

# **The Arbitration Council and the Process for Labour Dispute Resolution in Cambodia**

**Law & Commentary**

Third edition

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**Note:**

This publication is for informational purposes only. It is not intended to provide legal advice and it does not represent an official interpretation of the law by the Ministry of Labour and Vocational Training or the International Labour Organization.

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## **PREFACE TO THE SECOND EDITION BY H.E. NHEP BUNCHIN, MINISTER FOR LABOUR AND VOCATIONAL TRAINING**

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Since the first edition of this booklet was published, the Arbitration Council has been successfully hearing and resolving labour disputes for more than a year. The second group of 21 arbitrators began their terms in May 2004. Due to increased workload of the Council, a further 6 arbitrators were appointed in July 2004.

The Arbitration Council has been setting a high standard for legal and judicial reform in Cambodia. The Council promotes transparency because all of its decisions contain a detailed explanation of the relevant law and how it applies to each case. The Council is also consistent in its outcomes. The arbitral awards form a body of jurisprudence, and the Council generally follows the decisions that it has previously issued, which helps build trust in the system. Finally, the Council's decisions are available to the public. All decisions are posted on the Arbitration Council website within one week of being issued, and the first bound compilation of awards was published in February 2004.

All of this has contributed to the success of the Arbitration Council. It has already received over 100 cases since it was established last year. The large majority of these disputes were successfully resolved, either by mutual agreement during the arbitration process or by the issuing of an award which was then implemented by the parties. Statistics from the Garment Manufacturers' Association in Cambodia (GMAC) show that in the garment sector, which generates over 80% of the Arbitration Council's cases, the number of strikes dropped by over 45% during the first eight months of the Council's operation. These are significant milestones for the development of Cambodia's industrial relations system.

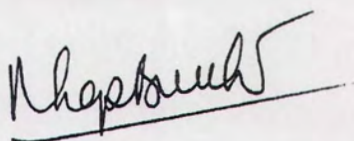
The Arbitration Council's achievements to date are based on a high level of cooperation between key stakeholders that include the Royal Government of Cambodia, employers' associations and union federations.



This second edition has been updated to include the revised Prakas on the Arbitration Council No. 99 of 2004, which was issued by the Ministry on 21 April 2004, and to include references to decisions made by the Arbitration Council during its first year.

On behalf of the Royal Government of Cambodia and the Ministry of Labour and Vocational Training, I would like to take this opportunity to express my appreciation to all those who have contributed to making the first year of the Arbitration Council a success, particularly the members of the Arbitration Council and the officers of the Secretariat of the Arbitration Council.

Phnom Penh  
6 October 2004

A handwritten signature in black ink, appearing to read 'Nhep Bunchin', written over a horizontal line.

**Nhep Bunchin**  
Minister for Labour and Vocational Training



**PREFACE TO THE FIRST EDITION BY H.E. ITH SAMHENG, FORMER MINISTER FOR  
SOCIAL AFFAIRS, LABOUR, VOCATIONAL TRAINING AND YOUTH REHABILITATION**

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The establishment of a strong, effective and fair system of industrial relations is essential for the economic and social development of Cambodia.

The *Labour Law* contains many provisions relevant to the settlement of labour disputes. Beside the procedures on labour dispute resolution actually stipulated in the Labour Law, the law also assigns the Ministry for Social Affairs, Labour, Vocational Training and Youth Rehabilitation (MOSALVY) to issue a number of Prakas to ensure the effective application and enforcement of the law.

Although the Labour Law was promulgated only 6 years ago, in March 1997, MOSALVY has achieved a great deal with regard to the establishment of an effective labour dispute resolution system. Achievements in this area include the formulation of Prakas, circulars and other notifications concerning the conciliation process such as Prakas No. 318 of 2001 on Procedures for Individual Disputes Settlement and Prakas No. 317 of 2001 on Procedures for Collective Disputes Settlement. We have also issued Prakas No. 305 of 2001 on the Representativeness of Professional Organizations of Workers.

In December last year, MOSALVY issued Prakas No. 338 of 2002 on the Arbitration Council. The Ministry has also appointed the 21 arbitrators who will make up the 1<sup>st</sup> Arbitration Council. These men and women will take up their posts and start hearing disputes in May 2003. These achievements represent an important step in the development of this country's industrial relations system. According to the Labour Law, the Arbitration Council is a mechanism to resolve collective disputes in the case that these disputes cannot be settled by means of conciliation.


Based on past experience we have seen that collective disputes can escalate quickly, producing negative consequences to concerned parties and the economy as a whole. The Arbitration Council will be an important institution for Cambodia because it will help to solve collective disputes in a neutral and impartial way.



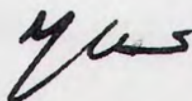
The Arbitration Council, however, is just one part of the system for labour dispute resolution. Conciliation, administrative enforcement, export sanctions, litigation and the right

to conduct a strike or lockout in accordance with law are other measures which will continue to play an important role in the promotion of peaceful, harmonious and productive labour relations in the Kingdom of Cambodia.

This booklet has been published to mark the opening of the Arbitration Council in May 2003. It provides an overview of Cambodia's labour dispute resolution system for all those who use our industrial relations system.

On behalf of the Royal Government of Cambodia and the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, I would like to take this opportunity to express my appreciation to all those who continue to contribute to the improvement of the labour relations system in Cambodia, particularly civil servants at MOSALVY and other Ministries, and those from the employers' associations, the union movement and the ILO. 

Phnom Penh  
30 April 2003



**Ith Samheng**

Minister for Social Affairs, Labour, Vocational Training and Youth Rehabilitation



## **FOREWORD TO THE SECOND EDITION BY HUGO VAN NOORD, CHIEF TECHNICAL ADVISOR, INTERNATIONAL LABOUR ORGANIZATION**

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Over the last decade or so, Cambodia has continued its integration into the global economy. The country's imminent accession to the World Trade Organisation is further evidence that this is continuing. As a result the industrial workforce of the country has sustained a rapid growth, particularly in the garment and tourism-related sectors. An astounding increase in employment has occurred over the last ten years; in 1995 there were fewer than 20,000 workers in the garment sector, compared with more than 250,000 today.

This high rate of growth brings major challenges for the institutions that are responsible for developing labour policy, enforcing the Labour Law and resolving labour disputes. To tackle these challenges, the International Labour Organisation (ILO) remains committed to cooperation with the Labour Ministry to help develop Cambodia's industrial relations system.

The Labour Dispute Resolution Project is a central aspect of this co-operation. The project aims to:

- develop a strategy for labour dispute prevention and resolution;
- establish and implement dispute resolution procedures that are transparent, fair and expeditious; and
- build capacity to resolve disputes at the earliest possible stage.

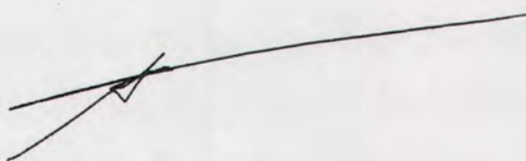
This booklet, published by the ILO together with the Ministry of Labour and Vocational Training and the Community Legal Education Center, gives an overview of the Cambodian system of labour dispute resolution. It has a particular focus on the recently established Arbitration Council. In addition to arbitration, it describes the conciliation process and the requirements for conducting lawful industrial action such as strikes and lockouts.



The establishment of the Arbitration Council has been a key step in the development of the system of labour dispute resolution set up under Chapter XII of the *Labour Law* (1997). The Council, established by Prakas in December 2002, has proven itself to be an important institution, available to employers and unions, for settling labour disputes and for upholding the labour law. The Council provides a venue to address collective disputes, which are usually the most difficult kind of labour dispute. By doing so, it has helped lift tripartite labour relations to new levels of co-operation, trust and understanding. It is important to emphasise, however, that the real challenge has not been the establishment of this Council, but rather the ongoing one of making it work independently, fairly and efficiently. In order to continue its success, the Council needs to be maintained and improved as a credible institution in which both employers and unions have faith. This cannot be achieved by government alone, much less by the ILO. It requires the active participation of employers and unions in its enduring operation.

I trust that the successful establishment and working of an Arbitration Council, together with the other developments in Cambodia's labour dispute resolution system, will contribute to making this country a more attractive place to work, invest and do business.

Phnom Penh  
5 October 2004



**Hugo van Noord**  
Chief Technical Advisor  
ILO - Labour Dispute Resolution Project



## INTRODUCTION

The Arbitration Council is one part of a system for the amicable resolution of labour disputes established under Chapter XII of the Labour Law. This Law allows unions and employers to include procedures for the resolution of disputes in their collective bargaining agreements. Where this does not occur, the Labour Law provides such procedures. Some of these processes are voluntary and others such as the arbitration procedure are mandatory. The sort of dispute resolution processes which the parties should use depends on two important factors:

1. Whether the dispute is an individual dispute or a collective dispute; and
2. Whether the dispute is a rights dispute or an interests dispute.

Before looking at the procedures for resolving disputes, it is worthwhile to clarify the differences between these disputes.

### RIGHTS DISPUTES V. INTERESTS DISPUTES

A *rights dispute* relates to existing legal rights.




*Workers at a garment factory earn 1200 riel per hour. One week workers agree to work 5 hours overtime. Instead of paying time and a half (1800 riel per hour) for these 5 hours, the employer only pays the regular rate (1200 riel per hour). The workers know that the law entitles them to a higher rate of pay than this and they claim for the full overtime rate.*

*The employer refuses their claim.*

This is a rights dispute because it relates to an existing right, in this case a right under law (the right to get paid time and a half for overtime). Rights disputes can also occur regarding other sorts of rights, such as those that arise out of contracts or collective bargaining agreements (CBAs).



An *interests dispute* relates to a future benefit and not to an existing right.

	<p><i>Workers at a garment factory are paid the minimum wage as set by the Ministry. This is set out in their employment contracts.</i></p> <p><i>The workers at the factory believe that they are very productive and deserve a higher rate. They would also like to receive two days annual leave per month (rather than 1.5) and a bonus every Khmer New Year.</i></p> <p><i>Factory management denies this request.</i></p>
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The dispute in the example above is an interests dispute because it relates to a future benefit and is not based on any existing legal right. The workers may believe that they deserve a pay increase, but they are not legally entitled to it.

## INDIVIDUAL DISPUTES V. COLLECTIVE DISPUTES

### *Individual disputes*

Under Article 300 of the Labour Law an *individual dispute* is a dispute that:

- a. occurs between an employer and one or more of their workers individually (**the parties**); and
- b. relates to the interpretation or the enforcement of the terms of a labour contract, a collective bargaining agreement or laws and regulations in effect (**the subject matter**).

The Labour Law only recognizes individual disputes that relate to existing rights (rights disputes).



## ***Collective Disputes***

The criteria for a *collective dispute* are set out in Article 302 of the Law. Three conditions must be satisfied in order for a dispute to be a collective dispute:

- a) there is a dispute between one or more employers and a group of workers (the parties);
- b) the issue at dispute relates to working conditions, the exercise of the rights of professional organisations, the recognition of professional organisations or problems in the relationship between employers and workers (the subject matter); and
- c) the dispute could lead to the disruption of the enterprise or threaten social peace (the consequences).

### **(a) The parties**

Under Article 302, the parties to a collective dispute must be employer and workers. This would also include professional organisations representing employers (employer associations) and workers (unions).

The dispute must involve more than one worker. It is not clear how many workers must be involved in a dispute before it can be said to be collective. However, it can be said that:

- i. the workers involved should see themselves as a group and have a collective interest in pursuing their claim together; and
- ii. the requirement that the claim is brought by a group of workers will usually be satisfied if the claim has the support of a union.





In the Hotel Cambodiana case (#11/03), the Arbitration Council ordered the employer to pay compensation to former workers as well as current workers. The employer was ordered to pay damages to all workers who had worked in the past three years for the uncertainty and the delay caused by the employer in distributing the service charge collected by the hotel from its customers. This case demonstrates that former worker, as well as current workers, can be parties to a collective dispute.

#### **(b) The subject matter**

In order for a dispute to be a collective dispute it must also fall within one of the categories of subject matters mentioned in Article 302. The issues that may be the subject of a collective dispute are very broad, so broad that it is difficult to think of a labour dispute that does not fall within one of these categories. Dealing with each category in turn:

*Working conditions:* This includes all of the items set out in Chapter VI of the Labour Law, entitled General Working Conditions, including:

- i. wages;
- ii. working hours;
- iii. weekly time off;
- iv. leave.

Working conditions also include other conditions of employment such as notice requirements before termination, severance pay and the obligation to provide healthy and safe working conditions.



*The Exercise of the Rights of Professional Organisations:* Professional organisations such as unions have a right to exist and promote the benefit of their members within the framework of the law. Issues relating to the exercise of the rights of professional organisations include issues such as:

- i. anti-union discrimination;
- ii. dismissal because of union membership or participation in union activities;
- iii. deduction of union dues;
- iv. the conduct of industrial action.

For example, where there is a dispute in which a worker is dismissed and the union argues that the dismissal took place for reasons including the worker's membership of the union, this dispute could be a collective dispute even though it only involves one worker. Any dispute that has the support of a union will usually be classified as a collective dispute.

*The Recognition of Professional Organisations:* In addition to their rights to form and operate, professional organisations have a right to be recognized within the workplace. Issues relating to the recognition of professional organisations could include:

- i. refusal by a union or an employer organisation to bargain with the other when required to do so by law;
- ii. recognition in the workplace of the most representative status of a union.

*Problems in the Relationship between Employers and Workers:* This final category is the broadest of all, as almost all labour disputes can be described as expressions of 'problems in the relationship between employers and workers'.

Therefore so long as a labour dispute satisfies the requirements relating to **parties** and **consequences** there should be little difficulty in finding that the subject matter of the dispute comes within one of the categories described above.



### (c) The consequences

Finally in order for a labour dispute to be a collective dispute under Article 302, it must have the potential to disrupt the operation of the enterprise in question or to threaten social peace. For this to be the case, a labour dispute must be pursued by a sufficiently large group of workers and with sufficient commitment that the dispute could, in the future, disrupt the enterprise in question. The number of workers required to threaten an enterprise in this way will depend on the type of workers and the type of enterprise. However, any dispute that has the support of a union will usually satisfy this third condition.

The Department of Labour Inspection decides whether a dispute is an individual dispute or a collective dispute (in accordance with the criteria discussed above). As discussed further below, the classification of a dispute as individual or collective is important because it determines the type of dispute resolution procedures that will apply to that dispute.

The Arbitration Council may also have a role to play in considering whether a dispute referred to it is properly classified as a collective dispute. Under the Labour Law, the Arbitration Council is only involved in the resolution of collective disputes. Therefore, if a party to a dispute questions the classification of a dispute as collective before the Arbitration Council, the Council will need to consider whether it has jurisdiction to hear that case.



In the Jacqsintex Garment case (#10/03) the employer objected to the classification as collective of a claim for the reinstatement of two workers. The Arbitration Council observed: "(T)he labour inspectorate and the Minister for Labour have the duty to decide if the dispute is an individual dispute or collective dispute before referring any dispute to the Arbitration Council. For this reason the Arbitration Council will generally follow the decision of the labour inspectorate and the Minister for Labour unless there are compelling reasons not to do so."<sup>1</sup>

<sup>1</sup> The decision was followed in *Hotel Cambodiana* (#02/04).



## RESOLUTION OF INDIVIDUAL DISPUTES

A party to any individual dispute has the option to seek resolution through the court.<sup>2</sup> Articles 300 and 301 of the Labour Law provide for a preliminary conciliation process that the parties to an individual labour dispute may attempt before filing a court complaint.



**Article 300 (paragraph 2).** *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.*

Conciliation under Article 300 is voluntary in that the process must have been initiated by one of the parties. However, if one of the parties does submit a complaint for conciliation, the other party is required to participate. Pursuant to the Labour Law, MOSALVY issued Prakas 318-01, "On Procedures for Settlement of Individual Labour Disputes", dated November 29, 2001. Article 300 of the Labour Law, together with Prakas 318-01, establish the following conciliation procedures:

1. Either party can make a complaint to the Labour Inspector. Throughout the conciliation process, the designated conciliator (from the Labour Inspectorate) will try to help the parties resolve their dispute by agreement.
2. The parties are required to provide information requested by the conciliator and to attend meetings called by the conciliator.
3. Regardless of whether the conciliation is successful, the conciliator must write and sign a report on the conciliation. Each party also signs the report and receives a certified copy of it. The report is then submitted to the Minister.<sup>3</sup>

<sup>2</sup> Labour Law, Article 387.

<sup>3</sup> In this publication, the "Minister" refers to the Minister in charge of Labour and the "Ministry" refers to the Ministry in charge of Labour. Since the formation of the third Royal Government in July 2004, this is the Ministry of Labour and Vocational Training. Previously, it was the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation (MOSALVY).



The process of conciliation uses a third party as a go-between who has a role of giving advice and recommending solutions. The conciliator does not have the power to impose a solution on the parties. If the conciliation leads to a resolution of the dispute, it is because the parties agree on the solution. Not all disputes can be solved by conciliation.

If the parties cannot reach an agreement through conciliation, either party can file a complaint with the court within two months.<sup>4</sup> The parties could choose to try a different dispute resolution process before they go to court. However, if no complaint is filed in the court within two months, the right to sue will lapse.

It is possible that an individual dispute turns into a collective dispute. This is, for example, the case, if a union or group of workers find that the individual dispute relates to issues of union freedom or to a matter of principle that could affect other workers in the future. As soon as a union or group of workers is concerned about an individual dispute and there is potential for the dispute to lead to industrial action, it satisfies the definition of a collective dispute and should be resolved following the procedures as outlined in the next chapter.

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<sup>4</sup> *Labour Law, Article 301.*



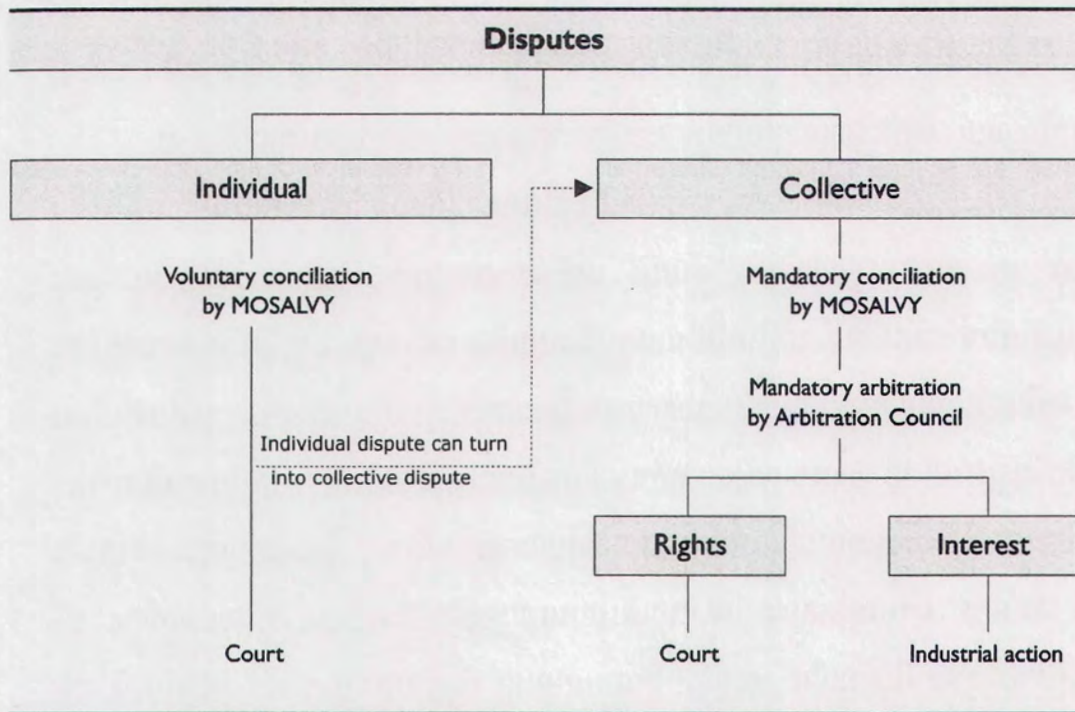


Figure 1: Overview of labour dispute resolution processes



## RESOLUTION OF COLLECTIVE DISPUTES

### DIFFERENCES BETWEEN RESOLUTION OF INDIVIDUAL AND COLLECTIVE DISPUTES

There are several significant differences between the resolution of individual and collective labour disputes:

1. In individual labour disputes, Alternative Dispute Resolution (ADR) procedures are voluntary. In collective disputes, ADR procedures are mandatory.
2. In individual disputes, the parties initiate the ADR process. In collective disputes, the parties may initiate the ADR process, but the Labour Inspector can also initiate the ADR process if the Labour Inspector learns about a collective dispute.
3. If parties are not able to resolve an individual dispute through conciliation, they can take the matter to court. But if the parties are not able to resolve a collective labour dispute through conciliation, the parties must try arbitration first.

The reasons for these differences relate to the number of people affected by the different types of disputes and the social and economic consequences of those disputes. In an individual dispute, only one or a few workers are involved. But many people may be affected by a collective labour dispute – perhaps all the workers in one enterprise, or in several enterprises. Failure to reach an amicable solution in a collective labour dispute can result in labour and social unrest and disruption of operations at one or several enterprises.

### PROCEDURES FOR RESOLVING COLLECTIVE DISPUTES



**Article 303.** *If there is no planned settlement procedure in a collective bargaining 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.*



To avoid these social and economic problems, the Labour Law includes mandatory dispute resolution procedures, which require the parties to report any collective dispute to the Labour Inspector as provided in Article 303. If, however, the parties are bound by a collective agreement that contains dispute resolution procedures, then the parties must use the procedures set out in their collective agreement.

Pursuant to Article 317 of the Labour Law, MOSALVY issued Prakas 317-01, "On Procedures for the Resolution of Collective Disputes", effective November 29, 2001. Prakas 317-01 and Articles 302 to 316 specify the procedures that the Labour Inspector and the parties must follow to resolve the dispute.

There are two main steps to these procedures:

- conciliation; and
- arbitration.

The services of the conciliator and arbitrators are free of cost to the parties.<sup>5</sup>

### **CONCILIATION OF COLLECTIVE DISPUTES**

Conciliation is the first process used to resolve a collective labour dispute. After a dispute is brought to the attention of the Ministry, a conciliator must be appointed within 48 hours.<sup>6</sup> Conciliation must then be carried out within 15 days. The parties can extend the conciliation time by mutual agreement.<sup>7</sup> All parties must attend the conciliation meetings and refrain from any act of hostility while conciliation is proceeding or be subject to penalties.<sup>8</sup>

If the conciliation results in an agreement, the agreement is written, signed by all parties and then signed and certified by the conciliator. The certified agreement has the same effect as a CBA, binding the parties to the dispute and any workers they legally represent.<sup>9</sup>

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<sup>5</sup> *Labour Law, Article 316.*

<sup>6</sup> *Labour Law, Article 304.*

<sup>7</sup> *Labour Law, Article 305.*

<sup>8</sup> *Labour Law, Articles 306 & 363.*

<sup>9</sup> *Labour Law, Article 307.*



If the conciliation fails to resolve all of the issues, the conciliator must make a written report of non-conciliation, noting the unresolved issues. The conciliator must file this report with the Minister within 48 hours of the conciliation's conclusion.<sup>10</sup>

The dispute must then be referred to one of the following procedures:<sup>11</sup>

- the arbitration procedure in the CBA, if any;
- any other procedure agreed on by the parties; or
- the arbitration procedure set out in the Labour Law.

### **ARBITRATION OF COLLECTIVE DISPUTES**

Articles 309 – 317 set out an arbitration procedure for resolving collective disputes that could not be resolved by conciliation. The body that conducts these arbitrations is called the Arbitration Council. The Arbitration Council was established by Prakas 338 of 2002. That Prakas was reissued with minor revisions on 21 April 2004 as Prakas #99 of 2004. The Prakas also designates a Secretariat within the Ministry which is responsible for providing administrative support to the Council.<sup>12</sup> The first group of 21 Arbitrators began their terms of office on 1 May 2003.<sup>13</sup> The second group of 21 Arbitrators began their terms on 1 May 2004, many of whom were reappointed from the first group.<sup>14</sup> A further 6 new arbitrators were appointed on 13 July 2004.<sup>15</sup> Under Prakas #99 of 2004, arbitrators are appointed for one year but shall be reappointed by Prakas each year unless certain events occur (e.g. the arbitrator dies, resigns, is convicted of a criminal offence or commits an act of misconduct).<sup>16</sup>

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<sup>10</sup> *Labour Law, Article 308.*

<sup>11</sup> *Labour Law, Article 309.*

<sup>12</sup> *Prakas #99 of 2004, Article 48 and Arbitration Council Procedural Rules, rule 1.* See further description of the role of the Secretariat below.

<sup>13</sup> *Prakas #96 of 2003.*

<sup>14</sup> *Prakas #103 of 2004.*

<sup>15</sup> *Prakas #265 of 2004.*

<sup>16</sup> *Prakas #99 of 2004, Article 2.*



In just over one year of operation, 77 disputes were referred to the Arbitration Council, of which 24 settled prior to or without an award being issued. Awards were issued in 39 cases.<sup>17</sup> Of those cases, 82% were in the garment sector, 10% in the hotel sector and 8% were in other industries.

### ***The Arbitration Council***

In cases where there is no alternative procedure set out in a CBA or otherwise agreed to between the parties, Article 310 of the Labour Law stipulates that the Minister must refer the case to the Arbitration Council within three days after receiving a conciliator's non-conciliation report.

The Arbitration Council is a tripartite body composed of members nominated by unions, employer associations and the government (represented by the Ministry). The Arbitration Council must have at least 15 members,  $\frac{1}{3}$  nominated by each of the stakeholder groups.<sup>18</sup>

The Arbitration Council is an independent body, meaning that its members are required to approach each case on its merits without favour to any party. Although  $\frac{1}{3}$  of the members are nominated by each of the stakeholders, this does not mean that an arbitrator represents the interests of that stakeholder when deciding a dispute. The tripartite nature of the Arbitration Council is designed to generate confidence amongst the parties and the stakeholders in the arbitration system. Once appointed, the members of the Arbitration Council are independent and are required to decide disputes according to the law and merits of the case.

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<sup>17</sup> These figures are as at 17 June 2004. Of the 77 cases referred, 14 were still pending at that date.

<sup>18</sup> *Prakas #99 of 2004, Ch 1.*



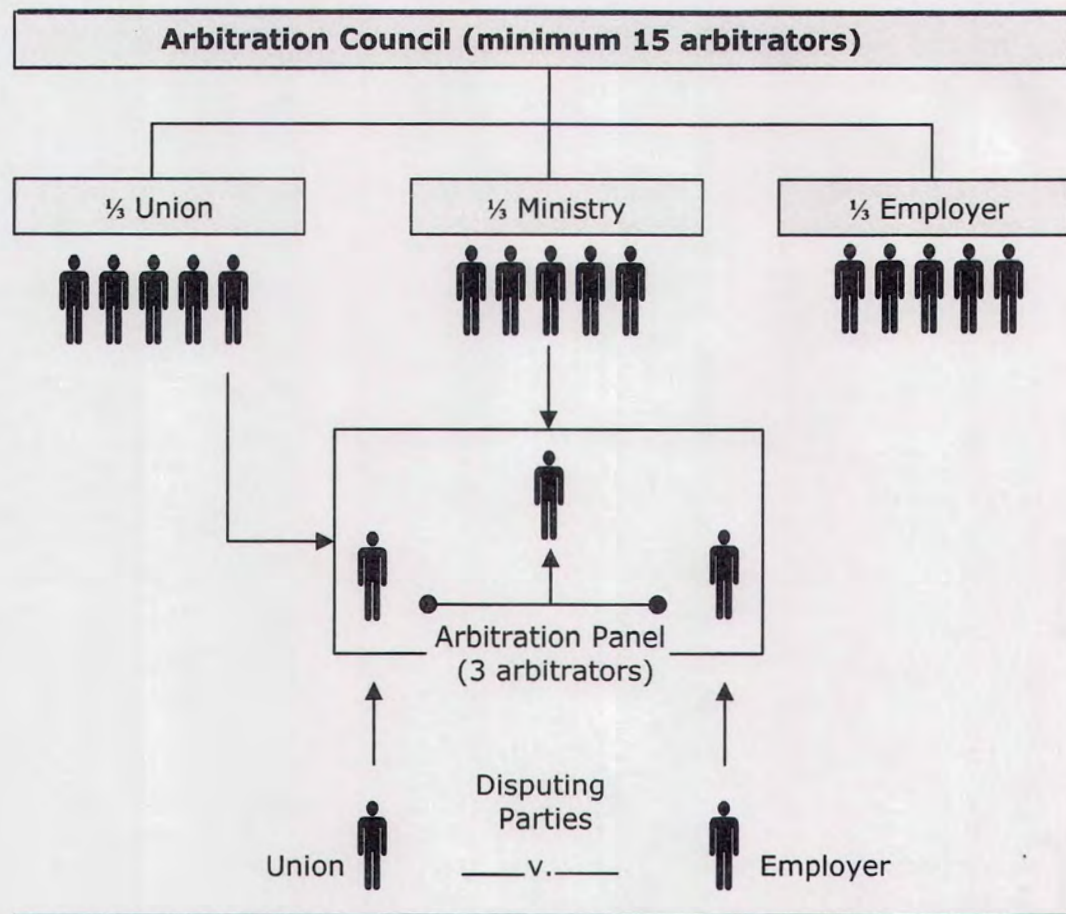


Figure 2: Tripartite structures in the Arbitration Council

### ***The Arbitration Panel***


Each case referred to the Arbitration Council is decided by an *arbitration panel* which is constituted especially for that case.<sup>19</sup> An arbitration panel consists of 3 members of the Arbitration Council. Of these three members:

- one is chosen by each of the parties to the dispute; and
- the third arbitrator is chosen by the two arbitrators who were chosen by the parties (the Chairperson).

<sup>19</sup> *Prakas #99 of 2004, Ch 2.*



If there are any difficulties in choosing arbitrators, or if a party refuses to choose, the Secretariat of the Arbitration Council is required to take all measures to facilitate the selection of arbitrators within 3 days of the receipt of the non-conciliation report.<sup>20</sup> In circumstances where a party is not able to decide on, or refuses to choose, an arbitrator, the Secretariat adopts the lot procedure to choose an arbitrator for that party.<sup>21</sup>

	<p>In the Hotels case (#18/04) the Secretariat contacted each of the employer hotels and invited them to choose an arbitrator. There was no consensus among the hotel parties with regard to the choice of arbitrator. Two of the hotels chose different arbitrators and the others did not make a selection. The Secretariat selected the employer arbitrator by the lot procedure set out in Article 13 of the Procedural Rules. One hotel objected to the manner in which the employer arbitrator had been selected, but the Arbitration Council held that there was no procedural irregularity in the choice of the arbitrator.<sup>22</sup></p>
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In order to ensure that the arbitration panel is impartial, a member of the panel must recuse him or herself if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality (e.g. a close personal or professional relationship with one of the parties).<sup>23</sup> At the commencement of the arbitration hearing, parties are generally given an opportunity to raise concerns about any conflict of interest of a member of the arbitration panel. If the party is informed of a potential conflict and does not object at that time to a particular arbitrator being on the panel, then they may waive their right to raise conflict of interest issues later in the process.<sup>24</sup>

<sup>20</sup> *Arbitration Council Procedural Rules*, rule 3.1.

<sup>21</sup> See, for example, *Kong Hong* (#43/04). The lot procedure is set in *Prakas* #99 of 2004, Article 13.

<sup>22</sup> See Interim Orders (1) made at a pre-hearing meeting on 12 April 2004 and the Reasons for those orders.

<sup>23</sup> *Prakas* #99 of 2004, Article 15.

<sup>24</sup> *Jacqsintex Garment Co Ltd* (#10/03).





In the Hotels case (#18/04), one of the employer parties objected to the arbitrator chosen by the unions on the basis that he worked as a legal advisor for a non-government organisation that supports the union movement. The Arbitration Council decided that the arbitrator chosen by the unions should remain on the panel as it was not convinced that there were circumstances which gave rise to doubts as to the arbitrator's capacity to deal with the current case in a fair and impartial manner. The Council observed that as "the Arbitration Council is a tripartite body it is to be expected that arbitrators will be involved in cases where they have professional contact with the parties or their representatives."<sup>25</sup>

### ***Powers and duties of the Arbitration Council in deciding disputes***

The arbitration panel is responsible for making decisions and orders which settle the dispute between the parties. Article 312 of the Labour Law defines the scope and powers of the arbitration panel. The panel can only examine two types of issues:

- issues specified in the non-conciliation report, and
- issues arising from events occurring after the report that are a direct consequence of the dispute.<sup>26</sup>

The arbitrators have the power to decide both rights disputes and interests disputes. In rights disputes, the arbitration panel makes legal decisions which are based on the interpretation and application of laws, regulations, contracts or CBAs. In the case of interests disputes, the panel makes decisions based on equity.<sup>27</sup> This means that the panel decides based on the principles of fairness.

<sup>25</sup> See Interim Orders (1) made at a pre-hearing meeting on 12 April 2004 and the Reasons for those orders.

<sup>26</sup> See *Raffles Le Royal* (#22/04) in which the Arbitration Council found that an issue raised by the workers at the hearing was a direct consequence of the dispute and so within the jurisdiction of the Council.

<sup>27</sup> *Labour Law, Article 312(2).*



The claimant in an interests case must provide sufficient evidence as to why they should succeed in their claim. Thus, for example, in the Chou Sing Garment (2) case (#14/03), the Arbitration Council found against the workers on the basis that they did not provide sufficient evidence as to why they should receive an increase in the piece rate above the minimum wage.



In the Advanced Industry case (#25/03), the Arbitration Council ordered that the employer pay seniority increments to its workers, even though there was no legal requirement to do so. The Council found that as this was a dispute about future interests, it had the power to decide on the basis of what was equitable and fair. In the circumstances of this case, the Council held that it was equitable for the employer to give seniority increments in similar amounts to the increments received by workers in the garment, textile or footwear factory.

### ***Hearing Procedures and Evidence***

The arbitration process must comply with the Procedural Rules of the Arbitration Council.<sup>28</sup> The Arbitration Council also has the power to make guidelines to facilitate the arbitration process, although as yet no guidelines have been issued.<sup>29</sup> The arbitration panel may make orders with regard to its own proceedings in a particular case.<sup>30</sup> Such orders are binding on the parties and are not subject to the opposition procedures available for final arbitral awards.<sup>31</sup>

<sup>28</sup> The Procedural Rules were first issued as an Annexure to *Prakas* #338 of 2002 and were recently re-issued as an Annexure to *Prakas* #99 of 2004.

<sup>29</sup> *Prakas* #99 of 2004, Article 31. This is a new power of the Arbitration Council, inserted in the 2004 *Prakas*.

<sup>30</sup> *Arbitration Council Procedural Rules*, rule 4.3; *Labour Law*, Article 312.

<sup>31</sup> *Raffles Le Royal* (#22/04). The opposition procedures for arbitral awards are discussed below.



Before reaching its decisions, an arbitration panel must conduct a hearing.<sup>32</sup> At any point prior to issuing an award, the arbitration panel may also conciliate in order to help the parties reach their own settlement of the dispute.<sup>33</sup> The outcome of such a conciliation may be issued as a consent order by the Arbitration Council or the parties may choose to make a private agreement settling the case. In such instances, once the Arbitration Council is satisfied that there has been a genuine resolution of the dispute, it will close the case.

At the hearing the parties may be represented by a lawyer or another other person who is authorised in writing by that party.<sup>34</sup> The proceedings are conducted in Khmer and so a party who wishes to address the panel in another language, or to call a witness who does not speak Khmer, must bring a professional interpreter to the hearing.<sup>35</sup> The arbitration hearings are held in closed sessions unless there is agreement from the parties to allow observers.<sup>36</sup>

The parties may supply any documents and other useful information to the arbitration panel. The arbitration panel also has the power to require the production of documents relevant to the dispute. The panel may obtain assistance and evidence from experts.<sup>37</sup> The panel has the power to examine any witnesses it considers appropriate and the parties have the right to question those witnesses as well.<sup>38</sup> Any documents supplied to the arbitration panel by one party, or obtained by the panel itself, must be communicated to all the parties.<sup>39</sup>

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<sup>32</sup> *Prakas #99 of 2004, Article 18.*

<sup>33</sup> *Prakas #99 of 2004, Article 31.*

<sup>34</sup> *Prakas #99 of 2004, Article 19.*

<sup>35</sup> *Prakas #99 of 2004, Article 23.*

<sup>36</sup> *Prakas #99 of 2004, Article 29.*

<sup>37</sup> *Labour Law, Article 312; Prakas #99 of 2004, Article 24.*

<sup>38</sup> *Prakas #99 of 2004, Article 26.*

<sup>39</sup> *Prakas #99 of 2004, Article 27.*



If a party fails to provide evidence to support assertions made by that party in the hearing, then this can lead the panel to draw an adverse inference about that party's case or to accept the evidence of the other party. Thus in the Jacqsintex Garment case (#10/03) the employer refused to provide an internal report setting out the reasons for the dismissal of particular workers. The Arbitration Council held that in these circumstances it had no choice but to accept the testimony of the workers about the reasons for their dismissal.<sup>40</sup>



During the hearing in the Advanced Industries case (#25/03), the employer argued that they could not agree to the demands of the workers because the company obtained little profit. Following a request from the panel, the employer promised to provide evidence to support this argument. However it did not submit its balance sheet documents to the Arbitration Council as promised. Failure to give the documents without reasons led the Council to conclude the company gained more profit than the amount reported in the hearing.

### ***Decision of the Arbitration Council or Termination of the Dispute***

The Arbitration Council has an obligation to decide any collective dispute referred to it by the Minister.<sup>41</sup> Unless both parties agree to an extension, the arbitration must be completed and the Arbitration Council must make an award within 15 days of receiving the case.<sup>42</sup> If the Council does not make a decision within that time period, then the workers can exercise their right to strike.<sup>43</sup>

<sup>40</sup> See also *Raffles Le Royal* (#22/04) where the employer refused to provide any evidence in relation to Issue #3.

<sup>41</sup> *Prakas* #99 of 2004, Article 32.

<sup>42</sup> *Labour Law*, Article 313; *Prakas* #99 of 2004, Articles 30 & 39. See also *Tonga Garment Co Ltd* (#03/03).

<sup>43</sup> *Labour Law*, Article 320.



Maximum Time Limits in Collective Disputes		
Process	Interim Steps	Total
Conciliation	Collective dispute reported to Labour Inspector (Art. 303) <i>48 hours</i>	
	Minister appoints conciliator (Art. 304) <i>15 days</i>	
	Conciliation agreement/report (Art. 305) <i>48 hours</i>	
	Report sent to Minister (Art. 308)	
	Referral to Arbitration Council <i>3 days</i>	
Arbitration	Constitution of Arbitration Panel (Art. 310) <i>3 days</i>	15 working days
	Arbitration Panel meets (Art. 310)	
	Decision by Arbitration Panel (Art. 313)	
	Notification of Minister <i>Immediate</i>	
	Notification of parties	
Opposition	Parties have opportunity to lodge opposition	8 calendar days

Figure 3: Maximum time limits for collective dispute resolution processes

There are some circumstances in which the Council will not hear a dispute and may terminate the proceedings.

During the arbitration process, the parties to a dispute must abstain from any strikes or lockouts of any other action likely to aggravate the situation.<sup>44</sup> For example, in an interim decision in the Hotels Case (#18/04), the Arbitration Council ordered that the workers must cease their strike before the claim could be heard by the Council. Similarly, in an interim decision in the MSI case (#04/04), the Arbitration Council stated that it would not hear a dispute while the complainants were in breach of an order of the Council that required them to cease striking.

<sup>44</sup> *Prakas #338, Article 20.*



If a party fails to appear before the arbitration panel, without good reason, the panel has the power to proceed to hear the case in the absence of that party or to terminate the proceedings by way of an award.<sup>45</sup> In the Thai Dou case (#05/04), the complainant did not come to the hearing of the case and so the arbitration panel refused to hear the dispute and removed the case from its list. In other cases where the respondent has failed to appear without reasons,<sup>46</sup> or where they have abandoned the hearing,<sup>47</sup> the panel has proceeded to hear the case in the absence of that party.

If the Arbitration Council finds that there is no dispute currently existing or that the dispute is not a collective dispute, then it does not have jurisdiction and so cannot decide the issue. In the Jacqsintex Garment case (#10/03) the workers demanded that the employer should not dismiss workers for reasons other than serious misconduct. The workers did not give any instances of such dismissals. The Arbitration Council held that there was no existing dispute and that it would not decide disputes which have not yet occurred.

Further, if the Arbitration Council has already decided an issue as part of the same dispute between the parties, then it may refuse to decide the same issue a second time.



In an interim decision in the Hotels case (#18/04), the Arbitration Council ordered that Raffles le Royal and Raffles Grand Hotel d'Angkor be removed as parties to the dispute as in cases #28/03 (Raffles Grand Hotel d'Angkor) and #29/03 (Raffles Le Royal), the Arbitration Council had already decided the issue in dispute (i.e. that the two hotels must continue to collect a 10% service charge and distribute it in full to their workers). The Council decided that it would be unjust to submit the parties to arbitration a second time on the same issue.<sup>48</sup>

<sup>45</sup> *Prakas* #99 of 2004, Article 21.

<sup>46</sup> See for example *Tonga Garment Co Ltd* (#03/03).

<sup>47</sup> *Raffles Le Royal* (#22/04).

<sup>48</sup> *Hotels case* (#18/04) - Interim Orders (1) made at a pre-hearing meeting on 12 April 2004 and the Reasons for those orders.



## **Remedies**

In both rights and interests disputes, the arbitration panel has a wide discretion to fully remedy the dispute before it.<sup>49</sup> Examples of remedies ordered by the Arbitration Council include:

- reinstatement of workers on contracts of undetermined duration with accumulated seniority and back pay;<sup>50</sup>
- orders for workers to cease striking immediately and employers to accept the workers back to work without imposing any penalty or punishment on those workers;<sup>51</sup>
- issuing a comprehensive CBA, which includes those matters already agreed between the parties as well as those matters in dispute;<sup>52</sup>
- orders to bargain; for example, orders have been made that include a deadline for the date by which a CBA should be completed and requiring the worker and employer parties to meet for at least one and a half hours per week during working hours to negotiate on the CBA;<sup>53</sup>
- brief disciplinary procedures and rules of conduct to be implemented in the workplace until such time as proper internal rules could be made;<sup>54</sup>
- compensation to workers for acts of discrimination on the basis of union membership;<sup>55</sup>
- consent orders for binding arbitration of future disputes.<sup>56</sup>

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<sup>49</sup> *Prakas #99 of 2004, Article 34.*

<sup>50</sup> *Prakas #99 of 2004, Article 34A & B; Jacqsintex Garment (#10/03).*

<sup>51</sup> *Prakas #99 of 2004, Article 34C; Raffles Le Royal (#29/03).*

<sup>52</sup> *Prakas #99 of 2004, Article 34G; Top One (#24/03), Raffles Grand Hotel D'Angkor (#28/03), Raffles Le Royal (#29/03).*

<sup>53</sup> *Prakas #99 of 2004, Article 34E; Chou Sing Garment (#06/04).*

<sup>54</sup> *Standard Garment (#27/03).*

<sup>55</sup> *Lucky Zone (#15/04).*

<sup>56</sup> *Day Young (#47/04).*



### ***Role of the Arbitration Council Secretariat***

The role of the Secretariat is to provide administrative support to the Arbitration Council. The Secretariat was established by Prakas #174 of 2003 and is currently comprised of a Head and 2 Officers. The Arbitration Council Procedural Rules set out the roles and responsibilities of the Secretariat. These include to:

- administer and facilitate the resolution of disputes by the Arbitration Council;<sup>57</sup>
- facilitate communication between parties and an arbitration panel outside of a hearing;<sup>58</sup>
- assist the parties with their queries concerning procedural aspects of the dispute and assist in clarifying issues arising out of the Prakas or the Procedural Rules.<sup>59</sup>

The Secretariat also plays specific roles in relation to the following procedures:

- initiating arbitration (rule 2);
- selection of arbitrators (rule 3);
- receiving and managing documents and communications (rule 6);
- arbitration proceedings (rule 4);
- the award (rule 5).

So, for example, the Secretariat notifies the parties of the date and place of the arbitration hearing, maintains the records of the arbitration hearing, and publishes the awards both electronically<sup>60</sup> and in the form of a 6-monthly bound volume.<sup>61</sup>

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<sup>57</sup> *Procedural Rules, rule 1.1*

<sup>58</sup> *Procedural Rules, rule 1.4.*

<sup>59</sup> *Procedural Rules, rule 1.5.*

<sup>60</sup> [www.arbitrationcouncil.org](http://www.arbitrationcouncil.org). English translations of the award are also available on the website.



### ***Awards of the Arbitration Council***

"Award" is the official name for the final written decision of the Arbitration Council. The final decision of the arbitration panel becomes the award of the Arbitration Council.<sup>62</sup>

The three members of the arbitration panel attempt to reach agreement about their decision, but if no agreement is possible, then the panel makes its decision by majority. Article 38 of the Prakas sets out the requirements for an award. These include that the award must contain:

- a summary of the procedure;
- a description of the claim and any counter claim;
- the reasons for the decision given in the award with, where applicable, reference to relevant legal provisions.

Once the award is issued the Minister, through the Arbitration Council Secretariat, must immediately notify the parties and provide them with certified copies of the award.<sup>63</sup> Awards and digests of the awards are also published on the Arbitration Council website in Khmer and English ([www.arbitrationcouncil.org](http://www.arbitrationcouncil.org)). At present the Arbitration Council is the only court or tribunal in Cambodia to publish reasons for all its decisions and to make its decisions publicly available.

### ***Enforcement of awards***

An award will be enforceable immediately if:

- the parties have agreed in writing to be bound by the award; or
- the parties are bound by a CBA which provides for binding arbitration.<sup>64</sup>

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<sup>61</sup> *Procedural Rules*, rule 4.1, 4.4 and 4.11.

<sup>62</sup> *Prakas* #99 of 2004, Article 12.

<sup>63</sup> *Labour Law*, Article 313; *Procedural Rules*, rule 5.3.

<sup>64</sup> *Prakas* #99 of 2004, Article 42. See for example *Day Young* (#37/04).



In all other cases, a party that does not wish to be bound by an award of the Arbitration Council may file an opposition with the Secretariat within eight calendar days of receiving notification of the award.<sup>65</sup> Filing an opposition to an award makes the award unenforceable.<sup>66</sup> If neither party files an opposition to the award within the time permitted, the award will be enforceable.<sup>67</sup>

Once the award becomes enforceable the Labour Inspectorate will assist in its implementation.<sup>68</sup> If either party refuses to abide by an enforceable award, then the other party can ask the court to enforce the award.<sup>69</sup> This is not an appeal. The court should not look in detail at the factual or legal aspects of the case and it can only refuse to enforce the award in the strictly limited circumstances set out in Article 47 of Prakas #99 of 2004.

To refuse enforcement, the court must rule that the award was unjust because of procedural irregularities or because the Arbitration Council made an award which went beyond the power given to it by law.



*Union A and Employer B are involved in a collective dispute. They cannot reach an agreement in conciliation so the dispute is referred to the Arbitration Council. By mistake the Secretariat fails to notify A of the award of the Arbitration Council. Eight days pass and neither party files an objection so the decision becomes enforceable.*

*The court might refuse enforcement of this award because the Secretariat failed to inform both parties of the award as required by Article 313 of the Labour Law.*

<sup>65</sup> Labour Law, Article 313; Prakas #99 of 2004, Article 40.

<sup>66</sup> Prakas #338, Article 40.

<sup>67</sup> Labour Law, Articles 313 & 314; Prakas #99 of 2004, Articles 40 & 41.

<sup>68</sup> Prakas #99 of 2004, Article 35.

<sup>69</sup> Prakas #99 of 2004, Article 46.



In cases involving interests disputes, the Arbitration Council's award will have the status of a CBA between the parties. This means that the award and the conditions listed in it will govern the working relationship between the parties. Such an award will remain in effect for at least one year, unless the parties agree to replace the award with another CBA.<sup>70</sup> Because such an award has the status of a CBA, this may effectively bar the worker party from bringing any other interests disputes to the Arbitration Council or taking industrial action on interests issues during the one-year period.<sup>71</sup>

The Arbitration Council has issued several awards in interests disputes which have set out comprehensive terms and conditions of employment in the form of a CBA.<sup>72</sup> In the Chou Sing Garment case (#06/04), the Arbitration Council declined to decide a single interests issue and instead made orders to requiring the parties negotiate a CBA. This was done because the Council was concerned that the parties did not understand that issuing an award which decided this interests issue would bar them from negotiating a full CBA for one year.

All enforceable awards must be posted in the enterprise involved and in the relevant provincial or municipal Labour Inspectorate office.<sup>73</sup> Additionally, awards in interests disputes must be registered in the same way as a CBA.<sup>74</sup>

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<sup>70</sup> Prakas #99 of 2004, Chapter 6.

<sup>71</sup> Article 321 of the Labour Law; Chou Sing Garment (#06/04).

<sup>72</sup> Top One (#24/03), Raffles Grand Hotel D'Angkor (#28/03), Raffles Le Royal (#29/03).

<sup>73</sup> Labour Law, Article 315.

<sup>74</sup> Prakas #99 of 2004, Article 45.



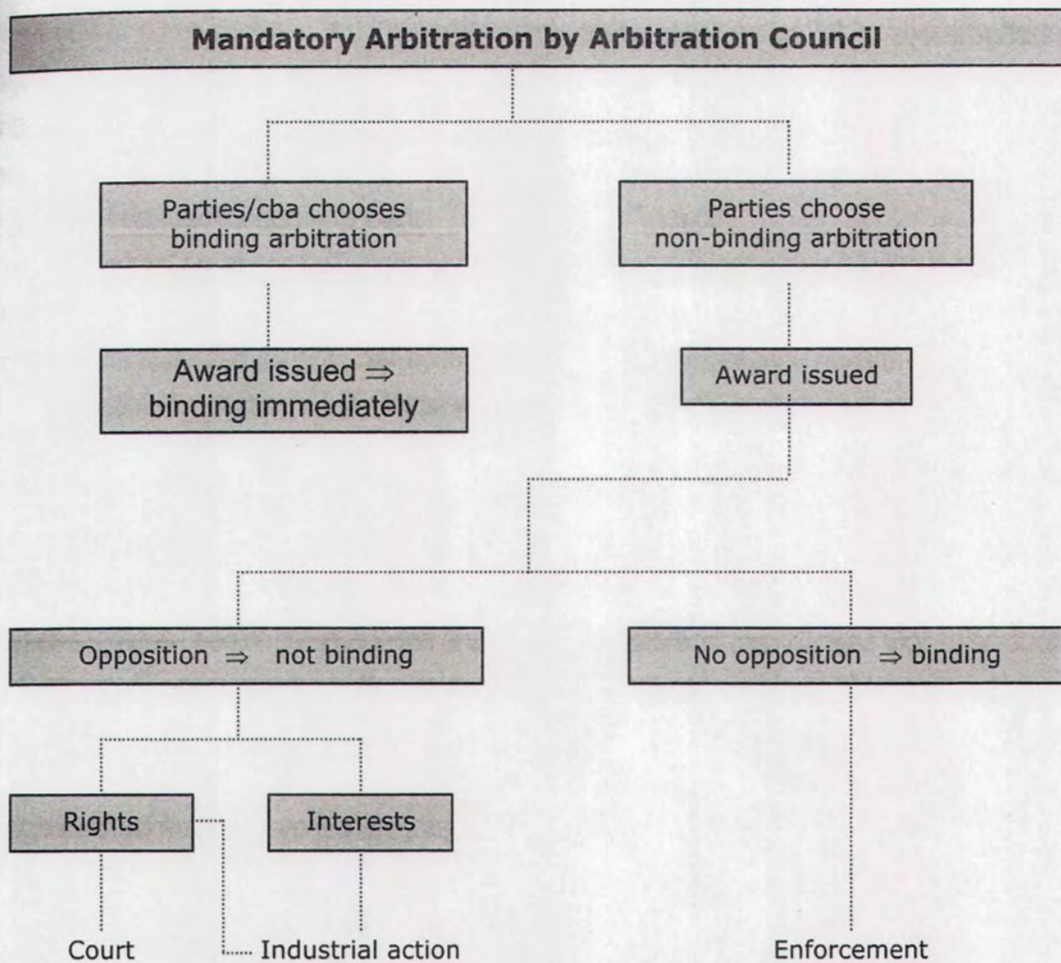


Figure 4: Enforcement of an award



### ***Consequences of Filing an Opposition***

If one of the parties objects to a decision of the Arbitration Council, the award will be unenforceable.<sup>75</sup>

In the case of interests disputes, the parties cannot go to court. The courts in Cambodia have no right to decide issues such as whether workers should get a pay raise or deserve better working conditions than those provided by law. Where arbitration fails, the parties must find their own solution to an interests dispute. This may involve other actions such as strikes or lockouts.

In rights disputes, however, the aggrieved party may seek resolution through the court. This is possible because it is the role of the courts to settle disputes relating to rights under law and contract. The courts are given a specific jurisdiction to deal with labour disputes under Articles 385-389 of the Labour Law. Of course, the aggrieved party is not compelled to go to court. Parties may also take action such as strikes and lockouts to compel the other party to comply with a CBA or with the law. In this case the strike or lockout is being used as a tool to resolve a rights dispute.

Under Cambodian law, workers must take certain steps before they can exercise their right to strike. Importantly, they must have exhausted all peaceful avenues for resolving the dispute before they hold a strike.<sup>76</sup> In case of a collective dispute, this will usually include arbitration.

The right to strike can also be exercised if the Arbitration Council fails to make or submit its award within the time limits set by law.<sup>77</sup> Details regarding the right to strike are discussed below.

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<sup>75</sup> *Labour Law, Article 313; Prakas #99 of 2004, Article 41.*

<sup>76</sup> *Labour Law, Article 320.* Exceptions to this rule may apply where, for instance, the workers demand immediate action for their life and safety. For example, if part of a factory is dilapidated and the workers fear it may fall at any moment, then peaceful means of dispute resolution may be regarded as having been exhausted without waiting for conciliation and arbitration to occur. They may have no other option but to press for the demand by initiating a strike. Similarly, if there is a failure to conciliate or to refer a dispute for arbitration within the time limits set out in the Labour Law, then it could be argued that the workers have exhausted all peaceful means of dispute resolution when the relevant time limits expires (see Labour Law, Article 320(1)).



## STRIKES AND LOCKOUTS

When one or more workers and their employers cannot resolve their labour dispute through negotiation or other dispute resolution processes, one party may decide to take action to force the other party to compromise. Workers may take action by withholding their work. This is called a "strike." Employers may take action by closing all or part of the workplace so that workers cannot come to work. This is called a "lockout."

Through strikes and lockouts, one party to the dispute puts economic pressure on the other party to compromise. If the workers strike, the employer is not able to earn any money. If the employer locks workers out, the workers cannot earn any money. In either a strike or lockout, both parties are affected economically. The difference is who initiates the action – the workers or the employer.

The right of workers to withhold their work and the right of employers to suspend their business operations are fundamental freedoms in a democratic society. For this reason, international conventions and laws in many countries protect these rights, particularly the right of workers to strike. But strikes and lockouts are drastic actions, and they can be very disruptive to the parties involved and to other people. For this reason, laws in many countries place limits on workers' right to strike and the employer's right to lockout.

Article 37 of the Cambodian Constitution recognises the right to strike and states that it will be implemented in the legal framework. As a general rule under the Labour Law:

- If the strike is lawful, workers cannot be lawfully terminated for going on strike – but they do not earn any salary while they are on strike.<sup>78</sup> If the strike is declared to be unlawful by the court, striking workers may be terminated for serious misconduct if they do not return to work within 48 hours from the time when this judgment is issued.<sup>79</sup>

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<sup>77</sup> Labour Law, Article 320.

<sup>78</sup> Labour Law, Articles 332 & 333.

<sup>79</sup> Labour Law, Article 337. See also *Raffles Le Royal* (#22/04).



- If the lockout is lawful, the employer is not required to pay the salaries of locked-out workers. But if the lockout is unlawful, the employer must pay salaries during the time the workers were locked out.<sup>80</sup>

## DEFINITION OF A STRIKE

Article 318 of the Labour Law defines a strike under Cambodian law.



**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.*

Strikes are “concerted” actions, meaning a group of workers acting collectively. When unions call a strike, the action clearly is concerted. Workers who do not belong to unions can also go on strike. It is not clear how many workers must stop work together to be considered a “concerted work stoppage.” However, if the dispute meets the definition of a collective labour dispute in Article 302, then the action also should be considered “concerted” for the purposes of Article 318.

Although workers have a right to strike, Articles 319 – 321 of the Labour Law set limitations and qualifications on the exercise of this right. These provisions primarily concern the purpose and timing of strikes.

## LAWFUL PURPOSES OF STRIKES

There are two lawful purposes of strikes:<sup>81</sup>

- to enforce compliance with a CBA or with the law, and
- to defend the economic and socio-occupational interests of workers.

<sup>80</sup> Labour Law, Article 335.

<sup>81</sup> Labour Law, Article 320.



The first purpose relates to rights disputes, that is, to disputes with regard to unlawful labour practices or other unlawful actions on behalf of the employer. Workers contend that the employer is not complying with a CBA or with the law. The union or group of workers<sup>82</sup> strikes to enforce the agreement or the law.

The second purpose relates to interests disputes. Usually, these strikes occur during negotiations on CBAs when the employer refuses to grant worker demands for wage increases, reduced working hours, promotion policies, and other working conditions.

### **UNLAWFUL PURPOSES OF STRIKES**

The Labour Law lists two specific *unlawful* purposes of strikes:<sup>83</sup>

- to dispute the interpretation of a law, regulation, CBA, or arbitral award accepted by the parties; and
- to revise a CBA or arbitral award accepted by the parties and that has not yet expired.

The first unlawful purpose concerns disputing an interpretation of a law or legal instrument by an official who has the legal authority to make that interpretation.

Therefore, for example, workers may not strike to protest an interpretation of the law contained in a binding award of the Arbitration Council or a judgment of a court. The employer has no authority to disobey such interpretations of the law and thus, it is not proper for workers to strike in order to force them to do so.

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<sup>82</sup> The second paragraph of Article 320 authorizes a strike when a "union" intends to enforce a CBA or the law. The use of the word "union" in the second paragraph probably does not mean that only unions may strike for this reason. It seems that under Article 318, a group of employees who are not represented by a union could also call, a strike to enforce their CBA or the law.

<sup>83</sup> *Labour Law, Article 321.*



The second unlawful purpose relates to the legal obligations of the employer and workers under *existing* CBAs or arbitral awards. Once the parties have agreed to a CBA, or have accepted an award, the parties are obliged to follow the CBA or award until it expires. Employers are not obliged to negotiate to revise these final agreements and awards until they expire. Therefore, workers may not go on strike to force the employer to negotiate on an existing CBA or arbitration award.

### **LAWFUL TIMING OF STRIKES**

Although the workers may have a lawful reason to strike, the strike still may be unlawful on the basis of timing. Articles 318 – 321 contain several provisions related to the lawful timing of strikes. In general, a strike may only be exercised after all peaceful means of resolving the dispute have been tried.



**Article 320 (4)** *The right to strike can only be exercised once all peaceful methods for settling the dispute with the employer have been exhausted.*

In addition to this general principle, the Labour Law sets out two specific triggers which make a strike lawful:

- when one of the parties lodges an opposition to an award of the Arbitration Council;<sup>84</sup> and
- when the Arbitration Council has not rendered an award within the time limits provided by law.<sup>85</sup>

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<sup>84</sup> *Labour Law, Article 319.*

<sup>85</sup> *Labour Law, Article 320.*



For disputes which are within the jurisdiction of the Arbitration Council, workers may not strike until one of the above occurs. This means that, there should be no strikes or lockouts during conciliation or arbitration of the dispute. On several occasions, the Arbitration Council has made orders requiring the workers to cease striking before their claims could be heard.<sup>86</sup> The Council has also made orders that the employer must accept workers back to work pending the resolution of the dispute by the Council.<sup>87</sup>

### **PROCEDURE REQUIRED FOR CALLING A STRIKE**

In addition to the requirements for the purpose and timing of a strike set out above, a strike is only legal if it is called according to the correct procedures. These are set out in Articles 323 – 325 and 327 of the Labour Law.

Under Article 323, a strike is not lawful unless the members of the union have approved the strike by secret ballot. This requirement ensures that members of the union have a democratic voice in this important decision.

Under Articles 324, 325 and 327, a strike is not lawful unless the union gives seven working days notice of the strike to the employer and to the Ministry. If the strike affects an essential service (for example hospitals, electricity or water supply) the notice period is 15 working days.<sup>88</sup> During the notice period, the Minister will attempt a final conciliation of the dispute.

These mandatory notice and conciliation requirements play two important functions. First, the requirements preserve the right of a union to call a strike, but only as a last resort when all other efforts have failed. Second, these requirements give a “cooling-off period” during which the Minister attempts to encourage the parties to reach a voluntary settlement.

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<sup>86</sup> See interim orders in *MSI* (#04/04) and *Hotels case* (#18/04).

<sup>87</sup> See interim orders in the *Hotels case* (#18/04).

<sup>88</sup> *Labour Law*, Article 327.



During the notice period, the parties are also required to attend a meeting to arrange the minimum services required during the strike period. The minimum services are only to ensure the protection of the facility's installations and equipment during the strike.<sup>89</sup> If the parties cannot agree, then the Minister will determine the minimum services required. For strikes affecting essential services, the Minister determines the minimum requirements so as not to endanger the life, health or safety of persons affected by the strike.<sup>90</sup> Workers who are required to provide minimum services, including minimum essential services, are guilty of serious misconduct if they fail to appear to carry out that work.<sup>91</sup>

### **DETERMINING THE LEGALITY OF STRIKES**

Articles 336 and 337 define illegal strikes and specify the effects of illegal strikes. When a strike does not comply with the required procedures, for example if the workers did not give the required notice or did not hold a secret ballot, the strike may be declared illegal. Although Article 336 refers specifically to procedures, it seems that strikes may also be declared illegal if they have an illegal purpose as set out in Article 321.

A failure to act peacefully during a strike may also result in the strike being declared illegal. Articles 330 and 331 describe two types of non-peaceful actions by strikers: committing acts of violence; and preventing non-striking workers from going to work by coercion or threats.



**Article 337.** ...the Courts have sole jurisdiction to decide on the legality or illegality of a strike...

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<sup>89</sup> *Labour Law, Article 326.*

<sup>90</sup> *Labour Law, Article 328.*

<sup>91</sup> *Labour Law, Articles 326 & 328.*



The courts have sole jurisdiction for determining the legality of a strike.<sup>92</sup> If the court declares that a strike is illegal,<sup>93</sup> then under Article 337 the strikers *must* return to work within 48 hours of this decision being issued. A worker who, without a “valid reason”, fails to return to work by the end of this period will be considered to have committed an act of serious misconduct and may be terminated.<sup>94</sup> However, the Arbitration Council has concluded that participating in an illegal strike is not, by itself, serious misconduct.<sup>95</sup>



In the Raffles Le Royal case (#22/04), the Arbitration Council held that the 48 hour period for the workers to return to work is calculated from the time (both the day and the hour) when the Court *issues* its decision with regard to the legality of the strike and not the time at which the decision is taken to or served on the workers. However, the fact that the Le Royal workers did not know about the declaration of the Court until 2pm on 10 April 2004, 24 hours after it was issued, provided a valid reason for them not to return to work until 2pm on 12 April 2004. The Council also considered whether the workers had a valid reason for not returning to work after that time. The Council held that the employer's requirement that the workers register their names and promise not to participate in any further strike was not reasonable, given that the right to strike legally is set out in the Labour Law and the Constitution, and therefore the workers had a valid reason not to return to work.

<sup>92</sup> Labour Law, Article 337.

<sup>93</sup> In *Raffles Le Royal* (#22/04) the Arbitration Council noted that interim orders made ex parte may not be a declaration for the purposes of Article 337 of the Labour Law. However, the Council noted that the *deka kec ka pranhap* in that case was a final decision of the Court and so was a declaration about the legality of the strike for the purposes of Article 337 of the Labour Law.

<sup>94</sup> Labour Law, Article 337.

<sup>95</sup> *Sunway Hotel* (#18/04) and *Raffles Le Royal* (#22/04).



Although the Labour Law does not give the Arbitration Council the jurisdiction to make a declaration as to whether a strike is legal or illegal, sometimes it will be necessary for the Council to consider the legality of a particular strike as part of another claim. For example, in the Lida Garment case (#04/03) the workers made a claim for wages during a strike. As part of its reasons on this issue, the Council considered the legality of the strike and concluded that it had not been conducted in accordance with the procedures required by the Labour Law.<sup>96</sup>

### **RULES IN EFFECT DURING A STRIKE**

To prevent labour disputes from getting out of control, and to deter abuses that may result from a strike, the Labour Law imposes certain rules on the conduct of the workers and the employer during a strike:

1. Non-violence. Any violent acts committed during a strike by either party are considered to be acts of *serious misconduct* and will be subject to the consequences associated with such an act. In addition, worker acts of violence may render the strike *illegal*.<sup>97</sup>
2. Labour contracts are suspended during a strike. Therefore, striking workers are generally not paid any salary during the strike.<sup>98</sup>
3. A partial exception to this contract suspension rule applies to workers' delegates, who must continue to perform as worker representatives.<sup>99</sup>
4. Workers are free to choose not to strike and may instead continue working and receiving their salary. The striking union or striking workers may not restrain or threaten these workers.<sup>100</sup>
5. All striking workers, except those who have committed acts of serious misconduct, must be reinstated to their jobs at the end of the strike and the employer may not in any way punish these workers because of their participation in the strike.<sup>101</sup>

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<sup>96</sup> See also *Wash Concept* (#08/04); *Lucky Zone* (#15/04).

<sup>97</sup> *Labour Law*, Articles 330 & 336.

<sup>98</sup> *Labour Law*, Article 332. See for example *Yada Printing* (#16/04).

<sup>99</sup> *Labour Law*, Article 332.

<sup>100</sup> *Labour Law*, Article 331.



6. Employers may not recruit new workers to replace striking workers unless those new workers are needed to meet minimum service requirements that the striking workers refuse to meet.<sup>102</sup>

There are strong penalties, including imprisonment, for violating any of the last three rules.<sup>103</sup> In addition any punishment of striking workers is void.<sup>104</sup>

Employers who illegally recruit replacement workers must then pay the salaries of the striking workers.<sup>105</sup> In the Lida Garment case (#04/03), the employer had transferred the raw materials to another factory for getting the work done there. The Arbitration Council held that it was in effect hiring new workers in place of the striking workers.

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<sup>101</sup> *Labour Law, Articles 330 & 333.* The Arbitration Council has observed that it may be an improper sanction, in the sense of Article 333, to withhold the \$5 regular attendance bonus from workers who participate in a strike that is held in compliance with Chapter XIII (*Lida Garment #04/03*).

<sup>102</sup> *Labour Law, Article 334.* See also *Lida Garment (#04/03)* and *Raffles Le Royal (#22/04)*.

<sup>103</sup> *Labour Law, Article 369.*

<sup>104</sup> *Labour Law, Article 333.*

<sup>105</sup> *Labour Law, Article 334.*



## LOCKOUTS

The Labour Law specifically protects the right of an employer to lock their workers out in a labour dispute.<sup>106</sup> A lockout is defined as "a total or partial closing of an enterprise or establishment by the employer during a labour dispute."<sup>107</sup>

The right to lockout is designed to allow employers to close their enterprise either during or in anticipation of a strike. The right to lockout is subject to the same rules and restrictions as the right to strike.<sup>108</sup>

If an employer conducts an illegal lockout they must pay workers' salaries during the lockout and penalties also apply.<sup>109</sup>

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<sup>106</sup> *Labour Law, Article 319.*

<sup>107</sup> *Labour Law, Article 318.*

<sup>108</sup> *Labour Law, Article 322.*

<sup>109</sup> *Labour Law, Article 369.*



**APPENDIX 1 - LABOUR LAW (1997)****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 organize 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.
- 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.



**APPENDIX 2 - PRAKAS ON THE ARBITRATION COUNCIL**

# 99 MOSALVY

Phnom Penh, 21 April 2004

**CHAPTER 1  
COMPOSITION OF THE ARIBTRATION COUNCIL**

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

The Ministry of Social Affairs, Labor, 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.-

**Article 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 Article 6 of this Prakas; or
- C. The member has assumed an office referred to in Article 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 Article 1 above, each member of the Arbitration Council shall be deemed to have been reappointed for a further term of one year.

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

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

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

**Article 4** If the representatives of employer associations on the Labor 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 Labor Advisory Committee, shall be entitled to submit an equal number of nominations.

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



**Article 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 Article 3 A, above shall:

- hold a Bachelor of Law degree or other equivalent legal qualifications;
- have a sound knowledge of the Labor Law and its implementing regulations.

C. Members, appointed under Article 3 B and C, above shall have:

- a sound knowledge of the Labor Law and its implementing regulations;
- at least one year's experience in labor issues or conflict resolution.

**Article 7** Persons that cannot be appointed as a member of the Arbitration Council are:

- A. civil servants of the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation;
- B. an owner or manager of an enterprise which is member of an employer organization, or an office holder of an employer organization, or a person who used to hold such office during the past period of 12 months; or
- C. a labor union member, or an office holder of a labor union, or a person who used to hold such office during the past period of 12 months.

**Article 8** A member of the Arbitration Council shall be appointed without being discriminated against because of his nationality or other reasons as provided in Article 31, Paragraph two of the Constitution of the Kingdom of Cambodia.



**Article 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.

**Article 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 Article 6 of this Prakas; or who has assumed an office referred to in Article 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.

**Article 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 Labor Law. No one shall give any instructions to the Arbitration Council or its members with regard to the settlement of disputes.

## **CHAPTER TWO**

### **Composition of Arbitration Panel**

**Article 12** Any collective dispute submitted to the Arbitration Council under Article 309 of the Labor 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 Article 3 B, above, and chosen by the enterprise which is party to the dispute;



- B. One member from the category indicated in Article 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 Article 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 Article 3 A.

**Article 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.

**Article 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.

**Article 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.

**Article 16** The fact that a member of an arbitration panel does not recuse himself or herself if required under provision of Article 15 above, may be used as a reason for the implementation of provisions set out in Article 47 of this Prakas relating to the non-recognition of an award.

**Article 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 Articles 12 and 13 above.



### **CHAPTER THREE**

#### **Arbitral Proceedings**

- Article 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.
- Article 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 authorized in writing by that party.
- Article 20** During the arbitration process, the parties to the dispute must abstain from any strikes or lockouts (as defined in Article 318 of the Labor Law), or any other action likely to aggravate the situation. The parties must attend all meetings to which the arbitration panel calls them.
- Article 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.
- Article 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.
- Article 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.



**Article 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 organizations 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.

**Article 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.

**Article 26** The arbitration panel is authorized 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.

**Article 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.

**Article 28** Except as provided in Article 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.

**Article 29** All meetings of the arbitration panel shall be held in closed session.



**Article 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 Labor 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.

**Article 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 Labor 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 Article 3 above.

#### **CHAPTER FOUR**

##### **Jurisdiction and Remedies**

**Article 32** The arbitration panel shall decide on any collective labor dispute that is referred to it in accordance with Article 309 of the Labor Law.

**Article 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.

**Article 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 Labor Law, implementing regulations under the Labor Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labor 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 Article 30 of this Prakas;
- G. the establishment of terms for a collective bargaining agreement;
- H. such other relief as is appropriate.

**Article 35** The Arbitration Council may give notice about the award to the Department of the Labor Inspection or to the provincial/municipal offices of Social Affairs, Labor, Vocational Training, and Youth Rehabilitation in order for these to assist in taking measures for the implementation of the award.

## **CHAPTER FIVE**

### **Arbitral Award**

**Article 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.

**Article 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.

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

**Article 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, Labor, 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, Labor, Vocational Training, and Youth Rehabilitation that the proceedings have been terminated.

**Article 40** Each of the parties may lodge an opposition to the arbitral award by informing the Minister of Social Affairs, Labor, 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 Labor 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.



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

**Article 42** Article 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**

**Article 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.

**Article 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.

**Article 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**

- Article 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 recognize 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.
- Article 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 Labor 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 Labor Law and this Prakas.

## **CHAPTER EIGHT**

### **Secretariat and Expenses**

- Article 48** The Department of Labor Inspection of the Ministry of Social Affairs, Labor, Vocational Training, and Youth Rehabilitation shall be responsible for the organization and functioning of the secretariat of the Arbitration Council.
- Article 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"**

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

## **CHAPTER TEN**

### **Transitional Provision**

**Article 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, Labor, Vocational Training and Youth Rehabilitation on the nomination of the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation after consultation with the ILO Labour Dispute Resolution Project.

## **CHAPTER ELEVEN**

### **Repeal of Prakas #338 and Entry into Force**

**Article 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.

**Article 53** This Prakas shall enter into effect on the date of the signature.



**APPENDIX 3 - ARBITRATION COUNCIL PROCEDURAL RULES**

**UNDER  
ARTICLE 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  
No.72, St. 592 (Corner of St. 327)  
Sangkat Boeung Kak II  
Khan Toul Kork  
Phnom Penh  
Cambodia

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 Labor 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 Article 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, Labor, Vocational Training and Youth Rehabilitation under Article 308 of the Labor 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 Labor Law, the Secretariat shall immediately assign a unique file number to the dispute and enquire whether the parties have chosen arbitrators pursuant to Article 12 of the Prakas.
- 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 Article 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 Article 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 Article 13 of the Prakas.
- 3.5 Upon selection of the arbitrators from the lists under Article 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, Labor, Vocational Training and Youth Rehabilitation under Article 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 Article 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 Article 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 confirmed 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 Article 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 Article 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 Article 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:

- (b) any evidence given in an arbitration hearing; and
- (c) 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.

All records of proceedings must be filed with the Secretariat.

#### **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 Article 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 standardized 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 Labor 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, Labor, 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 Labor Law, and to an opposition under Article 40 of the Prakas.
- 6.2 For the purposes of any proceedings under Chapter XII, Section II of the Labor 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 Article 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 Labor 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 authorized 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, Labor, Vocational Training and Youth Rehabilitation shall make such amendments after consultation with the Arbitration Council.