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**Cambodia's
Arbitration Council:
Institution-building in
a developing country**

**Hugo van Noord
Hans S. Hwang
Kate Bugeja**

August 2011

Industrial
and Employment
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ILO Regional
Office for Asia
and the Pacific

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Foreword

Most countries experience an increase in disputes between labour and management as they embark on the process of economic transition. The institutions and practices they establish to resolve those disputes determine not only their industrial relations, but also influence the course of economic progress. Of the countries in Asia that have introduced substantial economic or political reforms in the past 15 years (such as China, Mongolia, Indonesia, Vietnam), only Cambodia has successfully established a functioning labour dispute resolution system. While much attention has been focussed on industrial relations in Cambodia's garment industry, other workers, employers and industries are equally important. Whether in construction, services, or the informal economy, their ability to collectively pursue and defend their rights and interests – and to have those rights and interests addressed impartially and effectively – is a keystone of stable economic and social development.

Cambodia's policy experiment with the Arbitration Council¹ would have been considered a bold one under any circumstances. To establish such an institution under the auspices of a unique bilateral trade agreement (the same agreement that led to Better Factories Cambodia), and in a challenging governance and industrial relations setting, makes this experiment noteworthy. That the Arbitration Council has flourished and within a few years become an integral part – and driver – of a rapidly maturing industrial relations environment makes this a compelling story that deserves attention from anyone with a serious interest in development, labour, and governance.

This paper is a joint effort of the International Labour Office and the World Bank. It is the story of the Arbitration Council written from an insider's perspective, with first-hand knowledge and insights that an outside researcher would be hard-pressed to obtain. The value of this perspective is evident as the reader moves through the paper. The limitations, at least in principle, should also be acknowledged. Ultimately, however, the Arbitration Council can be evaluated on its own merits, and those interested in learning more about the institution are encouraged to contact the staff directly.

As this paper goes to publication, unions and employers in Cambodia are applying a new bipartite Memorandum of Understanding on Industrial Relations, a package of commitments that, among other things, enjoins the parties to refrain from strikes prior to arbitration, and to choose binding arbitration for rights disputes. The initial feedback from the parties to the Memorandum of Understanding is positive, borne out by the statistics included in this paper. That labour and management have moved from antagonism and mistrust to being able to implement a solemn commitment must be recognised and applauded. The Arbitration Council has played a key role in building the foundation that makes such an agreement possible.

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¹ To learn more about the Arbitration Council, please visit www.arbitrationcouncil.org

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If you have built castles in the air, your work need not be lost; that is where they should be. Now put the foundations under them.

Henry David Thoreau

1. Prologue

One of Cambodia's most successful legal reforms is the Arbitration Council, a labor arbitration center that has been highly effective at resolving labor disputes since it was established in 2003. The Arbitration Council demonstrates that it is possible to establish a high quality ADR institution in Cambodia that is effective and corruption free....

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and Mekong Private Sector Development
Facility

1.1 Introduction

The Arbitration Council might have been expected to go the way of many other attempts at governance reform in Cambodia. That is, it could have been started with the best of intentions and been supported by the resources of large international institutions and development bodies –and still not succeeded. That the Arbitration Council opened its doors at all in May of 2003 was a significant achievement. Today, eight years later, it is regarded as a landmark institution of justice in Cambodia.

The Arbitration Council is an alternative dispute resolution tribunal responsible for addressing claims of labour rights violations and resolving workplace disputes through direct engagement of workers and employers. It has helped resolve over 70 per cent of the nearly 1,000 cases it has received from inception to December 2010. The Council was established with the cooperation of unions, employers and government, and with assistance from the International Labour Organization. Operating in one of the poorest nations in Southeast Asia, it deals directly with conflicts that could otherwise result in prolonged strikes and income loss and even erupt into violence. The Arbitration Council resolves labour disputes expediently, transparently and based on the law and international standards, thereby improving the climate for investment and economic growth, promoting good industrial relations and trust in institutions of governance.

This paper tells the story of the establishment of the Arbitration Council, examining its evolution from initial concept to present realisation, including the numerous obstacles and challenges faced during the Council's establishment and the creative solutions and difficult decisions to overcome such obstacles. This paper also reviews the challenges that lay ahead, and the lessons that may be learned from the building of this institution. This paper is intended to inform International Labour Organization constituents, the World Bank and other international and development organisations, national governments, as well as academics, practitioners and others involved in dispute resolution in their attempts to support similar reforms in other countries, and to contribute to the ongoing dialogue about the development and sustainability of the Arbitration Council in the Cambodian context.

The information in this paper is based on a wide range of documents including ILO project reports and minutes of meetings, evaluation reports, and data collected from the Arbitration Council. It also draws on interviews conducted with key people involved at the time of the Council's inception and staff and management currently working there. The authors comprise the original Chief Technical Advisor to the ILO Labour Dispute Resolution Project and two (former) advisors to the Arbitration Council Foundation, and much of the information also comes from their own personal knowledge and observations

while working with the Arbitration Council. The attempt has thus been to document a critical insider's account of the experience.

1.2 Country context

Almost three decades of civil conflict left Cambodia's social, economic and political institutions devastated and its human capital decimated. During the nearly four years of the Khmer Rouge regime, it is estimated that one quarter of the population died through starvation, disease and systematic execution [Pham, Vinck, Balthazard & Hean 2009]. The regime targeted the educated elite. Many of those who were not killed fled the country and by the time the Vietnamese had defeated the Khmer Rouge and proclaimed the People's Republic of Kampuchea (PRK) on 10 January 1979, only ten law graduates are estimated to have remained alive in the country [Hall, 2000].

Under the PRK, Cambodia was re-established as a socialist state. The legal system was rebuilt along socialist lines, with the judiciary serving as an organ for enforcing state interests and judges appointed based on their political trustworthiness [Hall, 2000].

The Vietnamese forces withdrew in 1989 and civil conflict finally ended in 1991 with the signing of the Paris Peace Accords. As part of the peace agreement the UN sponsored general elections in 1993 and Cambodia embarked on a transition to a liberal democracy and market economy. Peace was fully restored across the whole territory in 1998 when the last Khmer Rouge troops finally put down their weapons, leading to increased security and the opening-up of livelihood opportunities.

The country has since achieved stability and economic recovery, which has been relatively rapid. In the period 1997 to 2007 Cambodia's income per capita increased by an average of 7.6 per cent per year and its growth performance, fuelled largely by the garment, tourism, construction and agriculture sectors, ranked seventh out of all countries in the world [World Bank, 2009].

Yet the influence of decades of conflict is felt deeply and serious problems remain. Despite impressive growth in the economy, this has disproportionately favoured the wealthy. Poverty in Cambodia remains a grave issue, with around 33 per cent of the population living below the poverty line and inequalities seemingly increasing; literacy levels (only 60 per cent of women are literate), access to education and a high rate of child mortality remain serious problems [UNDP Cambodia Annual Report 2007]. In 2008, Cambodia ranked 136 among 179 countries in UNDP's human development index, which looks beyond GDP to a broader definition of well-being, measuring life expectancy, adult literacy, school enrolment levels and purchasing power parity [UNDP Human Development Report 2008].

The absence of effective institutions of government, basic laws and an impartial judiciary leave Cambodia's citizens vulnerable to systematic denial and violation of their rights [UN Special Representative for Human Rights in Cambodia, 2007]. In 2008, the occurrence of land disputes and evictions, extrajudicial killings, abuse of detainees, arbitrary arrests and prolonged pretrial detention contributed to the government's poor human rights record [US Dept of State, 2009].

Corruption is considered endemic, with Cambodia ranked 166 out of 180 in the 2008 Corruption Perceptions Index published by Transparency International. Courts are subject to influence and interference by the executive branch, and a lack of resources, low salaries and poor training contribute to a high level of corruption and inefficiency. In a recent survey of adult citizens, 82 per cent said going to court was too expensive and required bribing judges or the police [US Dept of State, 2009]. There remains a critical shortage of trained lawyers. Yet numerous recommendations for reform of legal and judicial systems have gone unheeded, suggesting a lack of commitment at senior government levels to a concerted agenda for real change [UN Special Representative for Human Rights in Cambodia, 2008].

1.3 Economic development and industrial relations in Cambodia

Over the past decade Cambodia has witnessed an extraordinarily rapid expansion in its garment industry. In 1996 there were only 32 factories, employing an estimated 20,000 workers. By 1998 there were over 100 garment factories, employing 72,000 workers [Hall, 2000]. By mid-2008, this figure had grown to over 300 active factories, employing around 340,000 workers, approximately 90 per cent of whom were women [ILO Better Factories Cambodia, 2008]. The value of the industry to the Cambodian economy was significant. According to a joint report by the Ministry of Commerce and the Garment Manufacturers Association in Cambodia (GMAC), total garment exports in 1995 were US \$26.5 million; by 1996 exports had grown to US \$81.8 million; by 1997 to US \$229.5 million; and in 1998 to an estimated US \$360 million [Hall, 2000]. By 2007 exports were valued at US \$2.8 billion, with 70 per cent going to the U.S. market where Cambodia was the eighth largest supplier [World Bank, 2009].

Investors flocked to Cambodia, attracted by its low wages, relative political stability, nearby access to raw materials and lack of quota restrictions. Unlike countries such as China, Indonesia and Thailand, Cambodia was not party to the Multi-Fibre Arrangement (MFA) that restricted the amount they could export to countries protecting domestic garment and textile industries [Arnold, 2006]. Investment was also fuelled by the U.S. government granting Cambodia Most Favored Nation status in 1996 [Arnold, 2006].

At the same time as the expansion of the garment industry, labour conditions developed as a major issue. Despite a Labour Law which provided for protection of workers' rights, the Law was seldom enforced. Labour inspectors were poorly trained and poorly paid, reduced to taking bribes for under-reporting violations in order to make a living [Kolben, 2004]. There was also general concern that whatever dispute resolution process did exist was not effective or impartial, with government elites and garment factory owners tied politically and financially [Kolben, 2004].

The union movement emerged parallel with the development of the garment industry, and was linked from birth to political parties and the state. Internally, most unions were organised at enterprise and federation level, with the garment industry characterised by multiple unions at both levels. A lack of experience and capacity, serious allegations of corruption and extortion, and personal and political rivalries contributed to a chaotic industrial relations environment. This was mirrored on the employers' side by a similar lack of experience and capacity, allegations of poor HR practices and regular violations of the labour laws, anti-union discrimination, and attempts to bribe or otherwise unduly influence union leaders at enterprise and federation level.

Strikes, sometimes violent, increased rapidly with the growth of the sector. In 1997 the Ministry of Labour reported 17 collective disputes; by 1999 this had increased to 126 [ILO Project Document]. At the same time international labour groups drew attention to working conditions in Cambodia's factories and petitioned the U.S. government to review the alleged abuses of workers' rights. The U.S. labour movement was also campaigning against the loss of U.S. garment sector jobs to Cambodian 'sweatshops.'

It was a result of these pressures that in January 1999 the U.S.-Cambodia bilateral trade agreement was signed and the ILO initiated two projects (the Garment Sector Working Conditions Improvement Project, now known as Better Factories Cambodia, and the Labour Dispute Resolution Project) to improve working conditions in Cambodia. As a result of both ILO projects, it is widely accepted that there has been an improvement in compliance with Cambodia's labour laws and working conditions in Cambodia's garment industry [Polaski, 2004]. Progress has also been witnessed in improved social dialogue between management and unions, less chaotic industrial relations environment and better capacity to resolve disputes. In a 2006 garment industry survey almost all managers reported that in the prior five years the number and time lost to disputes had decreased and factory capacity to prevent and manage disputes had increased [Makin, 2006]. Also in that

same year, the country saw its first industry-wide wage bargaining when GMAC and a large number of garment union federations attempted to negotiate a new minimum wage. More recently the industry has initiated regular consultations with their union counterparts, including on key issues such as no-strike and binding arbitration for rights disputes.

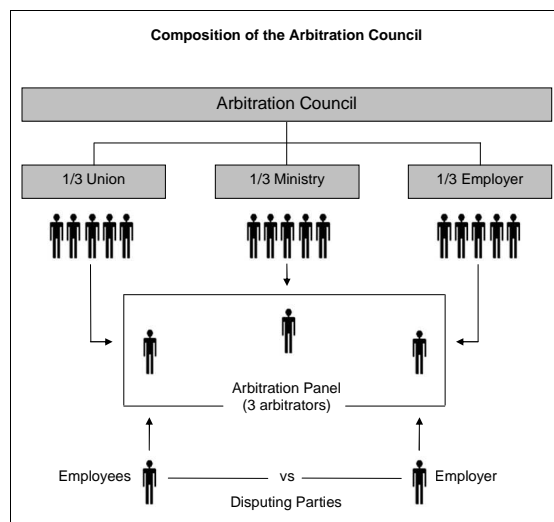
In the hotel and service sectors, workers have been organised by only one union federation. Following major strikes in 2003 and 2004, management and unions negotiated comprehensive collective bargaining agreements, most of which have been renewed multiple times. Although the union federation still experiences discrimination when it tries to organise new workplaces, where comprehensive agreements are in place, union and management have a constructive relationship.

Signs of progress in this young system contrast with the underlying problems that are still evident. Strikes do not follow the legal procedures, and unions commonly accuse employers of anti-union discrimination and refusal to engage in collective bargaining. The union movement itself maintains its close ties to the ruling party (31 federations) or the opposition (1 federation), with four independent federations [US Dept of State, 2009]. Labour inspectors and conciliators, responsible for enforcement of law and conciliation of labour disputes, still lack capacity and experience. Union activity has not been free from violence, harassment and intimidation, as evidenced by the killing of two prominent union leaders in 2004 and another local union leader in 2007.

While compliance with labour laws and union membership are higher in the formal sector, the vast majority of the population, around 90 per cent, is engaged in the informal sector and not members of a union [Adler & Woolcock, 2009]. Less than 3 per cent of Cambodia's total workforce is unionised [US Dept of State, 2009].

2. Arbitration Council: How it works

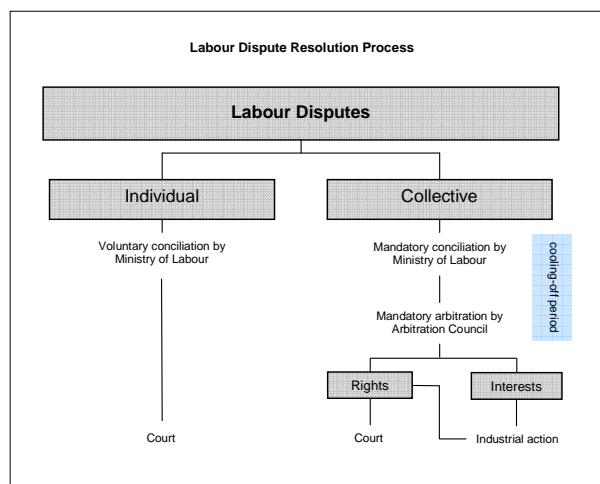
2.1 Mandate and composition



The Arbitration Council is a national labour arbitration institution established under Cambodian law to resolve collective labour disputes between employers and workers or their unions. The Council is mandated to resolve both 'rights disputes' – related to *existing* rights under the law, employment contracts or collective bargaining agreements, and 'interests disputes' – related to desired *future* benefits (mostly in the context of collective bargaining). It issues arbitral awards that are –in principle– non-binding on the parties.

2.2 The arbitration process

A collective labour dispute can threaten the effective operation of an enterprise and jeopardise social peace. Recognising this, as well as the imbalance of bargaining power in employment relationships, Cambodian law provides a structured and mandatory labour dispute resolution process. Once a dispute arises, a ‘cooling-off’ period is instituted during which parties are required to undergo conciliation and arbitration before workers exercise their right to strike (or employers conduct a lock-out).



In the event the parties are not able to settle the matter among themselves at the enterprise level, the Ministry of Labour will attempt to conciliate the dispute. If that fails, in whole or in part, the Ministry’s conciliator writes up a non-conciliation report, which is forwarded both to the Minister of Labour and to the Arbitration Council via its Secretariat. The Secretariat is responsible for carrying out clerical and registry tasks and is composed of Ministry officials co-located at the Arbitration Council.

The arbitration process takes the following steps:

Appointment of arbitral panel. The Secretariat registers the case; facilitates the selection of an arbitration panel; schedules and notifies parties of the hearing date; provides parties with information on procedural matters; and acts as intermediary for all communications between the panel and parties outside the hearing.

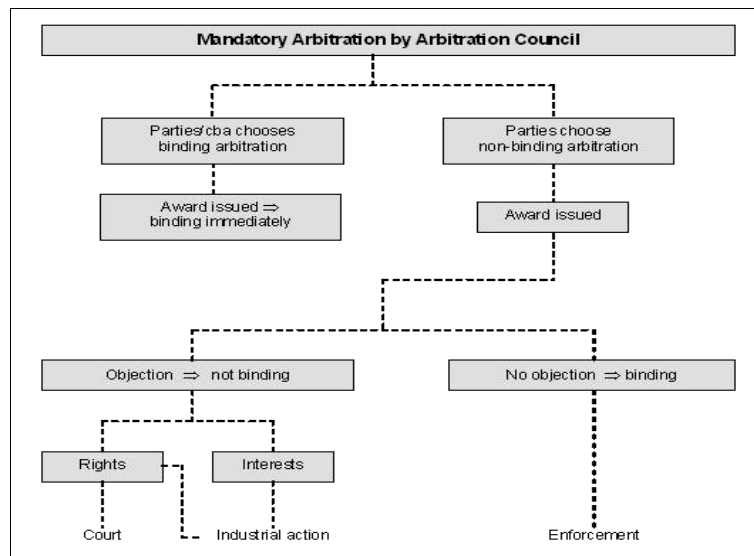
Preliminary discussions and interim orders. If a strike or lock-out is in effect at that time, the panel can issue an interim order, directing that the industrial action cease so that the Arbitration Council process can proceed.

Arbitration. At the hearing, the arbitration panel generally tries first to mediate the dispute. If this fails, the panel proceeds with formal arbitration and informs the parties of the procedures for arbitration and of their legal rights, including options for binding or non-binding arbitration. The panel hears the parties’ claims and arguments and examines any witnesses or documents related to the case.

Issuance of arbitral award. After the hearing, and within 15 days of receiving the case, the panel issues its decision in the form of an arbitral award. All awards are publicly available on the Arbitration Council website in both Khmer and English languages (www.arbitrationcouncil.org).

Enforcement of arbitral award. If the parties mutually agreed to binding arbitration, the award will be immediately enforceable. If they did not agree, then they have eight calendar days to file an objection to the award via the Secretariat. A timely objection means the award is unenforceable and triggers the parties’ right to take industrial

action (i.e., strike or lock-out) or, in the case of a rights dispute, proceed to the court. If no timely objection is filed, the award automatically becomes binding and enforceable. Under the law, if either party refuses to abide by an enforceable award, the other party can ask the court to enforce the award.



3. Origins and establishment: January 2002 – April 2003

3.1 The ILO Labour Dispute Resolution Project

In January 2002, the International Labour Organization began its Labour Dispute Resolution Project (the Project) in Cambodia to provide technical assistance to the Ministry of Labour in dispute prevention and resolution. While Cambodian labour laws provided an orderly system for the settlement of labour disputes, the system existed in large part only on paper. The Project was designed to address the ineffective application and implementation of those laws. These weaknesses had been exposed by the increasing – and increasingly violent – labour disputes in Cambodia. The mobilising workforce, economically powerful employers and their politically powerful employer associations (especially in the garment sector) and the Ministry of Labour were each open to, and in some cases clamouring for, an effective response to these escalating labour disputes.

The Project was conceived as complementary to ILO’s garment factory monitoring programme (today known as Better Factories Cambodia). Both were established in connection with the 1999 U.S.-Cambodia bilateral trade agreement, a unique agreement linking increased export quotas for garments to improved labour standards, and were initially funded by the U.S. Department of Labor. The Project’s scope, however, would extend beyond the garment sector to the broader Cambodian formal economy.

U.S.-Cambodia Bilateral Trade Agreement and the ILO projects

Cambodia in the mid-1990's witnessed the rapid growth of the country's garment sector, shadowed by mounting industrial disputes over working conditions and allegations of labour law violations. Under the 1999 U.S.-Cambodia trade agreement Cambodia agreed to support "the implementation of a programme to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor law." According to the agreement, export quotas could be increased if Cambodia demonstrated substantial compliance with such labour laws and standards. It was in this context that the U.S. funded two ILO projects to improve working conditions and the application of labour laws – one to monitor working conditions in garment factories (today, Better Factories Cambodia), and the other to help resolve labour disputes throughout Cambodia (the Labour Dispute Resolution Project). In accordance with the trade agreement, the U.S. and Cambodia held semi-annual labour consultations to review the progress of working conditions in the Cambodian garment industry and compliance with labour laws and standards. The monetary incentives to the Cambodian government from the trade agreement were considerable (far greater than any aid agreement). According to a 2006 World Development article, it was estimated that in 2002 the (then) 9 per cent quota bonus was worth US \$56.4 million to the Cambodian economy, with increased quotas of 14 per cent in 2003 and 18 per cent in 2004 raising the monetary value dramatically.

3.2 The original project design: Broad objectives, scant resources

The original project design contained three broad and ambitious objectives: first, preparing and implementing a national dispute prevention and resolution strategy applicable to all of Cambodia's tripartite stakeholders (including developing comprehensive training programmes and statistical reporting systems and providing technical support for collective agreements which agreements at that point did not yet exist); second, building an entirely new arbitration system (including recruiting and training arbitrators, training users of the new system, developing procedural regulations and guidelines and creating an operational Arbitration Council); and third, establishing a functional labour adjudication system, initially through common courts but ultimately through a formal labour court, complete with developing and implementing the necessary judicial training, case support materials, administrative tools and legal systems. This was to be completed within two years, with a budget of only US \$537,129.

It quickly became apparent that the Project's objectives would need to be reconsidered, particularly given the state of Cambodian industrial relations.

3.3 Cambodian contextual challenges: Sprawling, fundamental problems

The challenges of Cambodian employment relations had been grossly underestimated in the project design. As spelled out in the Project's mid-term evaluation report issued in 2003, and corroborated throughout the Project's stakeholder consultation process, there were fundamental problems in Cambodian industrial relations, including "a weak labour administration system in general, poorly trained and poorly paid labour inspectors, especially in prevention and conciliation; concern that whatever dispute settlement does exist is not effective, impartial or respected; overall concern that all decisions and interventions, by whatever party, including the judiciary, are governed by vested interests and susceptible to outside influence; weak and splintered trade unions unfamiliar with their rights and their obligations, coupled with almost a total absence of collective bargaining; distrust between employers and workers and between their organizations; distrust of the Government and little understanding of social dialogue and tripartism and of the potential advantages of collaborative relations between workers, employers and Government."

3.4 The project, reconsidered

The original project design may have underestimated the contextual challenges, but the ILO did select a project manager with a background in labour law and experience living and working in Cambodia. The ILO would later also engage a local non-governmental organisation, the Community Legal Education Center, to provide assistance in carrying out the Project, and thereby inculcating the Project with further expertise in Cambodian employment relations.

Soon after commencement it was determined that the Project required reconsideration. Given the difficulties posed by the weakness of the Cambodian judiciary (its lack of transparency, susceptibility to political influence and corruption, and failure to engender trust on the part of Cambodia's public), an assessment was made that an independent court to resolve labour cases could not be realised at that time. By contrast it was felt that the establishment of an Arbitration Council did have the potential to have a real and lasting impact on industrial relations in Cambodia –if its establishment could be shielded from vested interests and corruption. In addition, the Project would carry out activities related to the objective of developing and implementing a national dispute prevention and resolution strategy. This was important from an institutional sustainability perspective, with arbitration being just one part of a larger dispute prevention and resolution framework in Cambodia.

3.5 Stakeholder consultations: the Project's advisory committee

The Project started its work on the Arbitration Council by meeting with a wide range of stakeholders to discuss its establishment. The project document also stated that the Project would organise an advisory committee, comprised of members from the tripartite stakeholders (unions, employers and government) in equal numbers, to provide advice and feedback on project work. Given the distressed state of industrial relations in Cambodia and the fact that arbitration was a new concept, coordinating the tripartite committee would pose its own difficulties for the Project.

Splintered union movement

While all or nearly all employer associations were organised under one umbrella confederation, there was no similar overarching representative structure for the multiple Cambodian unions and certainly no singular voice or opinion. The Cambodian union movement was particularly splintered and highly politicised. Some unions existed only on paper, others openly aligned themselves with the employers and/or the dominant Cambodian political party, or with the political opposition party. All of the major national union federations, however, wanted a seat on the Project's advisory committee. The Project's response was to give all legally registered union federations a chance to attend all committee meetings either as formal representatives on a rotational basis or as observers.

Distrustful stakeholders

A more difficult issue was getting all three stakeholders to work together to move the Project forward. The unions, employers and Ministry (as well as some separate internal factions) each inhabited their own islands of interests, entrenched in their own positions, distrustful of each other and at varying levels of competence. As a result of all this, finding common ground among the wary members of the Project's committee was a challenge. The consultative approach thus required careful management to allow the Project to progress toward the establishment of a credible Arbitration Council that would not be captive to any party's interests. In addition to providing ideas on the establishment of the Council, the meetings of the committee enabled the Project to learn of the broader expectations and grievances among stakeholders, promoted the Project's commitment to a

transparent and accountable process, and contributed to a sense of ownership by the stakeholders over the Project itself.

3.6 Taking the lead among wary participants

After the initial stakeholder consultations, the central question for the Project remained: how could a legitimate Arbitration Council be established in such a distrustful environment?

In view of these contextual challenges it was concluded that the ILO had to take the lead (as opposed to, say, merely providing technical advice to and following the lead of the Ministry) in the Arbitration Council's establishment. Stakeholders perceived the ILO as a neutral and expert organisation and, with the prevalence of prolonged strikes and the lack of collective bargaining, were keen for the Project to succeed. The ILO would have to carefully guide the process of the Council's establishment to ensure the *involvement* of each of the stakeholders, while preventing such involvement from devolving into *interference and undue influence*. This delicate balancing act required the ILO to exercise the full leverage at its disposal.

Leverage

The U.S.-Cambodia bilateral trade agreement with its linking of increased garment quotas to improved labour standards was the genesis of the Project and provided one of its most important levers to create political space for the establishment of the Arbitration Council. At meetings of the Project's advisory committee, U.S. embassy representatives who were seated as observers discussed the importance of the Project's work in relation to the bilateral trade agreement: the U.S. considered the timely establishment of a truly independent Arbitration Council a critical benchmark for whether or not quotas for Cambodian garment exports to the U.S. would be increased. The implicit message, repeated during the semi-annual labour consultations between the U.S. and Cambodia and understood by all, was that the U.S. supported the ILO Project and so should the stakeholders. The quota increases, if they were obtained, were worth tens if not hundreds of millions of dollars in total. The ILO's own reputation and political capital were also exploited to overcome resistance to the plans for establishing a credible Arbitration Council. It was made clear that the ILO would only support a truly independent Council; the ILO would not allow its reputation to be tarnished by the establishment of a non-independent or corrupted institution.

Prakas

An independent Arbitration Council was not assured by the Labour Law, however, which contemplated a concrete role for the Ministry in the operation of the Council, including appointing arbitrators, forwarding cases to the Council, notifying parties of the Council's decisions and receiving parties' objections. But the Labour Law also required that the Ministry issue a legal regulation (*Prakas*) to realise the Law's provisions on collective dispute resolution. The Project thus determined that the work of building the Council would initially centre on the drafting of this regulation. The fact that the Law contained articles on the operation of the Arbitration Council meant that they had to be heeded; but that they provided only a broad framework meant there was space for developing the details to operationalise the Council. The legal regulation thus was drafted to ensure it was in accordance with the Law's explicit provisions while also incorporating necessary features to guard the Council's *independence, credibility and effectiveness*.

The Project, working off a preliminary draft from the ILO headquarters, prepared an initial version of the *Prakas*; it was presented at a seminar of tripartite stakeholders organised in July 2002 to collect feedback on the draft regulation. Thereafter, the *Prakas* underwent an intensive five-month process of re-drafting and revising: the Ministry prepared a separate version of the regulation, dual versions were reviewed and edited,

vigorous negotiations were conducted on the contents and language of the regulation and at one point, U.S. embassy representatives became involved in discussions. The Ministry would ultimately issue the regulation in December 2002 as *Prakas* 338, later revised, with its 11 chapters, 52 clauses and 41 additionally annexed procedural rules. It would serve as the detailed blueprint for the powers and operations of the Council, which would henceforth be simply known as the *Arbitration Council*.

3.7 An independent Arbitration Council

One of the primary challenges facing the establishment of the Arbitration Council was ensuring its independence, especially against capture (perceived or real) from any one party or interest. In the Cambodian context, a Council under the control of the Ministry could have been perceived by both unions and employers as non-independent; and it would likely have been unacceptable in particular to those unions which viewed –rightly or wrongly– the Ministry as aligned with employers’ interests. More broadly, as an institution tasked with dispensing justice in the resolution of labour disputes, a perception that the Council was not independent would threaten to undermine its purpose and existence. The Project thus introduced several measures in the *Prakas* to maximise the Council’s independence.

Tripartism

The Project understood the Arbitration Council’s independence would rest significantly on the arbitrators themselves, and resolved to lead the process of determining the composition of the Council. The Labour Law provided that the Ministry of Labour should issue an annual regulation on the appointment of arbitrators; but the Law did not explicitly prohibit involvement by someone other than the Ministry in the composition of the Council. The Project thus introduced the leveling feature of tripartism into the Council’s structure: unions, employers and Ministry would each list and nominate one-third of the arbitrators who would be appointed by the Ministry as members of the Council, and who would in turn arbitrate disputes in tripartite panels. This innovation, incorporated in the *Prakas* on the Arbitration Council, sought to bolster the Council’s independence against capture by any one party and provide a system of checks and balances, while also fostering support for the Council from its stakeholders.

However, in view of the distrust among stakeholders and in order to minimise potential for a polarised Council, it was determined that members and officeholders of unions and employer associations, as well as Ministry officials, would be ineligible for arbitrator membership. This initiative was not well-received among some representatives of the Ministry, employers and unions; nor did some Ministry officials support formalising such limits in the official *Prakas* which the Ministry was responsible for issuing.

Facilitating arbitrator recruitment

To ensure that individuals who would best protect the Arbitration Council’s independence were initially nominated as members to the Council, the ILO Project would also have a role in *facilitating* this process. This role for the ILO (to provide consultations on the nomination of arbitrators) was incorporated into the *Prakas* as a two-year transitional provision. In practice, the Project conducted the recruitment of arbitrators, searching for individuals of integrity and with the experience and skill set necessary to become members of the Council. The ILO established three lists of arbitrator candidates and vetted the lists with the respective stakeholder groups to ensure their endorsement. In addition, the ILO and the Ministry formally agreed that the Ministry would follow the ILO’s recommendations as to which arbitrators would be officially appointed to the Council.

Independent identity

The Project also promoted an independent identity for the Arbitration Council, as an institution derived from the Law rather than as a construction under the Ministry of Labour, operating from its own offices separate from the Ministry's, and displaying its own emblem, without reference to the Ministry of Labour. However, while some Ministry officials were valuable supporters of the Project's aim of establishing an independent identity, others were reluctant to relinquish (and some sought to assert) control over what they viewed as an administrative body under their domain. This was not necessarily unreasonable given the Labour Law's contemplation of a concrete role for the Ministry in the operation of the Council.



The Project's push to separate the Arbitration Council from the Ministry –to float above and along the formal government structures– and to lead the recruitment of arbitrators and composition of the Council, required the Project to utilise the full leverage at its disposal while also developing and maintaining the support of the stakeholders.

Floating model

The establishment and functioning of the Arbitration Council outside of the formal structure of the Ministry of Labour's dispute prevention and resolution system has not been without debate. While the premise may be acceptable that such 'independence' was a practical necessity during the initial process of establishing the Council, and perhaps even for the short term thereafter, a reasonable question arises: to what end? As a statutory body, the Council derives its authority from the Labour Law's provisions on labour dispute settlement, receives labour cases directly from the Ministry, and reports its decisions to the Ministry. But the Council was also intentionally established to be independent of the Ministry's (and other parties') control, receives no government funding, and depends on the support of a non-governmental organisation (initially, the ILO and the Community Legal Education Center; currently, the Arbitration Council Foundation) for its operations. There is some incongruity in the Arbitration Council being both of the state and outside the state's formal structures. On the one hand, the current model of the Council, borne of necessity and floating above and along the formal government structures, raises serious challenges to its own medium and long-term financial and institutional sustainability. On the other hand the Council is trusted as a credible institution of justice in Cambodia and perceived as having a real and positive effect on labour relations, and any submersion into the government system would involve a substantial risk to its credibility and thus effectiveness.

3.8 A credible Arbitration Council

Another challenge facing the establishment of the Arbitration Council was ensuring its credibility among stakeholders, especially employers against whom claims to the Council would be made. How could the Council instil trust among and maintain participation by the stakeholders, who were as sceptical of almost any dispute settlement mechanism as they were suspicious of each other? This was an essential question to answer since the weaknesses of the Cambodian judicial and enforcement systems meant the Council was likely to operate in a legal vacuum and would have to rely primarily on its integrity and stakeholders' belief in it.

Non-binding awards

Although it is mandatory under the Labour Law to participate in the arbitration process, there was no mechanism to enforce such participation and a real danger parties would not actually show up. In this respect, one of the Arbitration Council's most important features is its non-binding arbitration: the Labour Law explicitly provides that parties can object to an arbitral decision within an eight-day period (thus rendering the decision non-binding). This means that final outcomes are not imposed on the parties; they have little to lose

(either party can lodge an objection to the award if they are not satisfied) and much to gain (their dispute has a chance of being resolved) by participating in arbitration. It also means that parties, who might otherwise hold fears of a corrupt system, can be secure in the knowledge that they have a legal right to protect themselves from a decision being imposed upon them. Indeed, parties exercised their right to lodge an objection to 66 per cent of all awards issued by the Council up to the end of 2010, thus resulting in non-binding decisions. Rather than having a third-party intervener tell the parties what they must do, the parties themselves have an opportunity, and indeed are pressured, to take ownership over and settle their own dispute and determine their own workplace relationship.

While non-binding arbitration helped to ensure the participation of parties (especially the employers) in the arbitral process, it also led to criticism (primarily by unions) that the Arbitration Council lacked “teeth.” To address this concern and in a nod toward the benefits of bargaining, the *Prakas* introduced the additional option of binding arbitration by mutual consent between the parties or by applicable collective bargaining agreement. According to the Council’s records, since its establishment until the end of 2010, such option has been exercised in approximately 8 per cent of all issued awards; and an additional 26 per cent of issued awards were binding because *no* objections were filed.

Some critics have called for all awards of the Council to be binding on parties, regardless of consent. However, that response would not be without risks. Binding awards are not self-enforcing and still require the parties themselves to abide by decisions. Failing that, the aggrieved party might revert to the court to seek formal judicial enforcement. Given the state of Cambodia’s judiciary, however, that is hardly a reliable option. There is also a risk that binding awards could undermine the Council’s decisions and its developed body of jurisprudence: awards submitted to the court for enforcement *might* instead be reopened, reconsidered and overturned by a judge. In practice, unions currently have more effective non-legal avenues to enforce (binding and non-binding) awards, including strikes and appealing to local and international organisations such as labour rights groups, media, corporate buyers and international unions to exert influence on employers to implement awards.

Reasoned, published awards

The *Prakas* also introduced the requirement to record decisions in written arbitral awards and specified that the content of such awards would state reasons for the decisions, including references to relevant legal provisions. This requirement sets the Arbitration Council apart from Cambodian courts, which typically issue decisions without providing detailed reasons. By providing written copies of arbitral awards to parties (and later, to the general public via the internet and hard bound compilations), complete with an articulation of the legal reasons why the decision was made, the Council demonstrates its commitment to transparency, fairness and justice, and allows the parties to judge its credibility for themselves.

Consistent awards

Early on, in exercising its arbitral powers, the Arbitration Council was guided by a legal principle – later formalised as a guideline by vote among the arbitrators – of maintaining consistency in the interpretation and application of laws. In effect, the consistency guideline helps to ensure similarly situated parties receive similar treatment and outcomes, irrespective of the composition of arbitration panels across different cases. Also, since the outcomes can be reviewed in published awards, confidence is built among parties because they can see for themselves that the Council’s decisions are based on the equal application of laws. Today, employer associations and unions regularly reference awards in consultations with their members on labour law and industrial relations matters. Related to the Council’s consistency guideline, the *Prakas* also included provisions for internal consistency within each tripartite arbitration panel: arbitrators should attempt to

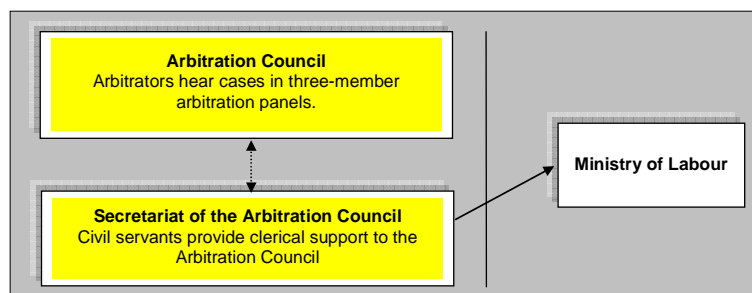
reach consensus in their decisions; at the same time, the *Prakas* also provided the opportunity for a dissent to be recorded if consensus is not possible. In this regard, it should be noted that only approximately 7 per cent of all awards include a dissenting opinion.

3.9 An effective Arbitration Council

The Project was engaged in a difficult exercise of institution-building. In the context of Cambodian industrial relations, the Arbitration Council was challenged to contribute to the stabilisation of the chaotic labour unrest, to help improve overall labour standards, as well as to actually resolve labour disputes. To this end, the Council needed the appropriate powers and mechanisms.

Broad arbitral powers

The Labour Law grants the Arbitration Council broad legal and equitable authority to resolve labour disputes. The *Prakas* expressed this in terms of power and authority to “fully remedy any violation [of the laws, and] to provide any civil remedy or relief which it deems just and fair.” Connected to this, and to address the high number of wildcat strikes in Cambodia, the *Prakas* specifically empowers the Council to issue orders to parties to stop strikes (or lock-outs), return to work and to cease any industrial retaliation connected to a labour dispute.



Secretariat of the Arbitration Council

Another mechanism designed to ensure the Arbitration Council could effectively resolve labour disputes was the Secretariat of the Arbitration Council, created by the Project to provide vital registrar and clerical support for the Council’s operations. Although the Labour Law does not specifically contemplate a Secretariat, it does place the arbitral system within a larger framework of dispute prevention and resolution managed by the Ministry of Labour. The Secretariat is officially an arm of the Ministry and staffed by civil servants, but it is housed on Council premises, separate from the Ministry. This was designed and incorporated into the *Prakas* to optimise efficiencies between the Council and the Ministry and allow the Council to accomplish its arbitral responsibilities quickly and efficiently without any undue delay or interference from the broader Ministry apparatus. In addition to the Secretariat’s location, the Project also considered that the selection of qualified staff, appropriate training and supervision and sufficient resources and remuneration for the Secretariat were critical to ensuring a well-functioning body. None of these, however, were easily attainable and raised challenges and required responses that in many ways paralleled the Arbitration Council’s establishment. The Ministry was not eager for the Secretariat’s physical location to be outside the Ministry, nor was it able or prepared to allocate government budget for the Secretariat’s operations. Once again, the Project would rely on its leverage and other resources in the establishment of the Council’s Secretariat.

3.10 Getting ready to open the doors

After issuance of the *Prakas* in December 2002, there was significant pressure to ensure that the Arbitration Council could open its doors before the upcoming U.S.-Cambodian labour consultations (as provided in the bilateral trade agreement). These consultations were scheduled for May 2003 and the Council's establishment was one of the benchmarks under review. The Project identified and acquired office space for the Council to conduct its hearings; organised trainings for arbitrators and stakeholders and developed and distributed informational materials; designed a model form of arbitral award; drafted administration manuals; developed a database to register cases, as well as other forms and systems for case administration; and, most importantly worked with the Ministry and the stakeholders to finalise the appointment of arbitrators.

Arbitrators, recruited

By this stage it had been determined that the position of arbitrator could not be considered a full-time post; rather, it was likely that those recruited would perform their arbitration activities in addition to regular occupations elsewhere. To the extent arbitrators would only work when selected by parties for a particular case, a case-by-case payment scheme made practical sense. Moreover, given the law's decree that arbitration be conducted for parties free of charge and the Project's limited funding availability, case-by-case payment was also a fiscal necessity. Initially each arbitration panel member was paid an honorarium of only US \$30 per case (later increased in 2004 to US \$100 per case, where it remained until 2008 when it was increased to its current level of US \$120 per case).

At its meeting of 28 February 2003, in a rare show of complete consensus, the Project's full tripartite advisory committee unanimously endorsed the list of all arbitrator candidates. On 12 March 2003, the Ministry issued a regulation officially appointing 21 arbitrators to the Arbitration Council; and on 30 April 2003, a swearing-in ceremony for the arbitrators was held.

Arbitrators of the Arbitration Council.

The Arbitration Council is comprised of 30 individual arbitrators, including 25 males and five females, all of whom are Cambodian nationals, ranging in age from 30 to 72 years old

- Average year of birth of arbitrators on Ministry list: 1961
- Average year of birth of arbitrators on Employer list: 1971
- Average year of birth of arbitrators on Union list: 1967
- 26 arbitrators hold education degrees in Law or law-related field
- Degrees are also held in other fields, including Public Administration, Public Policy, Business Administration, Economics, Science, Engineering, Medicine, Veterinary Medicine, Dental Surgery, Geography and Soil Science
- 24 arbitrators have studied abroad
- Five arbitrators hold governmental positions, including with the Council of Ministers, the Ministry of Economy and Finance and the Ministry of Interior
- 11 arbitrators are employed in the private sector (certain of whom also hold positions with the government)
- 16 arbitrators are employed by non-governmental or educational institutions

4. Opening the doors: May 2003 – April 2004

4.1 Arbitration Council opening and operations

On 1 May 2003, 16 months after the start of the ILO Labour Dispute Resolution Project, Cambodia's Arbitration Council officially opened its doors for business.

Though this was a significant achievement in itself, the pressing concern remained whether the Arbitration Council would actually function: whether cases would arrive; whether parties would show up; and whether arbitrators would make sound decisions.

4.2 Arrival of cases

On the very first day of its operations, the Arbitration Council received two labour dispute cases from the Ministry. The cases would continue to arrive in the following months and by the end of 2003 the Council had registered a total of 31 cases –an average of nearly four cases per month. However, the arrival of cases at the Council was not entirely smooth.

Problem of procedural delays

After the initial cases arrived at the Arbitration Council, the Ministry's conciliators stopped forwarding cases directly to the Council's Secretariat. Instead, they insisted that each case had to be delivered first to the desk of the Minister of Labour, where it was required to be reviewed for authorisation by the Minister before being forwarded to the Council. This additional bureaucratic requirement could have stalled the Council's operations before it had a chance to begin. Also, in the context of wildcat strikes and occasional violence, delays in processing cases were to be avoided at all costs.

The hotel cases

The case involving 71 hotel employees was one in a series of hotel labour dispute cases that arose before the Arbitration Council in its first year of operations, many of which required the novice arbitrators to deal with complex legal issues related to the interpretation of the Labour Law, allegations of union discrimination, questions about the Council's jurisdiction, and conflicts about the entitlement to and proper calculation of hotel 'service charges', potentially worth millions of dollars. These 'Hotel Cases' required the Council's arbitrators to perform their arbitral duties under a spotlight of national and international media, while withstanding private and political pressure from a multitude of sources.

The underlying issue in the Hotel Cases was whether or not the hotels had met their obligation of distributing the full 'service charge' to employees as required under the Labour Law. The Arbitration Council determined that the hotels had generally failed to meet their legal obligations in this regard. In the first of the Hotel Cases (brought to the Council in July 2003), both sides had agreed to a binding award and hotel management initially complied by making certain payments to its employees, though these were later stopped. In the remaining Hotel Cases, each of the employer parties exercised the right to object to the arbitral award thereby rendering the awards non-binding. But in none of the cases was that the end of the story. The union parties took the arbitral awards as proof they were right in their position and made explicit references to the awards of the Council in sustained campaigns, with support from an international network of union organisations, to eventually elicit concessions from the hoteliers. Ultimately most of the disputes were resolved through negotiated, comprehensive collective bargaining agreements, many of which have been renewed a number of times, thus avoiding further strikes.

Problem of (mis)characterising collective disputes

A more vexing and potentially more damaging issue was the chance that some cases that ought to be arbitrated might not arrive at the Arbitration Council at all. The Labour Law's

requirement for the Ministry to forward only (non-conciliated) *collective* labour disputes left open the risk that disputes would be mischaracterised as ‘individual’ rather than collective, and thus not forwarded to the Council. This is what appears to have happened in one of the so-called ‘Hotel Cases’ which involved the employer and employees of a major hotel in Phnom Penh. In that case, the union demanded the reinstatement of 71 employees who had been terminated in a mass layoff from the hotel within a period of 3 months in mid-2003. The Ministry refused to forward the case to the Council, deeming the labour dispute to be 71 individual disputes. This could have damaged the credibility of the Council as it would have demonstrated the Ministry’s discretion over the Council’s mandate of arbitrating collective disputes.

Ultimately, both of the above problems were resolved. Regarding the procedural issue, an agreement was negotiated whereby conciliators would send the original case file to the Minister and simultaneously send a copy to the Council’s Secretariat to allow the arbitration process to begin without delay. As for the hotel case, the Ministry was persuaded to reconsider its earlier determination of the labour dispute regarding the 71 laid off workers and forward the case to the Council.

Nevertheless, the above problems demonstrated that there were real risks associated with the Arbitration Council’s dependence on the Ministry’s forwarding of cases. To redress this (and other issues), *Prakas 338* was revised to offer the potential for the parties to agree to directly access the Council rather than going through the Ministry. It should be noted, however, that concerns regarding the Ministry’s characterisation of cases have diminished over time, as cases forwarded by the Ministry have steadily increased since the Council’s inception in May 2003, rising from 31 cases registered in that first year, to 180 cases in 2009 and 145 in 2010. To date no parties have accessed the Council directly.

4.3 Parties’ attendance

A further risk was that absent sanctions for non-attendance, parties would ignore the legal mandate to participate in arbitration and simply not show up. In fact, in almost every case the parties *did* attend. Moreover, as an indication of broader stakeholder interest, parties at the Arbitration Council were frequently accompanied by representatives from the employer associations and union federations, either acting as counsel to the parties or as observers of the arbitration process.

Parties and their representatives appeared at the Council, however, with little understanding about what to do. They were uniformly under-prepared, with almost no knowledge of basic arbitration concepts such as making arguments or presenting support for their demands. The Project provided training for unions and employers on the arbitration process, but the burden was on the arbitrators and Secretariat officials to guide parties through each step of arbitration. This meant arbitrators taking on a more active and probative role in hearings than originally anticipated.

4.4 The work of arbitrating

The arbitrators and the Project’s management all understood the real test of the Arbitration Council’s credibility would rest on its ability to effectively and fairly handle labour disputes. The Council would have to prove from the first cases that it was professional and balanced, could competently handle arbitral hearings, draft reasonable decisions, and would help the parties resolve their disputes. If not, the already skeptical stakeholders could turn away and withdraw their support before the Council had a chance to build up a reputation.

The general lack of human resources in a country still emerging from decades of conflict and the fact that the very concept of formal arbitration was new to everyone were serious challenges to the expectations for the arbitrators’ performance. Though the Project

had organised training for arbitrators and the Secretariat prior to the Council's opening, it was also understood that the bulk of the substantive training would have to be provided on the job, in the form of direct case mentoring.

Mentoring programme

The on-the-job mentoring programme was designed to train individual arbitrators and build the skills necessary to perform their responsibilities, while allowing the Arbitration Council to operate and resolve collective labour disputes. The primary case mentor was an expatriate lawyer who assisted the panel of arbitrators for a particular case through all phases of the arbitral process: from the preparations before a hearing; to sitting at and observing the hearing itself; to post-hearing discussions and assistance with the drafting of reasoned awards.

An early challenge for the Council

The tenth case received by the Arbitration Council, involving a garment factory and its union, posed particular challenges. The case raised an issue that had long been debated about the Law in relation to the length and renewability of fixed duration (short-term) employment contracts. At stake from the employer's side was the right to determine the duration of employment contracts; from the union's side, it was their scope to organise union activities without threat of members having their employment terminated by non-renewal of contracts.

From the Ministry's perspective, the Arbitration Council did not need to interpret the law with regard to this issue as it had already been settled by the Ministry via a letter of the Director of its Department of Labour Inspection. After a number of hearings between the parties, the Council issued an award in July 2003 which effectively placed a two-year limit on the consecutive use of fixed duration contracts. This raised serious concerns from employers and the Ministry of Labour. Employers argued that the Council had failed to properly interpret the law, raising allegations that some of the arbitrators involved had conflicts of interest and bias towards the unions. They issued a press release stating their disapproval of the ruling. Ministry officials, some of whom were already unhappy with the Council's autonomy expressed the view that the Council was infringing on the Ministry's authority by issuing an award that was not in accordance with the Ministry's interpretation of the law.

For the Arbitration Council, which was only in its third month of operations, the controversy raised fundamental questions about its power and jurisdiction vis-à-vis the Ministry in interpreting the Law, and raised political risks with the employers and employer associations whose support and ongoing participation in the arbitration process was necessary for its continued functioning. But the Council stood by its decision – and stood by its authority and mandate derived from the Labour Law itself to independently interpret the law in fulfilling its arbitral duties. To date, the Council has consistently ruled the same way on the issue of fixed duration contracts each time it has been raised.

4.5 Revising the blueprint

In the context of the above challenges and to take stock of the first months of the Arbitration Council, the ILO commissioned a review of the Council's work in November 2003. This review identified certain "weaknesses" at the Council ranging from procedural and administrative inefficiencies, to questions of sustainability. The Project would subsequently take action to address many of these through revisions to the original blueprint *Prakas* on the Arbitration Council.

To this end, the Project engaged the tripartite members of its advisory committee in consultations. The revisions to the *Prakas* were significant –including extending the one-year arbitrator term, allowing the arbitrators to pass guidelines by which to govern their

arbitral work, an ongoing role for the ILO in facilitating arbitrator recruitment, opening up the possibility of direct access for parties to the Council and extending the timeframe for the arbitration process— but they were not without contention. The Project would have to continue to utilise the leverage derived from the bilateral trade agreement (significantly amplified by the announcement of a 14 per cent quota increase for 2003) as well as the ILO’s reputation and the Project’s political capital accumulated from the successful establishment and initial operations of the Council.

In April 2004, the Ministry of Labour issued the revised *Prakas 99* on the Arbitration Council.

Changes introduced by the new Prakas 99 on the Arbitration Council

Arbitrator term. A significant revision to the regulation on the Arbitration Council concerned the extension of the one-year term of arbitrator appointments to the Council. It was evident there was a limited pool of individuals in Cambodia who were qualified to serve on the Council. Great effort (and political leverage) had been expended to recruit and facilitate the membership of the initial assembly of arbitrators in order to ensure the Council’s independence, and to provide them with adequate training and mentoring programmes. Replacing members after only one year of service would have squandered those efforts. The new Prakas provided that the term for members of the Council would still be for one year, which was consistent with the Labour Law’s directive for the Ministry to issue an annual decree on the appointment of arbitrators; but their annual reappointment by such regulation would be guaranteed under the revised Prakas (other than in the case of death, resignation, criminal conviction and certain other exceptions). In effect, arbitrators could now serve on the Council so long as they remained in good standing.

Guidelines. Drafting and later revising the comprehensive regulation on the Arbitration Council was a complex process requiring highly technical writing skills, an understanding of procedural and legal rights and restrictions and multitudinous rounds of review. This process also required the participation and approval of the Ministry and other stakeholders, each distrustful of the other and with different levels of competence and interests. Revisiting the official regulation raised the risk of opening a Pandora’s box. The new Prakas on the Arbitration Council therefore incorporated a provision allowing the Council to make its own “guidelines to facilitate the arbitration process.” Such guidelines would allow the arbitrators to determine the rules by which they would govern their arbitral work –without needing to involve the Ministry and other stakeholders. In January 2005 the arbitrators would enact the Council’s first guideline, which called for consistency in their interpretation of law.

ILO facilitation role. To reinforce the independence of the Arbitration Council and its arbitrators, the new Prakas 99 added a third one-year term to the “transitional period” during which the ILO Project would continue to formally facilitate the recruitment and appointment of arbitrators (in case of expansion or replacement).

Access. Prakas 99 opened the possibility of the Arbitration Council receiving cases directly from parties, for example in accordance with grievance procedures of the parties’ collective bargaining agreement.

Timeframe. One of the most acute challenges faced by the Arbitration Council was the pressure imposed by the requirement to complete an arbitral case in a tight 15-day timeframe. This timeline was imposed by the Labour Law itself, however, the new Prakas did provide that days should be counted as working days rather than calendar days, giving the Council up to six additional days (more if a public holiday arose during the period) to issue the arbitral award.

5. Laying the foundation: May 2004 – December 2005

5.1 The need for a strong foundation

During the initial period of the Arbitration Council's operations, daily management and administrative functions were carried out by Community Legal Education Center (CLEC), via a series of ILO contracts. CLEC was one of the only local non-governmental organisations in Cambodia with expertise in labour law. Contracting CLEC offered flexibility in carrying out the logistical and administrative tasks necessary for the Council's operations, particularly when it came to hiring necessary staff, procurement of goods and work, and financial disbursements.

ILO Project terms and funding		
Initial project term:	2 yrs	(Jan. 2002 – Jan. 2004)
First extension:	2 yrs	(Jan. 2004 – Jan. 2006)
Second extension:	2½ yrs	(Jan. 2006 – June 2008)
Third extension:	1 yr	(June 2008 – June 2009)
USDOL:	\$ 537,129	(Initial funds)
	\$ 200,000	(2002)
	\$ 800,000	(2003)
	\$ 150,284	(2005)
	\$ 48,000	(2006)
	\$ 76,878	(2007)
	<u>\$1,812,291</u>	(Subtotal)
USAID:	\$ 200,000	(2003)
	\$ 100,000	(2004)
	<u>\$ 900,000</u>	(2005)
	\$1,200,000	(Subtotal)
NZAID:	\$ 367,000	(2005)
	\$ 750,000	(2006)
	<u>\$ 450,551</u>	(2008)
	\$1,567,551	(Subtotal)
TOTAL:	\$4,579,842	
(Amounts denominated in U.S. dollars.)		

With the Project and its funding expected to run out at the end of December 2005 (the Project's original term of two years had been extended another two years), the question of the sustainability of the Arbitration Council became acute. Although the Project's term and funding would eventually be extended beyond 2005, it was clear that extensions were not unlimited. Using Project funds to run the Council was intended for the short to medium term, to allow the tripartite stakeholders time to develop a more permanent financing mechanism and take responsibility for the Council while preserving its independence. However, the Council's tripartite stakeholders, including the Cambodian government, appeared not able or prepared to make substantial financial commitments to the Council; and donors were not prepared to provide funds to or through the Ministry or to a Council which –although distanced from the Ministry– did not have its own organisational structure.

Having built the castle in the air, now it was time to put the foundation under it. After lengthy deliberations, it was determined a new institution would be created: a non-governmental legal entity dedicated to supporting the Council and its arbitration work –the Arbitration Council Foundation.

5.2 Arbitration Council Foundation

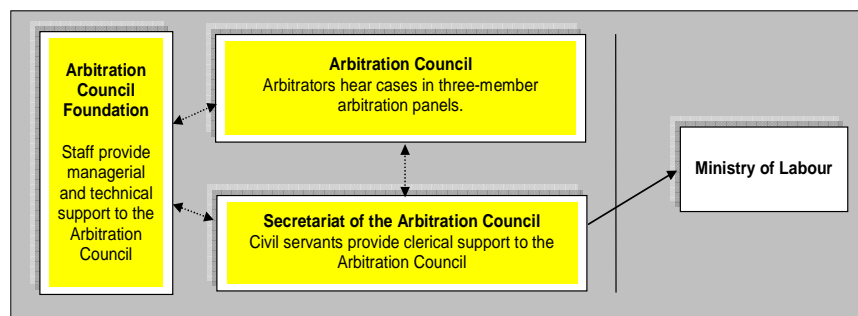
The Arbitration Council Foundation was designed to provide a permanent support structure for the operations of the Arbitration Council and to raise and administer funds on behalf of the Council. Moreover, the Foundation’s mandate focuses on facilitating and supporting the work of the Council; not on taking other projects or tasks which might be unrelated to (or conflict with) the Council.



The governance structure of the Foundation is linked to the Council, with three of the five members of the Foundation’s board of directors directly voted onto the board by the arbitrators. Arbitrators elect their representative board members from each of the three arbitrator lists –the employer, union and Ministry groups– which comprise the membership of the Council. This arbitrator representation gives them a level of ownership over the Foundation. In addition, the Foundation’s board also includes a seat for an ILO representative as a non-voting member.

By the end of December 2005, the Foundation began to take over the daily support functions of the Project (and CLEC) and take on the responsibilities of facilitating the work of the Arbitration Council. And as the Council has developed and evolved over time, so too has the work of its Foundation.

The arbitrator mentoring programme, for example, has evolved as the capacity of arbitrators has increased. Currently, the Arbitration Council’s case work is supported by an in-house team of local legal officers of the Foundation who perform a role similar to court clerks or judge’s associates dedicated to assisting the work of arbitrators through research, writing legal memoranda and providing drafting assistance with arbitral awards. International advisors, although they continue to provide guidance to arbitrators and local staff, no longer sit in on every arbitral hearing or even attend every case meeting. The evolution of the programme from international to local staff has been important in ensuring the development of local capacity and in fostering the sustainability of the Council. To further build capacity, the mentoring programme is supplemented by regular training sessions and exchange visits to or from other dispute resolution and legal institutions and experts in Australia, the U.S., Canada, France, the Philippines and Thailand.



In addition to capacity building of arbitrators, the Foundation has gradually become responsible for all other direct supporting responsibilities of the Arbitration Council previously carried out by the Project, including management, administration, financial control, public relations and fundraising and has grown into an institution with twenty supporting staff. In turn, the Project has been able to focus its efforts on assisting the Foundation with regard to stakeholder relations and fundraising, with funding from the World Bank and AusAid secured to the end of 2012 under the Demand for Good Governance Project.

6. Today and into the future



According to the records of the Secretariat and Foundation, as of 31 December 2010, the Arbitration Council had registered a total of 978 cases (from an average of almost four cases per month in 2003 to an average of 12 cases per month in 2010), and issued 121 return-to-work orders and 658 awards. The Council's reported success rate (measuring disputes actually resolved, see Annex A) remains steady at approximately 70 per cent of all cases up to the close of 2010.

While the Arbitration Council remains the most trusted statutory decision-making body in the country, many of the same issues regarding the independence, credibility and effectiveness of the Arbitration Council that were present throughout the period of its establishment and first years of operations continue to face the Council and its Foundation. In some ways, as an institution established to resolve serious disputes in a dynamic environment, the Arbitration Council will always have to be responsive to the challenges of industrial relations in Cambodia.

6.1 Moving forward: Challenges, future direction

While the Arbitration Council Foundation was established to address the sustainability issues facing the Council, the effects of transfer of responsibilities from an international organisation (the ILO) to a local one (the Foundation) were, to a degree, superficial. While localisation has had significant benefits, including strengthening stakeholders' sense of ownership and regard for the Council as a local/national Cambodian institution, development of national capacity and the provision of ongoing accountable and transparent management support to the Council, certain of the underlying problems remain –only now they are on the plate of the Foundation. Questions about funding, technical capacity and the need to ensure the Council's independence and credibility persist. These will need to be addressed as the Arbitration Council strives to continue as a sustainable institution into the future.

Maintaining an independent Arbitration Council

In a country whose judiciary is marred by political influence, the Arbitration Council's independence has been key to its credibility and success to date. Yet the measures which have served to protect its independence –including housing the Council outside Ministry premises, establishment of the Foundation to manage the Council and (perhaps especially) facilitation by the ILO of the recruitment of arbitrators– while insulating the Council from the Ministry, have also kept the Council from being fully integrated into the formal structure of the Ministry's labour dispute prevention and resolution system.

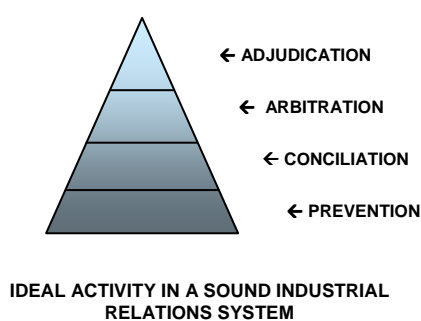
This has the potential to create tensions into the future. After all, the Arbitration Council is a creature of the state, whose origins are based in Cambodian law and whose functioning is interlinked with the larger state structures; yet the Council is situated outside these structures and depends on the support of a non-governmental organisation, the Arbitration Council Foundation. In other words, and as described earlier, there is some incongruity in the Arbitration Council with its supporting Foundation being something like a state institution and something not like a state institution.

Making a choice between either integrating more fully into the wider state system or segregating more completely from the same system is hardly a simple or clean solution. While the Arbitration Council might transfer tasks and responsibilities from the Foundation to the Ministry (or the state might provide the Council with its own institutional structure), attendant to this choice are the risk of political interference and losing independence. The alternative, for example transforming the Council and/or its Foundation into a privatised body that receives cases directly from the parties, is likely to meet resistance from the Ministry and probably other stakeholders and poses broader legal questions in view of the framework of the Labour Law.

Therefore, for the foreseeable future it seems the current mix between state and non-state institutions (or some evolution thereof) will likely best serve the ongoing effectiveness and independence of the Council.

Over-reliance on the Arbitration Council

In a sound industrial relations system, the Arbitration Council would be based within a 'pyramid' structure whereby prevention (including through effective labour inspection and collective bargaining), conciliation, arbitration and adjudication all play their role. Yet currently the Council exists in somewhat of a legal and industrial 'vacuum.'



While there is progress in Cambodia's industrial relations environment since the Arbitration Council's establishment –for example, in respect of improved dialogue between stakeholders, greater factory level capacity to manage disputes, improved technical capacity to use the Council's services and increased awareness of and engagement in collective bargaining– industrial relations is still relatively immature and continues to suffer from some underlying problems. Most unions and employers still lack the capacity, and in some cases, the willingness, to engage in collective bargaining; legal procedures for industrial action are still not followed; and the Ministry's labour inspectorate, tasked with dispute prevention, is still considered to be weak and under-

resourced. All of this creates challenges in prevention and conciliation at the early stages of labour disputes, which in turn can lead to more reliance on arbitration in Cambodia's labour dispute system. As the Cambodian economy grows and there is increasing unionisation in sectors other than the garment industry, the number and complexity of labour disputes is expected to increase, which risks overwhelming the resources of the Arbitration Council and exacerbating the pressure on part-time arbitrators.

The development of a sound, mature dispute prevention and resolution system will require significant investment and resources, and will rely largely on unions and employers taking greater responsibility for improving the industrial relations environment in Cambodia. The Ministry and other state bodies must improve their capacity to build trust between workers and employers, and ensure compliance with the law. In this respect, the ILO continues to play an integral role. At the time of writing it is focusing, in particular, on capacity building of unions and employers in collective bargaining. Though the Arbitration Council itself provides a platform for employers and workers to resolve disputes, and, through its Foundation and in conjunction with the ILO and other organisations, also conducts ongoing training, outreach and awareness raising programmes for stakeholders and members of the public, there are limits to what the Council (or its Foundation) can do beyond its core mandate. In these circumstances the Council's continued success is heavily dependent on the development of a programmatic approach to labour relations which includes the development of unions, employer associations, the Ministry and the courts.

Dependence on international donors

The Arbitration Council has to date been funded almost entirely by international donors and this will continue to be the case through to the end of 2012 under the Demand for Good Governance Project. However, development grants are not provided as a permanent lifeline.

Full state funding may theoretically be the most desirable option if the Arbitration Council is to remain a statutory body which works in the national interest and is able to continue to provide its arbitral services free of charge. However, while it may be possible to seek future support from the government, the reality at present is that such funding is not available; and even if it were, it might leave the Council open to the same corruptive forces that plague many Cambodian institutions. For the same reasons, a tri-partite model of funding, as was contemplated earlier by the Project for the Council, continues to remain elusive.

An alternative would be to seek funds from only employers and unions (possibly supplemented by donations from, for example, international union organisations, groups supportive of workers' rights, and international buyers). However, it is doubtful that such funds will be sufficient to cover the costs of the Council's operations in the near future. In this context it should be noted also that a user-pays model, in which parties pay for the direct cost of the arbitration, is not feasible as it is a requirement under the Labour Law that arbitration be free of charge (and therefore accessible to all).

Considering these constraints, it is expected that the Arbitration Council will be reliant in large part on funding from external donors for the foreseeable future. This will leave the Council, or rather its Foundation, in a state of regularly seeking funds and applying to obtain grants. The continued reliance on donor funds, however, may well be justified as the Council is the only body supplying Cambodia's demand for quick, fair and competent arbitration of labour disputes. A thriving private sector and healthy industrial relations require supporting institutions like the Arbitration Council.

6.2 Multidimensional success

While the Council was originally conceived of and established as a labour dispute resolution body, in performing its services, the Council has developed into a multi-

dimensional organisation: it is a key Cambodian institution promoting social dialogue, improved industrial relations, peaceful dispute settlement, good governance and the rule of law.

In this respect, the Arbitration Council is praised for contributing to broader legal, judicial and development reform in Cambodia. The creation of a new profession of arbitrators dedicated to justice and public service in Cambodia stands as a model for the wider judicial and legal community; and as the only Cambodian legal institution to regularly publish its written, reasoned decisions, the Arbitration Council also acts as an example for students, legal professionals and other members of the public who examine the Council's body of jurisprudence. As stated in the USAID 2009 report on labour and industrial activities in Cambodia, “[the Arbitration Council (AC)] has had an impact that transcends labor issues. The AC serves as a model of good governance and probity for the entire Cambodian judicial system. It alone has produced a consistent record of efficient decision making based on the evidence presented and applicable provisions of the labor law without regard to personal interest or the potential for unofficial payment which might be offered by a party to a dispute...While the AC’s ultimate influence on the further development of the Cambodian judiciary remains to be determined, there is no question that it has created a unique Cambodian standard that government officials can reference and learn from in the wider judicial reform process in the country.”

Labour Court

The Arbitration Council continues to operate in the absence of a properly functioning court. The establishment of a labour court, deemed unfeasible at commencement of the ILO Project, has been the subject of recurring discussions, with the government publicly in support of such a court. While its establishment appears unlikely in the short term, earlier concerns that a labour court may be vulnerable to corruption, slow and inefficient, remain. Given that decisions of the Arbitration Council may be open to review by courts, and parties may be more likely to go to a newly established labour court, this has the potential to undermine the work of the Council and its body of jurisprudence. The preferred option is of course a labour court which is the exception to the rest of the judiciary: a transparent, rational, non-corrupt court which respects the rule of law and engenders the respect of citizens. For the foreseeable future, that option is unlikely. If the establishment of a labour court does move forward, the ILO will have an important role to play by facilitating discussions and providing input into the regulations for this court, to ensure they are consistent with international labour standards and do not undermine the achievements of the Arbitration Council.

7. Lessons learned

While there are ongoing challenges and broader questions of sustainability that need to be addressed, the Arbitration Council has achieved remarkable progress since it first opened its doors in May 2003. The reason the Council works the way it does can be explained only by reference to a myriad of factors and the aim of this paper is not to provide a detailed manual for institution-building. However, there may be valuable lessons for those attempting similar reform in other countries. This section summarises the factors which have played a part in the Arbitration Council's success, with the hope that they are of use for future practitioners.

Lesson 1. Country context

Firstly, it was important to ensure a realistic setting of development objectives, consistent with the political and industrial relations environment in Cambodia. In this respect, the conclusion that an independent labour court was unrealistic in a country in which judicial systems are subject to interference and corruption and thus to instead focus on building an effective Arbitration Council was critical. The utilisation of local expertise ensured that support for the Council was based firmly on an awareness of the political environment in

Cambodia and an understanding of its constraints. The lesson is to design and frame assistance in institution-building with the country context as the starting point, which requires a clear understanding of what is and is not achievable within the country, and to include those who have local expertise in the implementation.

Lesson 2. Creation of political space

Secondly, the U.S.-Cambodia bilateral trade agreement –with its linking of increased quota privileges, worth many millions of dollars, to improved labour standards– created the necessary political space for the Arbitration Council’s establishment, the significance of which cannot be underestimated. Through its framework of incentives the trade agreement created an immediate commercial inducement for improved implementation of the Labour Law and the necessary leverage to negotiate an effective legal regulation (the enabling *Prakas*), establishing the Council. That the establishment of the Council was backed by a UN agency like the ILO strengthened this leverage, expanded the political space and meant that it was possible to avoid compromising on key issues such as the recruitment of arbitrators. This proved essential in creating a truly independent and non-corrupt institution. The lesson is that in particularly challenging and complex environments it is important to recognise that what can be achieved in institution-building will be directly proportional to the political space that can be created.

Lesson 3. Flexible management

Thirdly, the development of the Arbitration Council was necessarily a creative, step-by-step process given the complexities of the operating environment in Cambodia at the time. Rather than mapping out the process for the Council’s establishment according to a fixed template, implementation occurred in a responsive and adaptive fashion with ongoing revisions to plans and objectives. For example, the original development objectives were reconsidered and it was decided not to pursue establishment of a labour court; the regulatory *Prakas* on the Arbitration Council was revised after only the first year of the Council’s operations; and the Arbitration Council Foundation was created to address questions of financial and institutional sustainability. The use of a contracting arrangement with a local non-governmental organisation also helped by providing flexibility in human resources, budgeting and procurement. The lesson is that, in fluid operating environments, it is important that assistance in institution-building allows for flexible management which can quickly respond to unforeseen contextual changes and complexities in implementation.

Lesson 4. Managed stakeholder engagement

Fourthly, a focus on stakeholder engagement ensured a good understanding of the expectations and grievances and contributed to a sense of ownership in the Arbitration Council among employer groups and unions. However, given the level of mutual distrust, power imbalances, divergent interests and varying capacity levels among stakeholder groups in Cambodia, it was essential that there was careful management of the consultation process. Stakeholder consultation was used to test and legitimise ideas, balance out and fend off rash ideas and move the process forward. Failure to do so would have stalled implementation or risked domination by more powerful groups. In this respect, it was also critical that the ILO was proactive in guiding the process (as opposed to merely following the lead of the Ministry), ensuring no group could derail, unduly influence or dominate the Council in its establishment phase. The lesson is that where there are high levels of distrust and disunity among stakeholders, stakeholder engagement will only be effective if it is carefully managed.

Lesson 5. Sustained training and mentoring

Fifthly, given the inadequacies of legal education in Cambodia, it was crucial that significant resources were devoted to a comprehensive and long term training programme for arbitrators and others involved in the arbitration process. Intensive mentoring by international labour law specialists helped to develop the skill level of the arbitrators and assisted in ensuring the early arbitration decisions were well reasoned and appropriately decided. It was also recognised that the development of legal skills is an ongoing process which takes considerable time: the training and mentoring programme, while it has evolved, continues more than six years after the Council's establishment. The lesson is that a significant and ongoing investment must be made in training the people who form the human capital of the institution.

Lesson 6. Long-term commitment

Finally, it was essential that the ILO and other development partners were prepared to provide ongoing and continued support to the Arbitration Council. Initially funded for two years, it was soon realised that the lifespan for support was insufficient given the broad scope and depth the engagement and the many obstacles and challenges present in Cambodia's industrial relations environment. The ILO has committed more than seven years to the Project and the Arbitration Council, with multiple donor grants during that period; and, more recently, the World Bank has extended a four-year financial commitment to the Council and its Foundation. The final lesson for practitioners is that establishing a new institution in a developing country requires a sustained and long-term commitment from donors and project agencies; support is vital not only during the establishment phase of an institution, but is also likely to be required for a sustained period *post*-establishment, including for operational costs, to give the institution the best chance to mature and succeed.

8. Epilogue

In 2003, Cambodia's garment industry was on the ascent, and quota privileges derived from the U.S.-Cambodia bilateral trade agreement would propel the export industry to new heights, and the country's economy to several years of uninterrupted growth. Today, eight years later, the global financial crisis has had a deep impact on Cambodia's garment industry, with a sharp reduction in exports mirrored by factory closures. This raises a new challenge for the Arbitration Council: in a climate in which Cambodia's once thriving industries are struggling to survive and workers have been laid off by the thousands, how will this affect the Arbitration Council's role?

Over 90 per cent of the Arbitration Council's cases have originated from the garment sector where labour unions have historically been most active. To the extent the garment sector's ability to survive the present crisis is uncertain, there are serious challenges for the Council's future. If the garment industry declines rapidly and the unions are unable to organise in other sectors, the Council's relevance may be reduced. Furthermore, the U.S.-Cambodia bilateral trade agreement expired according to its terms in 2005 and the ILO-Labour Dispute Resolution Project relinquished its managerial role with respect to the Council as planned. Thus the two primary levers so instrumental to ensuring the Arbitration Council's independence, credibility and effectiveness are no longer on hand as they were at the establishment of the Council. Added to this, are the multitude of institutional, financial and overall sustainability challenges facing the Council as described earlier.

Nevertheless, there are reasons for optimism. Although the Arbitration Council can be seen as standing apart from the politicised and dysfunctional industrial relations

environment in Cambodia, it has never stood alone. From the direct establishment and operational support of the ILO, CLEC, and the Arbitration Council's Secretariat and Foundation, to the participation of the tripartite stakeholders themselves (including, indirectly, international buyers and international union organisations), to the financial or technical support of donors, local and international partners, and of course to the commitment and performance of the arbitrators themselves –the Arbitration Council's success has always been based on the community of participants and supporters who are willing (to one degree or another) to engage with the Council. From this perspective, the Arbitration Council is not merely a collection of individuals who are called on from time to time to arbitrate a dispute. Rather, the Arbitration Council is an institution with a purpose and identity that is intertwined in a diverse industrial relations community of other institutions and individuals, of relationships, customs, practices and ideas which themselves are ever-changing, sometimes conflicting and always raising new demands and expectations for the Arbitration Council.

In this sense, the real question is not whether the Arbitration Council will rise or fall to the economic challenges in Cambodia. The real question is whether the industrial relations community, especially employers, workers and government, will rise to these challenges and others it must inevitably face.

This question was partially answered in September 2010, when unions and employers reached a landmark agreement on improving industrial relations in the garment industry. The Garment Manufacturers Association in Cambodia (GMAC) and six of the largest union confederations and federations signed a Memorandum of Understanding (MoU), effective as of 1 January 2011, that emphasises the importance of collective bargaining and commits both parties to a number of principles and agreements for a more peaceful and productive industrial relations environment. Importantly for the Arbitration Council and as evidence of stakeholders' confidence in the Council's integrity, the parties to the MoU agreed to binding arbitration for collective rights disputes. The result has been a marked upsurge in the rate of binding arbitral awards issued by the Council: whereas approximately 8 per cent of all awards issued by the Council between its establishment in 2003 and the end of 2010 were binding based on voluntary agreement of the parties, in the first quarter of 2011 that figure rose to 33 per cent. Furthermore, the rate at which parties object to awards (thereby rendering decisions non-binding) has decreased substantially: for the period up to the end of 2010, parties had filed objections to approximately 66 per cent of all awards; but for the 1st quarter of 2011, that rate dropped to 46 per cent. Put another way, for the 1st quarter of 2011, more than half (approximately 54 per cent) of the awards issued by the Arbitration Council were binding either because of written agreement by the parties or because parties did not file any objections.

According to GMAC, nineteen strikes took place in the first 6 months of 2011, a rate that is less than half the historic average.

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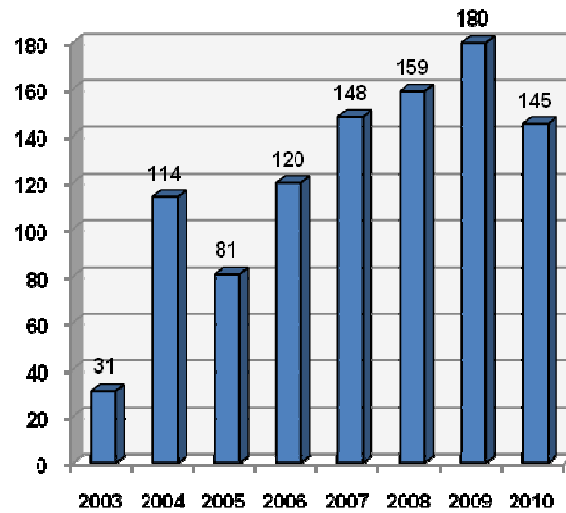
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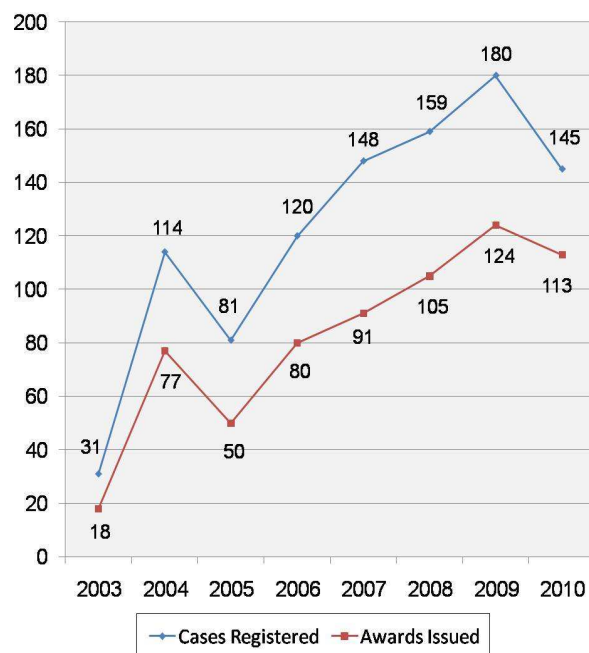
Annex A. Arbitration Council data, 2003-2010

Total Number of Cases Registered

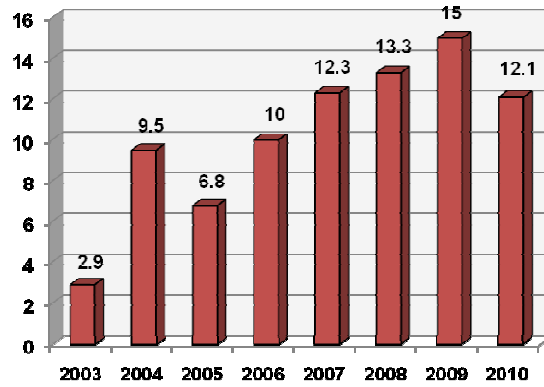


For year 2010 alone, the Arbitration Council registered 145 cases involving 26 different union federations, as well as 98 different employers who employed in the aggregate approximately 122,428 workers.

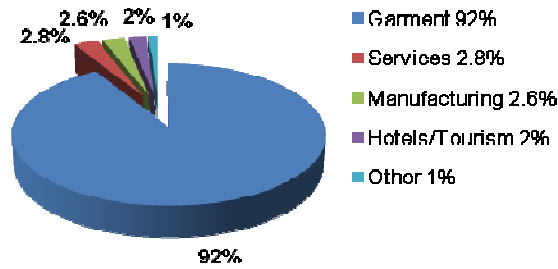
Comparison of Total Cases Registered vs Total Awards Issued



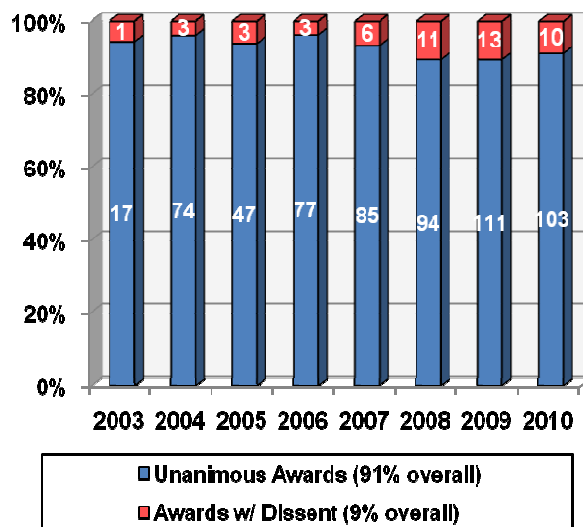
Average Number of Cases per Month



**Cases by Industrial Sector
2003 - 2010**

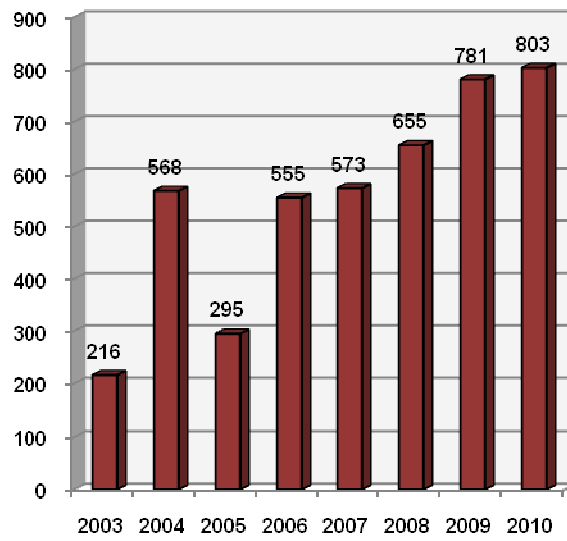


**Comparison of Awards Issued by Consensus
vs Awards with Dissent**

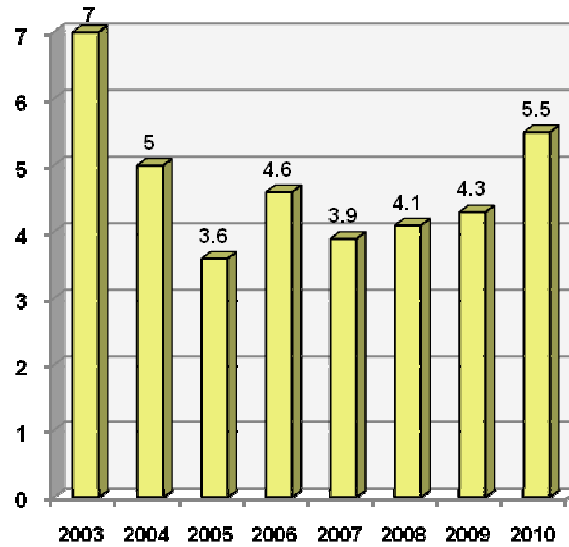


Sources: Secretariat of the Arbitration Council and Arbitration Council Foundation.
Data for year 2003 compiled as of 01 May, date of Arbitration Council opening.

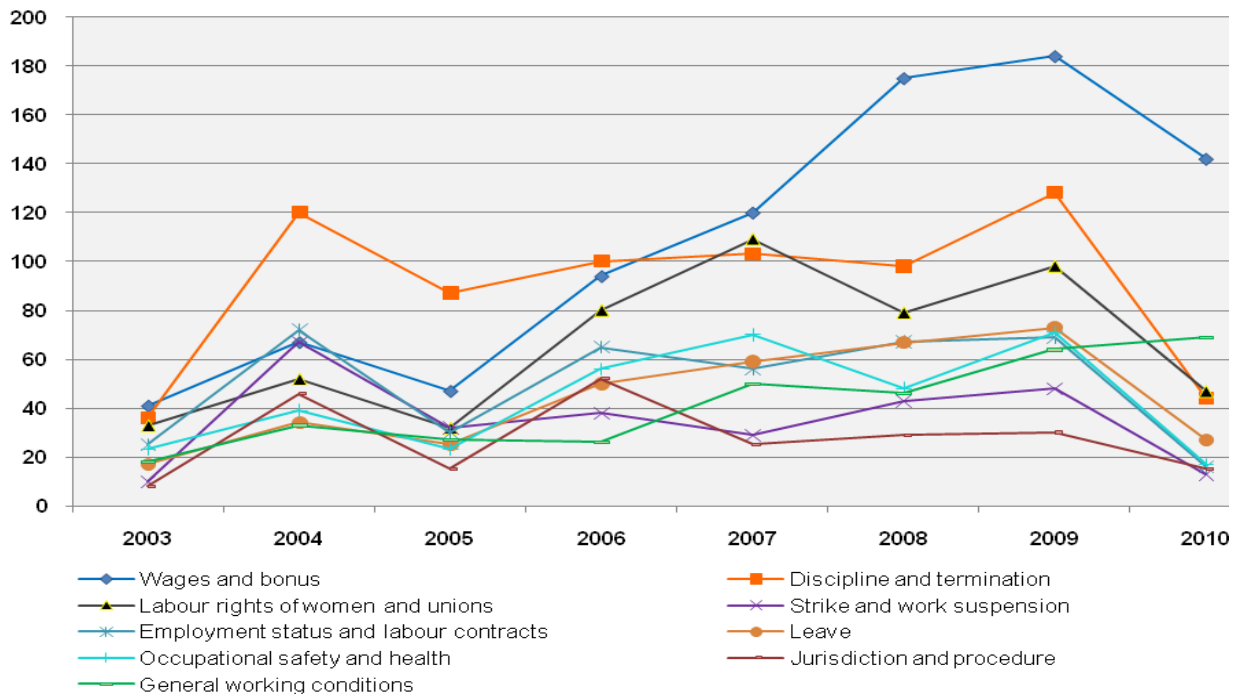
Total Number of Legal Issues



Average Number of Legal Issues per Case



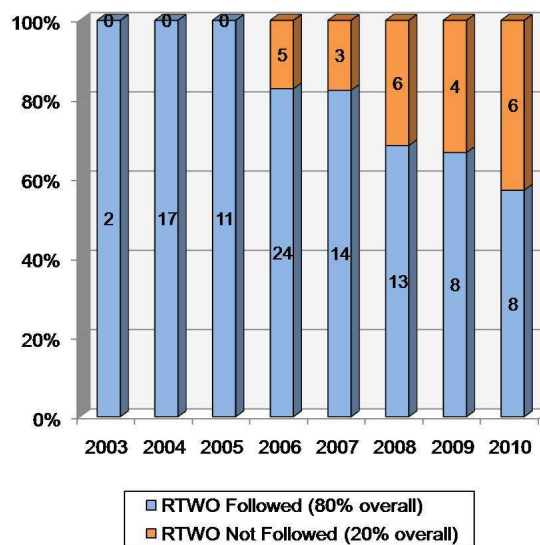
Legal Issues - Total by Categories



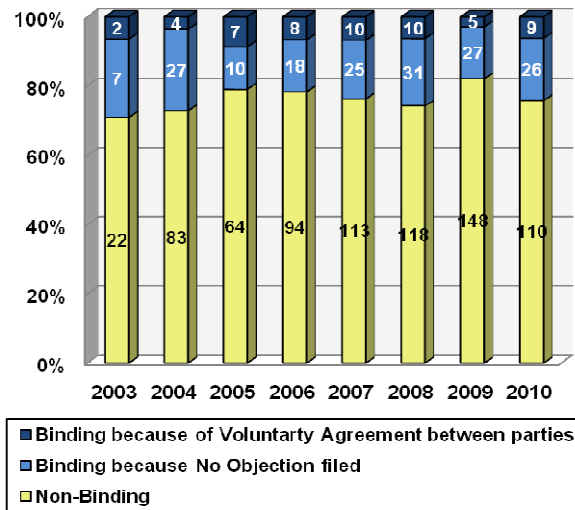
Each case forwarded to the Arbitration Council can have multiple demands and each demand can include multiple legal issues. For example, one case may include a demand for reinstatement of terminated workers and a separate demand for increased wages; in turn the demand for reinstatement may include multiple legal issues such as misconduct or union discrimination, contract renewal issues or other issues related to reinstatement. Legal issues are identified by ACF for legal research according to the categories indicated in the figure *Legal Issues—Total by Categories*.

Sources: Secretariat of the Arbitration Council and Arbitration Council Foundation.
Data for year 2003 compiled as of 01 May, date of Arbitration Council opening.

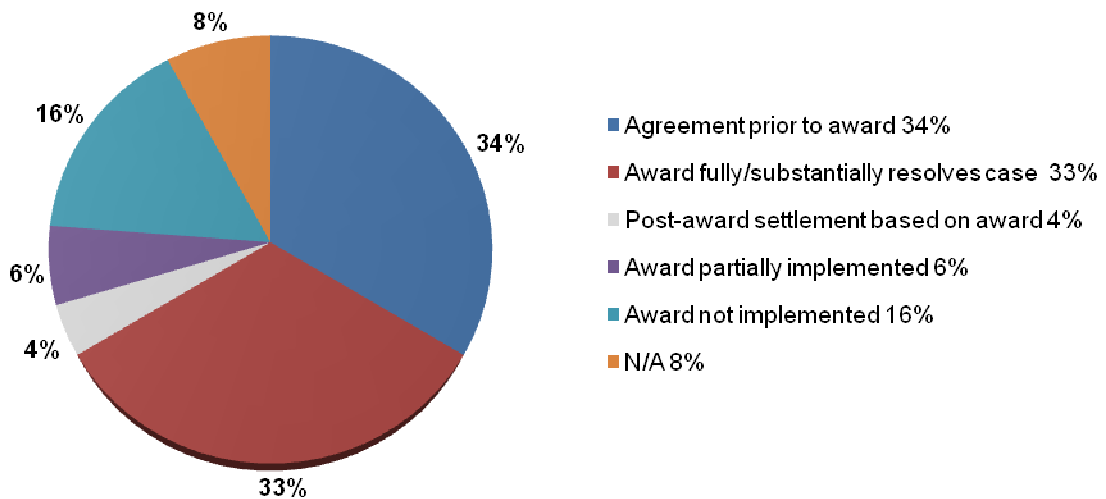
Return-To-Work Orders



Comparison of Binding vs Non-Binding Awards



Overall Success Rate as of Close of 2010: 71%



A successful outcome is one where the Arbitration Council has either:

- facilitated an agreement between the parties to settle the dispute (34%);
- issued an award which (even if it was opposed) has been fully or substantially implemented to resolve the dispute (33%); or
- issued an award which (although it was opposed) has formed the basis for a post-award settlement between the parties and which has resolved the dispute (4%).

A negative outcome is one where the arbitral award has either not been implemented (16%) or only partially (6%). (Implementation is considered to be partial where the arbitral award comprises decisions on multiple issues, and a party has implemented only one or several of these decisions.)

The category 'Not Applicable' (8%) includes cases where the Arbitration Council rejected a claim on jurisdictional grounds (e.g., the claim was improperly brought before the Council; or the complainant lacked standing to bring the claim), procedural grounds (e.g., the complainant failed to take part in the proceedings), or where follow-up was not possible (parties could not be contacted due to bankruptcy or other reasons).

Sources: Secretariat of the Arbitration Council and Arbitration Council Foundation.
Data for year 2003 compiled as of 01 May, date of Arbitration Council opening.

Annex B. Chapters XII-XIII of the Labour Law

CHAPTER XII

SETTLEMENT OF LABOUR DISPUTES

SECTION I

INDIVIDUAL DISPUTES, PRELIMINARY CONCILIATION

OF INDIVIDUAL DISPUTES

Article 300 An individual dispute is one that arises between the employer and one or more workers or apprentices individually, and relates to the interpretation or enforcement of the terms of a labour contract or apprenticeship contract, or the provisions of a collective agreement as well as regulations or laws in effect.

Prior to any judicial action, an individual dispute can be referred for a preliminary conciliation, at the initiative of one of the parties, to the Labour Inspector of his province or municipality.

Article 301 On receipt of the complaint, the Labour Inspector shall inquire of both parties to elicit the subject of the dispute and then shall attempt to conciliate the parties on the basis of relevant laws, regulations, collective agreements, or the individual labour contract.

To this effect, the Labour Inspector shall organise a conciliation meeting that is to take place within three weeks at the latest upon receipt of the complaint.

The parties can be assisted or represented at the meeting.

The results of the conciliation shall be contained in an official report written by the Labour Inspector, stating whether there was agreement or non-conciliation. The report shall be signed by the Labour Inspector and by the parties, who receive a certified copy.

An agreement made before the Labour Inspector is enforceable by law.

In case of non-conciliation, the interested party can file a complaint in a court of competent jurisdiction within two months, otherwise the litigation will be lapsed.

SECTION II

COLLECTIVE LABOUR DISPUTES

A. CONCILIATION

Article 302 A collective labour dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognised rights of professional organisations, the recognition of professional organisations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardise the effective operation of the enterprise or social peace.

Article 303 If there is no planned settlement procedure in a collective agreement, the parties shall communicate the collective labour dispute to the Labour Inspector of their province or municipality. However, the Labour Inspector can take legal conciliation proceedings

upon learning of the collective labour dispute even though he has not been officially notified.

Article 304 The Minister in charge of Labour shall designate a conciliator within forty-eight hours from the moment he is apprised or himself learns of the dispute.

Article 305 Conciliation shall be carried out within fifteen days from the designation by the Minister in charge of Labour. It can be repeated only by joint request of the parties to the dispute.

Article 306 During the period of conciliation, the parties to the dispute must abstain from taking any measure of conflict. They must attend all meetings to which the conciliator calls them. Unjustified absence from any such meeting is punishable by a fine set in the rules of Chapter XVI.

Article 307 A conciliatory agreement, signed by the parties and visaed by the conciliator, has the same force and effect of a collective agreement between the parties and the persons they represent. However, when the party representing workers is not a trade union, the agreement is neither binding on such union nor on the workers it represents.

Article 308 In the absence of an agreement, the conciliator shall record and indicate the key points where the conciliation failed and shall prepare a report on the dispute. The conciliator shall send such record and report to the Minister in charge of Labour within forty-eight hours at the latest after the conclusion of conciliation.

B. ARBITRATION

Article 309 If conciliation fails, the labour dispute shall be referred to settle:

- a) by any arbitration procedure set out in the collective agreement, if there is such a procedure; or
- b) by any other procedure agreed on by all the parties to the dispute; or
- c) by the arbitration procedure provided for in this Section.

Article 310 In a case covered by paragraph (c) of Article 309 above, the Minister in charge of Labour shall refer the case to the Council of Arbitration within three days following the receipt of the report from the conciliator as specified in Article 308 above.

The Council of Arbitration must meet within three days following the receipt of the case.

Article 311 Members of the Council of Arbitration shall be chosen from among magistrates, members of the Labour Advisory Committee, and generally from among prominent figures known for their moral qualities and their competence in economic and social matters. These persons shall be included on a list prepared each year by a Prakas (ministerial order) of the Ministry in charge of Labour.

Article 312 The Council of Arbitration has no duty to examine issues other than those specified in the non-conciliation report or matters, which arise from events subsequent to the report, that are the direct consequence of the current dispute.

The Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes.

The Council of Arbitration has a broad power to investigate the economic situation of the enterprises and the social situation of the workers involved in the dispute.

The Council has the power to make all inquiries into the enterprises or the professional organisations, as well as the power to require the parties to present any document or economic, accounting, statistical, financial, or administrative information that would be useful in accomplishing its mission. The Council may also solicit the assistance of experts.

Members of the Council of Arbitration must keep the professional confidentiality regarding the information and documents provided to them for examination, and of any facts that come to their attention while carrying out their mission.

All sessions of the Council of Arbitration shall be held behind closed doors.

Article 313 Within fifteen days starting from the date of its receipt of the case, the Council of Arbitration shall communicate its decision to the Minister in charge of Labour. The Minister shall immediately take action to notify the parties. The latter have the right to oppose this arbitral decision by informing the Minister by registered mail or by any other reliable method within eight calendar days from the date of receiving the notification.

Article 314 The final arbitral decision to which no objection was lodged by either party shall be implemented immediately.

The arbitral decision which has become enforceable shall be filed and registered the same way that a collective agreement is.

Article 315 The reports on conciliation agreements and arbitral decisions, which have not been opposed, shall be posted in the workplace of the enterprise involved in the dispute and in the office of the relevant provincial and municipal Labour Inspectorate.

Article 316 The procedure for conciliation and arbitration shall be carried out free of charge.

Article 317 The Ministry in charge of Labour shall issue a Prakas (ministerial order) to determine the mode of enforcement of the present section.

CHAPTER XIII

STRIKES - LOCKOUTS

SECTION I

GENERAL PROVISIONS

Article 318 A strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work.

A lockout is a total or partial closing of an enterprise or establishment by the employer during a labour dispute.

Article 319 The right to strike and to a lockout are guaranteed. It can be exercised by either of the parties to a dispute in the event the arbitral decision is rejected.

Article 320 The right to strike can also be exercised when the Council of Arbitration has not rendered or informed of its arbitration decision within the time periods prescribed in Chapter XII.

It can also be exercised when the union representing the workers deems that it has to exert this right to enforce compliance with a collective agreement or with the law.

It can also be exercised, in a general manner, to defend the economic and socio-occupational interests of workers.

The right to strike can be exercised only when all peaceful methods for settling the dispute with the employer have already been tried out.

Article 321 The right to strike cannot be exercised when the collective dispute results from the interpretation of a juridical rule derived from law, or the collective agreement, or the rule relating to an arbitral decision accepted by the concerned parties.

It also cannot be exercised for the purpose of revising a collective agreement or reversing an arbitral decision accepted by the parties, when the agreement or the decision has not yet expired.

Article 322 The right to a lockout shall be exercised under the same provisions as the right to strike.

SECTION II

PROCEDURES PRIOR TO THE STRIKE

Article 323 A strike shall be declared according to the procedures set out in the union's statutes, which must state that the decision to strike is adopted by secret ballot.

A. PRIOR NOTICE

Article 324 A strike must be preceded by prior notice of at least seven working days and be filed with the enterprise or establishment. If the strike affects an industry or a sector of activity, the prior notice must be filed with the corresponding employer's association, if any. The prior notice must precisely specify the demands which constitute the reasons for the strike.

The prior notice must also be sent to the Ministry in charge of Labour.

Article 325 During the period of prior notice, the Minister in charge of Labour shall actively seek all means to conciliate between the parties to dispute, including soliciting the collaboration of other relevant ministries. The parties are required to be present at the summons of the Minister in charge of Labour.

B. MINIMUM SERVICE

Article 326 During the period of prior notice, the parties to the dispute are required to attend meetings in order to arrange the minimum service in the enterprise where the strike is taking place so that protection of the facilities and equipment of the enterprise will be assured. If there is no agreement between the parties, the Ministry in charge of Labour shall determine the minimum services in question.

A worker who is required to provide minimum service covered by this Article and who does not appear for such work is considered guilty of serious misconduct.

C. ESSENTIAL SERVICES

Article 327 If the strike affects an essential service, namely an interruption of such a service would endanger or be harmful to the life, safety, or health of all or part of the population, the prior notice mentioned in Article 324 shall be extended to a minimum of fifteen working days.

Article 328 During the period of such prior notice, the Minister in charge of Labour shall determine the minimum essential service to be maintained so as not to endanger the life, health or safety of persons affected by the strike. The workers' union that has declared the strike shall be asked to give its views as to which services to be maintained.

A worker who is required to provide the minimum essential service covered by this Article and who does not appear for such work is considered guilty of serious misconduct.

Article 329 The list of enterprises that provide essential services in the sense of Article 328 shall be established by a Prakas (ministerial order) of the Ministry in charge of Labour. All disputes concerning the determination of what is an essential service shall be settled by the Labour Court, or in the absence of a Labour Court, by a general court.

SECTION III

EFFECTS OF A STRIKE

Article 330 A strike must be peaceful. Committing violent acts during a strike is considered to be serious misconduct that could be punished, including work suspension or disciplinary layoff.

Article 331 Freedom of work for non-strikers shall be protected against all form of coercion or threat.

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- Article 332** A strike suspends the labour contract. During a strike, neither allowances nor salary are paid.
- The worker shall be reinstated in his job at the end of the strike.
- The mandate of workers' representatives shall not be suspended during the strike so that they can maintain contact with representatives of the employer.
- Article 333** The employer is prohibited from imposing any sanction on a worker because of his participation in a strike. Such sanction shall be nullified and the employer shall be punishable by a fine in the amount set in Article 369 of Chapter XVI.
- Article 334** During a strike, the employer is prohibited from recruiting new workers for a replacement for the strikers except to maintain minimum service provided for in Articles 326 and 328 if the workers who are required to provide such service do not appear for work. Any violation of this rule obligates the employer to pay the salaries of the striking workers for the duration of the strike.
- Article 335** A lockout undertaken in violation of these provisions obligates the employer to pay the workers for each day of work lost thereby.

SECTION IV

ILLEGAL STRIKES

- Article 336** Illegal strikes are those that do not comply with the procedures set out in this Chapter.
- Non-peaceful strikes are also illegal.
- Article 337** The Labour Court or, in the absence of the Labour Court, the general court, has sole jurisdiction to determine the legality or illegality of a strike.
- If the strike is declared illegal, the strikers must return to work within forty-eight hours from the time when the judgment is issued. A worker who, without valid reason, fails to return to work by the end of this period is considered guilty of serious misconduct.

Annex C. Prakas on the Arbitration Council

Prakas No. 99 MOSALVY

Phnom Penh, 21 April 2004

CHAPTER 1

COMPOSITION OF THE ARBITRATION COUNCIL

Clause 1 This Prakas establishes an Arbitration Council composed of at least 15 members pursuant to Article 317 of the Labour Law.

The Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation shall issue a Prakas appointing members of the Arbitration Council every year. The Prakas appointing Arbitration Council members each year shall be issued at least 14 days prior to the expiration of the term.

Clause 2 The term for members of the Arbitration Council shall be one year. Each member of the Arbitration Council shall be reappointed by Prakas each year unless:

- A. The member has died, resigned, or has otherwise become incapacitated from carrying out his or her duties as an arbitrator; or
- B. The member has been convicted of a criminal offence or has committed an act of misconduct with the effect that the member is no longer eligible for membership of the Arbitration Council under Clause 6 of this Prakas; or
- C. The member has assumed an office referred to in Clause 7 of this Prakas.

In case a member of the Arbitration Council is not reappointed for a reason set out in paragraphs A, B and C above then a new member shall be nominated by the same body as nominated the outgoing member, and that person shall be appointed in accordance with the procedure set out in this Prakas.

If at the end of a term a Prakas is not issued in accordance with Clause 1 above, each member of the Arbitration Council shall be deemed to have been reappointed for a further term of one year.

Clause 3 The membership of the Arbitration Council shall have the following components:

- A. One third nominated by the Ministry of Social Affairs Labour and Vocational Training and Youth Rehabilitation;
- B. One third nominated by employer associations that are full members of the Labour Advisory Committee;
- C. One third nominated by labour unions (federations) that are full members of the Labour Advisory Committee.

The members of the Arbitration Council shall be appointed in accordance with the above nominations.

Clause 4 If the representatives of employer associations on the Labour Advisory Committee cannot reach consensus as to their nominations for membership of the Arbitration Council, each of the employer associations, which is fully represented in the Labour Advisory Committee, shall be entitled to submit an equal number of nominations.

Clause 5 If the representatives of labour unions (federations) on the Labour Advisory Committee cannot reach consensus as to their nominations for membership of the Arbitration Council, each of the labour unions (federations), which is fully represented in the Labour Advisory Committee, shall be entitled to submit an equal number of nominations.

Clause 6 The members of the Arbitration Council shall meet the following requirements:

- A. All members shall:
 - be at least 25 years old;
 - be known for their moral qualities;
 - possess relevant work experience of at least three years.
- B. Members, appointed under Clause 3 A, above shall:
 - hold a Bachelor of Law degree or other equivalent legal qualifications;
 - have a sound knowledge of the Labour Law and its implementing regulations.

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- C. Members, appointed under Clause 3 B and C, above shall have:
- a sound knowledge of the Labour Law and its implementing regulations;
 - at least one year's experience in labour issues or conflict resolution.
- Clause 7** Persons that cannot be appointed as a member of the Arbitration Council are:
- A. civil servants of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation;
 - B. an owner or manager of an enterprise which is member of an employer organisation, or an office holder of an employer organisation, or a person who used to hold such office during the past period of 12 months; or
 - C. a labour union member, or an office holder of a labour union, or a person who used to hold such office during the past period of 12 months.
- Clause 8** A member of the Arbitration Council shall be appointed without being discriminated against because of his nationality or other reasons as provided in Clause 31, Paragraph two of the Constitution of the Kingdom of Cambodia.
- Clause 9** Notwithstanding the lapse of a member's term, that member shall continue to sit on any arbitration panel in which he or she has been chosen prior to the elapse of his or her term until an arbitral award is made or proceedings are discontinued.
- Clause 10** A member of the Arbitration Council who during his or her term dies, or becomes incapacitated or resigns his or her membership of the Arbitration Council; or who has been convicted of a criminal offence or has committed an act of misconduct with the effect that the member is no longer eligible for membership of the Arbitration Council under Clause 6 of this Prakas; or who has assumed an office referred to in Clause 7 of this Prakas, shall be replaced for the remaining period of that term. The new member shall be nominated by the same body as nominated the outgoing member, and be appointed in accordance with the procedure set out in this Prakas.
- Clause 11** The members of the Arbitration Council shall function in complete independence and within the scope of their authority as established in Article 312 of the Labour Law. No one shall give any instructions to the Arbitration Council or its members with regard to the settlement of disputes. Members of the Arbitration Council shall be impartial.

CHAPTER TWO

Composition of Arbitration Panel

- Clause 12** Any collective dispute submitted to the Arbitration Council under Article 309 of the Labour Law shall be settled by an arbitration panel specially constituted for the consideration of that dispute. An award made by an arbitration panel shall be considered as an award of the Arbitration Council. An arbitration panel shall be composed of three members of the Arbitration Council, as follows:
- A. One member from the category indicated in Clause 3 B, above, and chosen by the enterprise which is party to the dispute;
 - B. One member from the category indicated in Clause 3 C, above, and chosen by the union or group of employees which is party to the dispute;
 - C. One member, who shall chair the arbitration panel and chosen from the category indicated in Clause 3 A, above by agreement between the two members above. In the case that the two members cannot reach an agreement as to the third member of the panel, this member shall be chosen by lot from the category indicated in Clause 3 A.
- Clause 13** In the case that two or more enterprises are party to the dispute and they fail to reach agreement on the selection of a member, this member shall be chosen by lot. In the same way, in the case that two or more unions and/or groups of employees are party to the dispute and they fail to reach agreement on the selection of a member, this member shall be chosen by lot.
- Clause 14** In the case that an employee is required to attend a hearing of an arbitration panel during working hours, his or her employer shall allow him or her to do so without any negative effect on his or her existing work entitlements.
- Clause 15** A member of the arbitration panel shall recuse himself or herself from membership of the arbitration panel on which he or she has been chosen, if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, including close personal or

professional relationship with other members of an arbitration panel or with any of the parties, or direct personal or professional interest in the outcome of the case.

- Clause 16** The fact that a member of an arbitration panel does not recuse himself or herself if required under provision of Clause 15 above, may be used as a reason for the implementation of provisions set out in Clause 47 of this Prakas relating to the non-recognition of an award.
- Clause 17** If a member of an arbitration panel becomes de jure or de facto unable to perform his or her functions, a substitute arbitrator shall be chosen in accordance with Clauses 12 and 13 above.

CHAPTER THREE

Arbitral Proceedings

- Clause 18** The arbitration panel shall invite the parties to the dispute to make an oral presentation of their arguments before the arbitration panel and to submit documentation and any other useful information.
- Clause 19** A party may appear before the arbitration panel in person, be represented by a lawyer who is a member of the Bar Association of the Kingdom of Cambodia, or be represented by any other person expressly authorised in writing by that party.
- Clause 20** During the arbitration process, the parties to the dispute must abstain from any strikes or lockouts (as defined in Article 318 of the Labour Law), or any other action likely to aggravate the situation. The parties must attend all meetings to which the arbitration panel calls them.
- Clause 21** In the case that one of the parties, although duly invited, fails to appear before the arbitration panel without showing good cause, the arbitration panel may proceed in the absence of that party or may terminate the arbitral proceedings by means of an award.
- Clause 22** The office of the Arbitration Council shall be in Phnom Penh. However, the arbitration panel may meet at any other place in Cambodia it considers appropriate for consultation among its members, for hearing parties, witnesses or experts, for inspection of goods, other property or documents or for paying visits on site. In such cases, the arbitration panel shall inform the parties of the alternative location for its activities.
- Clause 23** The language to be used during the arbitral proceedings shall be Khmer. Any party who wishes to address the arbitration panel in a language other than Khmer, or who calls a witness who does not speak Khmer, must bring a professional interpreter to the arbitration proceedings.
- Clause 24** The arbitration panel has the power to obtain information on the economic situation of the enterprises and the social situation of the employees involved in the dispute. It may conduct any inquiry with respect to enterprises or professional organisations and require the parties to present any document or economic, accounting, statistical, financial or administrative information that might be useful for the accomplishment of its mission. The arbitration panel may also solicit the assistance of experts.
- Clause 25** The arbitration panel shall be free to determine the admissibility, relevance, materiality and weight of evidence as well as the allocation of the burden of proof.
- Clause 26** The arbitration panel is authorised to examine witnesses as it deems appropriate. The arbitration panel shall determine the day, time and place of the examination of witnesses. All parties to a dispute shall be entitled to question the witnesses before the arbitration panel.
- Clause 27** All statements, documents or other information supplied to the arbitration panel by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitration panel may rely in making its decisions shall be communicated to the parties. The arbitration panel shall have the authority to make appropriate rulings to safeguard the confidentiality of the information.
- Clause 28** Except as provided in Clause 27 above, members of the arbitration panel must keep confidential the information and documents provided to them, as well as any facts that come to their attention while carrying out their duties.
- Clause 29** All meetings of the arbitration panel shall be held in closed session.
- Clause 30** The arbitration panel may invite the parties to the dispute one last time in order to help them to reach a settlement. This should not lead to an extension of the time limit given in

Article 313 of the Labour Law, unless both parties agree to such an extension. Agreements made between the parties during the arbitration process may be made the subject of an arbitral award.

- Clause 31** The arbitration process shall take place in compliance with the Procedural Rules of the Arbitration Council, which form the Annex to this Prakas.
The Arbitration Council may make guidelines to facilitate the arbitration process. Such guidelines must not be inconsistent with the Labour Law, this Prakas or the Procedural Rules. The guidelines must be approved by all the members of the Arbitration Council. Alternatively if all members do not agree, the guidelines may be approved by an absolute majority of the members in each of the three categories indicated in Clause 3 above.

CHAPTER FOUR

Jurisdiction and Remedies

- Clause 32** The arbitration panel shall decide on any collective labour dispute that is referred to it in accordance with Article 309 of the Labour Law.
- Clause 33** The power of an arbitration panel to consider a dispute shall be limited to addressing those issues which are contained in the non-conciliation report including issues which are the direct consequences of the dispute but which arise from events subsequent to the date of the report.
- Clause 34** In matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the Labour Law, implementing regulations under the Labour Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labour Law and this Prakas, it has the power and authority to provide any civil remedy or relief which it deems just and fair, including:
- A. orders to reinstate dismissed employees to their former or any other appropriate position;
 - B. orders to the immediate payment of back pay;
 - C. orders to cease immediately any industrial action which is being conducted by a party to the dispute;
 - D. orders to cease immediately any other illegal or prohibited conduct, including but not limited to retaliation;
 - E. orders to bargain;
 - F. orders following a settlement under Clause 30 of this Prakas;
 - G. the establishment of terms for a collective bargaining agreement;
 - H. such other relief as is appropriate.
- Clause 35** The Arbitration Council may give notice about the award to the Department of the Labour Inspection or to the provincial/municipal offices of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation in order for these to assist in taking measures for the implementation of the award.

CHAPTER FIVE

Arbitral Award

- Clause 36** The arbitration panel shall attempt to reach consensus in its decisions. If consensus is not possible, the arbitration panel shall make its decisions by majority.
- Clause 37** The arbitration panel shall record its decisions in an award which shall be signed by all 3 arbitrators. If one of the arbitrators does not agree with the decision of the majority, the dissenting arbitrator may record his dissent as an annex to the award.
- Clause 38** Arbitral awards shall contain:
- A. the names of the three arbitrators;
 - B. the name, domicile and seat or actual residence of the parties;
 - C. a summary of the procedure;
 - D. a description of the claim and a description of the counterclaim, if any;

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- E. the reasons for the decisions given in the award with, where applicable, reference to relevant provisions in the Labour Law, its implementing regulations or collective bargaining agreements or individual labour contracts;
 - F. the decisions of the arbitration panel;
 - G. the date on which the award is made.

Clause 39 Within 15 days of the date after which the case is received, the Arbitration Council shall report its award in writing to the Minister of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation, who shall immediately take action to notify the parties of it by providing them with a duly certified copy of the award. In cases where proceedings are terminated without an award, the Arbitration Council shall notify the Minister of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation that the proceedings have been terminated.

Clause 40 Each of the parties may lodge an opposition to the arbitral award by informing the Minister of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation by registered letter or any other reliable means, within eight calendar days of notification. If the last day of this period is not a working day for civil government officials then the period shall be extended to include the next working day.

If either party to a dispute lodges such an opposition within the specified timeframe, the award shall be unenforceable. In this case, if the dispute is about a right relating to the application of a rule of law (for example, a provision of the Labour Law, of a collective bargaining agreement, or an arbitral award that takes the place of the collective bargaining agreement) the disputant party may bring the case before the court of competent jurisdiction for final resolution.

Clause 41 If no opposition has been lodged within the specified timeframe as indicated in Clause 40 above, the arbitral award shall become final, and the disputant parties shall be bound to implement it.

Clause 42 Clause 40 does not apply in case parties to the dispute have agreed in writing before the notification of the arbitral award, or they are bound to comply with a collective bargaining agreement stipulating, that no objection to the award shall be allowed. In such case the award shall become final and binding immediately after notification.

CHAPTER SIX

Awards Regarding Interest Disputes

Clause 43 An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.

Clause 44 Such an award shall still remain in effect after this one-year period, unless either party gives three-month advance notice to the other party that it no longer wishes to be bound by the award.

Clause 45 When an arbitral award which takes the place of a collective bargaining agreement becomes final, it shall be filed and registered in accordance with procedures on collective bargaining agreements.

CHAPTER SEVEN

Enforcement

- Clause 46** If the period for opposition has lapsed and one party refuses to abide by the award, the other party can request the competent court to recognise and enforce the award. The party requesting recognition and enforcement of the award shall provide to the court a duly certified copy of the award.
- Clause 47** A party can only avoid the recognition and enforcement of a final and binding award if that party provides to the court proof that the award of the Arbitration Council was unjust on the grounds that:
- A. that party was not properly involved in the selection of arbitrators or was not given proper notice of the arbitral proceedings or was unfairly prevented from making a full presentation of his case;
 - B. there was non compliance with procedures indicated in the Labour Law or this Prakas in connection with the making of the award; or
 - C. the Arbitration Council rendered an award which went beyond the power given to it by the Labour Law and this Prakas.

CHATER EIGHT

Secretariat and Expenses

- Clause 48** The Department of Labour Inspection of the Ministry of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation shall be responsible for the organisation and functioning of the secretariat of the Arbitration Council.
- Clause 49** In case of a non-Khmer speaking arbitrator, the body that nominated this arbitrator shall be responsible for the reasonable cost of translation and interpretation.

CHAPTER NINE

Calculation of “Days”

- Clause 50** Unless otherwise expressly stated, in clauses of this Prakas the term 'days' means working days for civil government officials.

CHAPTER TEN

Transitional Provision

- Clause 51** In a transitional period, during the first, second and third terms of the Arbitration Council, all members of the Arbitration Council shall be appointed by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation on the nomination of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation after consultation with the ILO Labour Dispute Resolution Project.

CHAPTER ELEVEN

Entry into Force

- Clause 52** The Prakas of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation No. 338 dated 11 December 2002 shall be declared null and void.
- Clause 53** This Prakas shall enter into effect on the date of the signature.

Annex D. Arbitration Council procedural rules

UNDER

CLAUSE 31 OF THE PRAKAS ON THE ARBITRATION COUNCIL

(hereinafter, the Prakas)

Rule 1: The Secretariat of the Arbitration Council

- 1.1 The Secretariat of the Arbitration Council (the Secretariat) is the body constituted under Chapter 8 of the Prakas to administer and to facilitate the resolution of disputes by the Arbitration Council.
- 1.2 The address of the Secretariat is:
Secretariat of the Arbitration Council
Phnom Penh Center (A)
Sothearos Blvd
Sangkat Tonle Bassac
Khan Chamkar Morn
Phnom Penh
Changes of the address of the Secretariat shall be announced to the public.
- 1.3 Parties to any dispute brought before the Arbitration Council shall co-operate with the Secretariat in order to assist it in its functions and shall deal with any requests made to them by the Secretariat quickly and constructively.
- 1.4 The members of an arbitration panel and the parties shall communicate directly with each other only during a duly convened hearing of the arbitration panel. Any communication between the arbitration panel and the parties outside of a hearing shall take place through the Secretariat. The Secretariat shall take all reasonable measures to ensure that such communications reach their destination.
- 1.5 The Secretariat shall be available to assist the parties with their queries concerning procedural aspects of the dispute and assist in clarifying issues arising out of the Prakas or of these Procedural Rules.

Rule 2: Initiating Arbitration

- 2.1 Where arbitration of the dispute is required under Article 309 (c) of the Labour Law, each party shall, within 48 hours of the conclusion of the failed conciliation, advise the Secretariat, of its chosen arbitrator from the Arbitration Council to serve on the arbitration panel constituted under Clause 12 of the Prakas.
- 2.2 In satisfying the requirements of Rule 2.1, a party may advise the conciliator, at the conclusion of the failed conciliation, of its chosen arbitrator. Where a party has so advised the conciliator of its chosen arbitrator for the arbitration panel, such choice of arbitrator shall be included in the report of non-conciliation provided to the Minister of Social Affairs, Labour, Vocational Training and Youth Rehabilitation under Article 308 of the Labour Law.
- 2.3 A party to any arbitration proceedings shall ensure that the Secretariat is informed of the address at which that party will accept notices and service of any documents in the proceedings as well as, if possible, a contact telephone number. Such information shall be provided at the earliest opportunity and, where possible, provided to the conciliator at the conclusion of the failed conciliation.

Rule 3: Selection of Arbitrators

- 3.1 The Secretariat shall make every effort to have all three arbitrators constituting an arbitration panel selected within three days after receipt of the report of non-conciliation by the Secretariat. The Secretariat shall take all measures to facilitate the selection of arbitrators in accordance with these Rules.
- 3.2 When the Secretariat receives a report of non-conciliation under Article 308 of the Labour Law, the Secretariat shall immediately assign a unique file number to the dispute and enquire whether the parties have chosen arbitrators pursuant to Clause 12 of the Prakas.

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- 3.3 If a party has not chosen an arbitrator, or the chosen arbitrator is unavailable to perform his or her functions, then the Secretariat will assist in assuring that all parties have chosen an arbitrator in accordance with Chapter 2 of the Prakas.
- 3.4 In assisting the selection process under Rule 3.3, the Secretariat shall:
- (a) provide to an enterprise which is a party to a dispute the list of employer-nominated arbitrators on the Arbitration Council under Clause 3B of the Prakas, from which the choice for arbitrator shall be made;
 - (b) provide to a union or group of workers which is a party to a dispute the list of union-nominated arbitrators on the Arbitration Council under Clause 3C of the Prakas, from which the choice for arbitrator shall be made;
 - (c) conduct the selection of an arbitrator by lot where required under Clause 13 of the Prakas.
- 3.5 Upon selection of the arbitrators from the lists under Clause 3B and 3C of the Prakas ("the two arbitrators"), the Secretariat shall communicate with the two arbitrators in order to verify their availability. The Secretariat shall inform the two arbitrators of the file number and parties to the dispute. The two arbitrators shall inform the Secretariat if they are unavailable for any reasons, including legal reasons, such as conflicts of interest.
- 3.6 Where a chosen arbitrator is unavailable to serve on the arbitration panel, the Secretariat shall require the party which has chosen the arbitrator to make a further selection in accordance with these Rules.
- 3.7 Once the selection of the two arbitrators is complete, the two arbitrators shall confer to select an arbitrator from the list of arbitrators nominated by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation under Clause 3A of the Prakas ("the third arbitrator").
- 3.8 If the two arbitrators are able to agree on the choice of the third arbitrator, the two arbitrators shall communicate with the third arbitrator in order to verify his/her availability. The two arbitrators shall inform the third arbitrator of the file number and parties to the dispute. The third arbitrator shall inform the two arbitrators if he or she is unavailable for any reasons, including legal reasons, such as conflicts of interest.
- 3.9 Once the selection of the third arbitrator is complete, the third arbitrator shall communicate the composition of the arbitration panel to the Secretariat including the file number, the parties to the dispute, and the date and time at which the third arbitrator verified his/her availability to sit on the arbitration panel in question. The Secretariat shall record these details and file them appropriately.
- 3.10 Where required under Clause 12C of the Prakas, relating to the inability of the two arbitrators to agree on the identity of the third arbitrator, the Secretariat shall conduct the selection of the third arbitrator by lot. In such cases the Secretariat shall also take responsibility for verifying the availability of the third arbitrator.
- 3.11 Where a procedure for selection by lot is needed pursuant to the Prakas, and unless parties agree on a different lot procedure, such a lot procedure shall be as follows:
- (a) a designated officer of the Secretariat shall write on a separate piece of paper the name of each of the arbitrators on the relevant list referred to in Clause 3A, 3B, or 3C of the Prakas. The officer shall then gather these sheets of paper in an opaque container, and pick one of these sheets of paper at random, thus selecting the arbitrator.
 - (b) The parties to the dispute and any arbitrators already selected to sit on the arbitration panel shall be given notice of the conduct of the lot procedure and shall be entitled to be present for the conduct of the procedure.
- 3.12 For the purposes of these Rules, the selection of an arbitrator is complete when an arbitrator has been selected according to the mandated procedure and that arbitrator has determined his/her availability to sit on the arbitration panel for the dispute in question.
- 3.13 As soon as the selection of all three arbitrators is complete, the arbitration panel shall be considered as constituted. At the same time, the 15 day period referred to in Clause 39 of the Prakas, during which the Arbitration Council must report its award, shall commence.
- 3.14 Where, following the constitution of the arbitration panel, a member of that panel becomes de jure or de facto unable to perform his or her functions, the Secretariat shall ensure that a substitute arbitrator is chosen pursuant to Clause 17 of the Prakas, following the same procedure as the one established under these Rules.

Rule 4: Arbitration Proceedings

- 4.1 The members of the arbitration panel shall meet within three days following the constitution of the arbitration panel. Such meeting may be conducted by means of telephone. The arbitration panel shall inform the Secretariat of the holding of meeting and any decisions made at the meeting. Following instructions from the arbitration panel, the Secretariat shall notify the parties of a date and place at which they shall be required to appear before the arbitration panel.
- 4.2 In addition to oral presentation provided for in Clause 18 of the Prakas, the arbitration panel may require the parties to specify their respective claims and answers in writing, in such terms.
- 4.3 It shall be entirely within the power and competence of the arbitration panel to decide upon any matters related to the proper preparation of the dispute for hearing and regarding any aspect of the hearing.
- 4.4 The chairman of the arbitration panel shall record any direction, notification, advice or other such communication made by the arbitration panel during a hearing and shall provide the Secretariat with a copy of this record.
- 4.5 The arbitration panel may require a party to provide evidence in the form of witnesses, exhibits or documents. In addition, the panel may call experts to give evidence in relation to a dispute.
- 4.6 Parties are entitled to examine any evidence presented to the arbitration panel and to question any witnesses who give evidence to the arbitration panel.
- 4.7 If a party fails to appear in person or to be represented at arbitration proceedings, the arbitration panel may proceed in the absence of that party or may terminate the arbitration proceedings by means of an award. In either case, it must be satisfied that the parties have been properly notified of the date, time and venue of the arbitration proceedings before making such decision.
- 4.8 In making any decision concerning proceedings, including procedural disputes, the arbitration panel shall be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute quickly.
- 4.9 Postponements of arbitration hearings are costly and undesirable. Postponements will only be granted by the arbitration panel where all parties to the arbitration agree such postponement.
- 4.10 Settlement through conciliation is always the desirable option and the parties at all times retain the right to settle on their own terms including during the course of the arbitration.
- 4.11 The arbitration panel must keep record of:
 - (a) any evidence given in an arbitration hearing; and
 - (b) any arbitration award or ruling made by the arbitration panel.The record may be kept as handwritten notes or any other means including electronic recording.

Rule 5: Award

- 5.1 The arbitration panel must notify the Secretariat of its arbitral award within 15 days of the date of the initial constitution of the arbitration panel, unless the parties otherwise agree as provided under Clause 30 of the Prakas and Rule 4.9 above. In cases where proceedings are terminated without an award, the arbitration panel shall notify the Secretariat that the proceedings have been terminated.
- 5.2 The arbitration panel shall present its award in writing to the Secretariat in the standardised form provided for by the Secretariat.
- 5.3 Following receipt of the arbitration award, the Secretariat shall immediately notify the parties by providing them with a duly certified copy of the award. This may be done by serving the award upon the parties at their respective addresses as provided to the Secretariat by them pursuant to Rule 2.3, above, or at the respective addresses of the representatives of the parties

Rule 6: Documents and other Communications relating to Arbitration Proceedings

- 6.1 For the purposes of any proceedings under Chapter XII, Section II of the Labour Law, or under the Prakas, where any person or party is required to serve documents upon or file documents with the Minister of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, such service shall be achieved by duly delivering such documents to the Secretariat. This Rule also applies to a non-conciliation report under Article 308 of the Labour Law, and to an opposition under Clause 40 of the Prakas.

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- 6.2 For the purposes of any proceedings under Chapter XII, Section II of the Labour Law, or under the Prakas, where any person or party is required to serve or deliver a document, that party must be able to prove that service or delivery occurred. Acceptable methods for the service or delivery of a document include:
- (a) faxing a copy and keeping the fax transmission slip;
 - (b) sending it by courier and obtaining proof of receipt; and,
 - (c) delivery in person and obtaining proof of receipt.
- This Rule also applies to an opposition to an award under Clause 40 of the Prakas.
- 6.3 Because time is of the essence in the conduct of proceedings of the Arbitration Council, the use of telephone communications is encouraged among all persons involved, unless the Labour Law, the Prakas or these Rules specifically require written communication. In any case, proof of such communication may be required.
- 6.4 Any requirement in the Prakas or in these Rules that the Secretariat or arbitrators communicate with a party will be fulfilled if there is communication with the authorised representative of that party.

Rule 7: Amendments to these Procedural Rules

- 7.1 Where amendments to these Procedural Rules are needed, the Minister of Social Affairs, Labour, Vocational Training and Youth Rehabilitation shall make such amendments after consultation with the Arbitration Council.