child in forced labor.

UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)

On ratification of this Convention, Cambodia agreed to take all practicable and necessary legislative steps to bring about the abolition of the practices of debt bondage, serfdom and child labor.

International Labor Organization Forced Labor Convention (1930) (No. 29) and Abolition of Forced Labor Convention (1957) (No. 105)

In ratifying these ILO Conventions, Cambodia undertook to suppress the use of work or service which is exacted from a person under the menace of a penalty, and further to suppress such activity as a method of mobilizing and using labor for purposes of economic development.

International Labor Organization Minimum Age Convention (1973) (No. 138) and Worst Forms of Child Labor Convention (1999) (No. 182)

Convention 138 provides that Cambodia undertakes to abolish child labor and enforce a minimum age of employment of at least 15. Convention 182 requires immediate and effective prohibition of all forms of child labor including debt bondage and serfdom.

