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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189121 **DATE:** April 15, 1983

MATTER OF: The Heirs of Mr. Kim Xum

DIGEST:

1. Request for reconsideration of denial of claim for payment allegedly due under a lease is denied where claimants assert that the claim should be decided using foreign law but fail to produce sufficient evidence as to the content of the foreign law.

2. An option to renew a lease that is incorporated into the lease requires no separately stated consideration. Further, there is no requirement that the exercise of the renewal option be independently supported by consideration.

3. Where the exercise of a renewal option is not the making of a new contract, the concept of unconscionability does not apply at the time the option is exercised.

The Heirs of Mr. Kim Xum (Heirs) request reconsideration of our denial of a claim for payments allegedly due under a lease executed between the decedent and the United States Secretary of State. Kim Xum, B-189121, November 30, 1977, 77-2 CPD 423. The request for reconsideration is denied.

Pursuant to Lease No. S-647-FBO-72/72, dated August 23, 1971, the decedent, a Cambodian diplomat, leased to the United States Secretary of State for use as an Embassy residence certain property in Phnom Penh, Khmer Republic (formerly Cambodia), for a term of 2 years at the stipulated rental of 25,000 riels per month, payable quarterly in advance after the initial year of occupancy. The lease agreement permitted renewal of the lease for up to four further 1-year terms under the same terms and conditions as the original lease at the option of the Secretary of

State, and also provided that the Secretary of State could terminate the lease at any time after giving 30 days notice to the lessor. By letter of May 26, 1972, the General Services Officer at the Embassy notified Kim Xum of the Department's intention automatically to renew the lease and of its desire to cancel the provision requiring annual notice of its intent to renew. Kim Xum was requested to signify his receipt of this letter and acceptance of its terms by signing and returning the letter to the Embassy. The record contains a copy of this letter, evidently signed by Kim Xum on June 6, 1972. In January 1975, the lease was amended to provide, among other changes, for rent to be paid in the riel equivalent of $450 per month, beginning April 1, 1975. Notice of termination was given on April 12, 1975, effective May 12, 1975.

The Heirs claim the rent for the period January 1, 1974 through March 31, 1975, in U.S. currency at the 1971 conversion rate. The record indicates that payments for this period were routinely processed by the United States in accordance with the terms of the lease; however, the decedent failed to collect the checks, apparently because inflation which occurred between 1971 and 1974 reduced the value of the stipulated rent. Although the record does not indicate exactly what the rate of inflation was between 1971 and 1974, a comparison of the prevailing rates of currency exchange illustrates the decline in the value of the riel during this period.[1] In our 1977 decision denying the claim, we said that the risk of currency

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[1] When the lease was signed in August 1971, the official rate of exchange for the riel was 55.54 to the U.S. dollar. At this rate, the 25,000 riel monthly rent would convert to $450. The riel was devalued by the Khmer government in October 1971, with the establishment of a Flexible Floating Rate, set initially at 140.20 riels to the dollar. In May 1972, when State exercised its option to renew the lease, the Flexible Floating Rate averaged 149.70 riels to the dollar. By January 1974, the riel had declined to an average of 376.25 to the dollar, yielding a dollar equivalent of the 25,000 riels per month rent of $66.45. After the Khmer Rouge came to power in April 1975, the riel was abolished. It was worthless at the time of our 1977 decision.

devaluation is an element that a contractor is presumed to take into account. Further, no recovery could be had since by 1977 the riel had become worthless. In addition, payment in dollars instead of riels could not be authorized since no officer or employee of the United States is empowered to modify an existing Government contract or lease to favor another party unless compensating benefit is received by the Government.

While a large part of their request for reconsideration consists of summary criticism of our decision, the Heirs complain primarily that our prior decision was based solely on American law. They maintain that because the lease is silent on whose law is to govern disputes between the parties Cambodian law should control. They say that if it was necessary for some reason to resort to non-Cambodian law to resolve this dispute, it would have been more appropriate to apply French law upon which Cambodian law was largely based. They apparently believe that French law would render the lease void because, given the considerable devaluation of the riel, the exercise of the option to renew the lease was not supported by consideration. The Heirs also suggest that the exercise of the option under these circumstances may have been unconscionable.

In support of their request for reconsideration, the Heirs extracted a number of short quotations from Alex Weill's Civil Law, General Introduction (3d ed.). No citations to the primary law of either Cambodia or France were provided. Stating that their argument is based upon French law, the Heirs say simply, "[I]t is up to you to see whether Cambodian law protects Mr. Kim Xum in the same way against the risk of injury." Assuming that Cambodian or French law applies, however, we have not been furnished sufficient information as to the content of either to enable us to decide the case using foreign law.

Generally, when foreign law is to be applied its content must be pleaded and proved like any other fact. 15A C.J.S. Conflicts of Laws § 3(9) (1967). Foreign law is not judicially noticed by Federal courts. Kearney v. Savannah Foods & Indus., Inc., 350 F. Supp. 85, 89 (S.D. Ga. 1972). When a party fails to provide information as to the content of applicable foreign law, it is for the forum to determine whether to decide the case in accordance with its own local law or to dismiss the party's

claim with prejudice. Restatement (Second) of Conflicts of Laws § 136 comment g (1971). In this case, the proof provided by the Heirs as to the content of French law is not sufficient for us to use French law as a basis for decision. Proof of the content of Cambodian law is non-existent. Under these circumstances, the request for reconsideration using foreign law is denied.

Notwithstanding our denial of this request for reconsideration on the choice-of-law issue, we believe that certain of the Heirs' contentions deserve comment. In essence, the Heirs argue that the exercise of the option to renew the lease for the four additional 1-year terms was not supported by consideration and, indeed, may have been unconscionable. We disagree. Although an option granted to one party to a lease to extend its term must be supported by consideration, see 51C C.J.S. Landlord & Tenant § 56(4) (1968), the "sufficiency of the consideration must be determined from the facts as they existed when the contract was made, rather than by subsequent developments." Id. Generally, an option to renew a lease that is incorporated into the lease requires no separately stated consideration. Parham v. Glass Club Lake, Inc., 533 S.W.2d 96 (Tex. Civ. App. 1976). There is no requirement in our law that the exercise of an option be independently supported by consideration. In addition, the general rule in this country is that if a contract is "unconscionable at the time the contract is made a court may refuse to enforce the contract * * *." Restatement (Second) of Contracts § 208 (1981) (emphasis added). Our review of the August 23, 1971 lease indicates that the parties intended to grant the Department of State the unilateral option to extend the term of the lease beyond the 2-year base period. We do not view the exercise of that option as the making of a new contract; thus, the concept of unconscionability as formulated by the Restatement does not apply.

Even if the concept did apply here, we would not view the renewal as an unconscionable act. As indicated, it is the lessor/contractor in these circumstances who bears the risk of a currency devaluation. Moreover, both at the time of the May 1972 option exercise and in January 1974 the riel's official value had declined but, as reflected in the footnote on page 2, it was not worthless. In addition, at the unofficial/exchange rate, which is viewed

as representing the "true" value of a currency, see F. Pick, Pick's Currency Yearbook (1975), the value of the riel had increased from 295 to the dollar in August 1971, when the lease was first signed, to 195 to the dollar in May 1972, and then declined again, see Pick's, supra, at 379, so that it appears that the riel was fluctuating substantially during this time but was not clearly without value.

The request for reconsideration is denied.

F. H. Barclay Jr.
for Comptroller General
of the United States