Arbitration of Individual Versus Collective Labor Disputes: A Critique for the Better
Abstract

This master’s thesis analyzes matters over the two main categories of labor disputes in order to clarify the concerned legal provisions and the jurisdiction of the Arbitration Council over individual labor disputes. Also the purpose is to provide recommendations on certain criteria the Arbitration Council should consider in determining the dispute categories. The study is based primarily on relevant arbitral decisions made by the Arbitration Council from its inception in 2003 until 2008. The plain text meaning theory of statutory interpretation also serves as major means of explaining the related articles of the labor law and regulations regarding the two types of labor disputes. The findings of the paper suggest that the existing legal texts do not restrict the Arbitration Council’s jurisdiction to only collective labor disputes and that the arbitration body should improve its legal reasoning about the issues.

The thesis also examines the existing laws and regulations to find out what the silence in law means regarding the establishment of private arbitration procedures for labor dispute resolution. The purpose is to expand the already reliable and expeditious alternative system to justice in Cambodia. A variety of legal instruments in effect are used including the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, which Cambodia ratified in 1960; the Constitution, the Code of Civil Procedure, the Law on Commercial Arbitration, the Labor Law and other regulations. The results of the analysis reveal that parties may legally opt for arbitration to settle their disputes, collective or individual. The findings also suggest that the Arbitration Council Foundation, which provides technical and financial support to the Arbitration Council, is in the best position to take the initiative to establish such procedures. However, the study recommends that Cambodia needs a uniform arbitration law to govern arbitration system, both state-sponsored and private.

All these results may carry major implications for developing jurisprudence of the Arbitration Council concerning collective and individual disputes. To managements and workers, the findings represent fresh hope of labor justice without them risking their employment relationship in the adversarial litigation, which in turn helps boost the national economy. To legal practitioners and scholars, the findings present a new topic for discussion hopefully contributing to the current efforts for legal and judicial reforms in the country.
Acknowledgement

This thesis arose in part out of my two years of study at the Nagoya University Graduate School of Law. I have worked with a great number of persons whose contribution in assorted ways to the research and the making of the thesis deserved special mention. It is a pleasure to convey my gratitude to them all in my humble acknowledgment.

In the first place I would like to record my gratitude to Professor WATANABE Miyuki for her supervision, advice and guidance in the early stage of this study before she had to depart for Germany to conduct her own research. As my first academic adviser, she provided me with considerable encouragement and support in various ways. Her intuition as a teacher guided me smoothly toward the formation and structure of the thesis.

I gratefully thank Professor WADA Hajime, my current academic adviser, for his thoughtful comments on the contents of the study. His encyclopedic knowledge about labor and employment law, and specialist inputs to the research have triggered my intellectual maturity that I will benefit from for the rest of my life. The seminars we had on a regular basis opened up my eyes to a wide range of issues in labor and employment law of various countries around the world. I am profoundly indebted to him.

My special thanks also go to Japan International Cooperation Center (JICE) and the International Students Affairs Office of Nagoya University Graduate School of Law for providing the active support in both our academic and social life. Without them, it would have been much harder for me to mentally remain in the prime of life while staying so far away from home in the country whose language I could barely speak.

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My parents deserve a special mention here too, for their emotional support and prayers. My father, SRENG Y, is the person who has taught me to enjoy the present. Thinking of him always relieves me of the fearful past and future in which my ego catch me. My mother, PICH Thavy, is the most loving and caring person in my life. During my years here, she never failed to pray for my success and joy. Her special pride in me serves as a forceful drive in my life journey.

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Y Samphy

December 14, 2008
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**Abbreviations and Acronyms**

AAA American Arbitration Association  
AC Arbitration Council  
ACF Arbitration Council Foundation  
CLEC Community Legal Education Center  
DFID International Development  
FMCS Federal Mediation & Conciliation Service  
ILO International Labor Organisation  
LoCA Law on Commercial Arbitration  
MoLVT Ministry of Labor and Vocational Training  
MoSALVY Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation  
NAC National Arbitration Center  
UNDP United Nations Development Programme  
USAID United States Agency for International Development

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Introduction

Short Overview of Individual versus Collective Labor Disputes

Cambodia’s effective Labor law\(^1\) of 1997 (hereinafter, “the Labor Law”) classified labor disputes into two main categories: collective disputes and individual disputes. For a labor dispute to be qualified as a collective dispute three criteria must be considered under Article 302: the parties, the subject matter, and the consequences. The first requirement concerning the parties provides that there must be one or more employers and a group of workers (whether collectively or not is unmentioned). The second condition regarding the subject matters requires that the issue relate to working conditions, the exercise of the rights of professional organizations, their recognition within the enterprise, or problems regarding relations between employers and workers. The third requirement about the consequences states that such a dispute could result in the disruption of the enterprise or threaten social peace.

Only two conditions are attached to an individual dispute: the parties and the subject matter. An individual dispute is defined under Article 300 as a dispute that occurs between “the employer and one or more of their workers or apprentices individually (emphasis added)” and that “relates to the interpretation or enforcement of the terms of a labor contract or apprenticeship contract, or the provisions of a collective agreement as well as regulations or laws in effect.”\(^2\)

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\(^1\) The 1997 Labor Law can be viewed online at http://www.arbitrationcouncil.org/pdf_files/laws/LL_1997_e.htm

**Figure 01: Differences in legal elements of individual and collective disputes**

<table>
<thead>
<tr>
<th>The parties</th>
<th>Individual disputes</th>
<th>Collective disputes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Employer and one or more workers <em>individually</em></td>
<td>One or more employers and a group of workers (whether collectively or not is unmentioned)</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>The subject matter</th>
<th>Individual disputes</th>
<th>Collective disputes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interpretation or enforcement of the terms of the disputed parties’ labour contract;</td>
<td>Working conditions;</td>
<td></td>
</tr>
<tr>
<td>The provisions of a collective agreement; and</td>
<td>Exercise of the right of professional organizations;</td>
<td></td>
</tr>
<tr>
<td>The provisions of regulations or laws in effect.</td>
<td>Recognition of professional organizations within the enterprise; and</td>
<td></td>
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<td></td>
<td>Issues regarding relations between employers and employees.</td>
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<table>
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<tr>
<th>The consequences</th>
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Different procedures are required to resolve labor disputes depending on how they are classified.\(^3\)

Parties to a collective dispute go through mandatory conciliation by the labor conciliator of the Ministry of Labor Law, Ch. XII §§1, 2 (1997).

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\(^3\) Labor Law, Ch. XII §§1, 2 (1997).
Labor and Vocational Training ("MoLVT") if their collective agreement does not include a planned settlement procedure (Art. 303). Where conciliation fails, the case may be referred to any arbitration procedures set forth in their collective agreement; any other procedure the parties agree to; or else an arbitration body known as the Arbitration Council (hereinafter, “the AC” or “the Council”) for mandatory arbitration (Art. 309). The AC renders a non-binding award to which parties may oppose, in which case the disputants may proceed with litigation if the dispute concerns rights or take industrial action where it concerns interest.  

In case of an individual dispute, parties may opt for voluntary conciliation conducted by the labor conciliator before filing their complaint with the competent court (Art. 300-01). There is no mention of arbitration as a means of settlement of individual disputes.

**Background to the Problem**

Access to justice through the formal system appears not viable in Cambodia, at least not in many years to come, due mainly to corruption issues. The defect is that Cambodia does not have a mechanism to resolve labor disputes fairly and expeditiously. As a result, efforts in legal reform have turned to the Alternative Dispute Resolution (ADR) for better access to justice in the country. An obvious outcome was

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4 Prakas #099 on The Arbitration Council [Prakas #099] § 5 Clause 40 (Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation [MoSALVY]) (2004) (Prakas, a Khmer legal term meaning ministerial order, is issued by the head of a Ministry or a State Secretariat. Prakas can be for the purpose of establishing the structure and operations of individual ministries and/or defining activities to be carried out by the ministries concerned, at the departmental or other low-ranking levels. Prakas can also provide for the appointment, replacement or dismissal of public servants ranking lower than a department chief of the Ministry concerned).


the establishment of the Arbitration Council in 2003. The AC is the only arbitration body resolving labor disputes in Cambodia. Where only 28 disputes were processed during the first nine months since its inception, by July 2008 the Arbitration Council received some 600 cases. Because of its independence, transparency and fairness, the AC has gained a great deal of trust from all of the industrial stakeholders and is viewed by such interested donors as DFID, USAID and the World Bank as a great model for legal and judicial reform in Cambodia. Arbitration as an alternative form of labor dispute resolution is always necessary so long as arbitrators can guarantee their neutrality and are competent in their decision making.

The Arbitration Council has interpreted the 1997 Labor Law and a ministerial order officially known as Prakas #099 on the Arbitration Council (hereinafter, “Prakas #099”) to mean that it does not have jurisdiction over individual labor disputes and therefore refuses to resolve them at all. Such jurisprudence has provoked the following questions: 1) To what extent is labor justice achieved through the AC; and 2) Who is left out in the journey toward better access to labor justice? It is parties to individual dispute, unionized or non-unionized. Litigation, the formal method for justice system which is charged with the settlement of this category of labor disputes, does not earn the trust of management and workers in Cambodia. Moreover, there is nothing in the existing labor law and regulations expressly forbidding or allowing for other method of dispute resolution. Employers and employees are left with questions concerning the validity of a decision by a third neutral whom they mutually select to help handle their individual disputes as set out by law.

There is a growing trend in Cambodia that workers would try to convert their individual disputes into collective ones with the support from workers’ organizations so that their disputes can be heard fairly

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10 Orn Panhha, Harmonizing the Administration of Industrial Justice in Cambodia 164, 169 (doctoral dissertation, Nagoya University Graduate School of Law June 2008).
11 Prakas, a Khmer legal term meaning ministerial order, is issued by the head of a Ministry or a State Secretariat. Prakas can be for the purpose of establishing the structure and operations of individual ministries and/or defining activities to be carried out by the ministries concerned, at the departmental or other low-ranking levels. Prakas can also provide for the appointment, replacement or dismissal of public servants ranking lower than a department chief of the Ministry concerned.
12 E.g. 10/03 – Jacqsintex, 6 (AC 2003); 41/04 – Micasa Hotel, 9 (AC 2004); 07/05 – Coca Cola, 9 (AC 2005).
and expeditiously by the Arbitration Council. However, the attempts to have disputes classified by the Ministry as individual disputes does not exert influence considerable enough to bring about better labor justice in the country. According to a list of trade unions compiled by CLEC’s Industrial Relations Team, there are 1022 trade unions across various sectors in the country, representing about 496,000 employees. Of the total workforce of seven million,\(^{13}\) only about seven percent could benefit from the conversions of their individual into collective disputes while the remaining 93 percent are left with no good mechanism for their labor dispute resolution.

This thesis analyzes the existing laws and regulations in an attempt to open up a new arbitration door to labor justice through which individual disputes could be resolved fairly and expeditiously. First, the study reviews cases before the Arbitration Council over individual versus collective labor disputes, draws attention to certain legal provisions and principles regarding the two categories of disputes, and provides recommendations as to how the AC should define and resolve the disputes. Second, the thesis scrutinizes legal provisions relevant to individual labor dispute resolution through arbitration and seeks to answer whether or not this method is disallowed by law and how initiatives can be taken to succeed in the founding of such a system.

Methodology

The purpose of this thesis is to offer a flash of insight into how individual versus collective labor disputes are and should be defined under the law of Cambodia and to discuss the possibilities of the establishment of an arbitration system to settle individual labor disputes. In order to better understand individual versus collective disputes, more than twenty relevant cases of the Arbitration Council are critically reviewed and analyzed to find and provide recommendations for its future decision making. The review points out both the weaknesses and strength of those cases and certain legal principles which could

be exploited for better legal reasoning. In the discussion over the possibilities for establishing an arbitration system to settle individual labor dispute, the thesis first attempts to interpret the silence in law regarding arbitration of individual disputes. For this purpose, provisions of the labor law as well as those of other legislations such as the Constitution, the Code of Civil Procedure, and the Commercial Arbitration Law are carefully examined on the basis of plain text meaning theory of statutory interpretation, a theory under which interpretation is made based on the meaning of the text of relevant legal provisions.

**Significance and Structure of the Study**

The UNDP’s Access to Justice, the World Bank’s Justice for the Poor, and the ILO’s Labor Dispute Resolution Project have turned to the development of informal or alternative dispute resolution in their efforts to push for legal and judicial reform in Cambodia. In its *Feasibility Study on the Establishment of Justice for the Peace* (2007), the UNDP found that the judiciary was not an option for Cambodians living in rural areas. Likewise, the AC was created because of the belief that the establishment of a labor court under the Labor Law would end up being hampered in the middle of the process or that were it a success, the court would likely be negatively impacted by the current system.\(^\text{14}\) For these reasons, research into the development of arbitration may have the potential to bring Cambodia into a new era of effective legal and judicial reform.

This study also contributes to the further development of the highly respected arbitration system in Cambodia in the area of individual and collective labor disputes. From the discussions about the scope of the AC jurisdiction over individual labor disputes, remedies are suggested for possible problems in future cases. The analysis of relevant provisions both within the labor law and regulations and beyond, introduces wider concepts of arbitration as a means of dispute resolution. From a legal perspective, the results of the study open up a new round of discussion among legal scholars, local or foreign, over whether or not the

\(^{14}\) Adler, *Supra* note 8.
silence in law regarding arbitration of individual disputes could be interpreted to obstruct it from being
developed to add another door to labor justice in Cambodia.

The thesis is divided into six main parts. The introduction covers the background to the existing
problems concerning individual dispute resolutions in Cambodia, the significance of the study, and
methodology applied in the research. The second part presents a brief literature review on arbitration and
its setting, defines arbitration, traces its origin and development and discusses its advantages within the
Cambodian context. In the third chapter, the thesis gives a quick overview of labor dispute resolution. The
fourth part is dedicated to a critical review of cases before the Arbitration Council in light of collective
versus individual disputes. Focus is given to the strengths and weaknesses in those arbitral decisions. Also
recommendations are, based upon the review, given for improvement in future cases. The fifth part
carefully analyzes legal provisions relevant to arbitration as a means of individual dispute resolution in
Cambodia and explores the best options into which the mechanism for dispute settlement could be
consolidated. The conclusion comes with certain recommendations for further research for those interested
in the same area of legal study.
Chapter One

Arbitration and Its Setting – A Focus on Cambodia

Arbitration Defined

Various definitions of arbitration have been given in different jurisdictions. The Law on Commercial Arbitration of Cambodia (hereinafter, “LoCA”) defines the term arbitration as, “conciliation of disputes which uses an arbitral forum and may be done within or outside the framework of administration by a permanent conciliation body.”\(^{15}\) No other effective legal instrument of the nation attempts to define the term. Even the 1997 Labor Law, in accordance to which the Arbitration Council was established in 2003, fails to give the definition. Under US law, arbitration is defined as a mechanism for dispute resolution by an impartial person outside of the normal judicial process, whose decision is binding upon the parties and based upon evidence and arguments presented by the disputants.\(^{16}\)

The definition under LoCA may be unconventional as it uses the term conciliation which is universally accepted as a different form of Alternative Dispute Resolution (ADR). However, the procedure set out therein as well as that of labor arbitration is basically the same. First, disputes are settled by an impartial third person, the arbitrator. Second, the proceedings are also similar. The disputing parties select the arbitrator or arbitration panel to settle their case and present evidence or witnesses in the hearing, which is usually more informal than that in the judicial process. Third, the person has the power to render his or her decision called award, binding in most cases.\(^{17}\) Finally, arbitration may be compulsory by law or voluntary based on the agreement of the concerned parties. In a nutshell, although definitions of arbitration may be different in wording, they bear the same basic concept and setting. Arbitration is a form of

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\(^{15}\) Law on Commercial Arbitration, Art. 2 (a) (2006).
Alternative Dispute Resolution (ADR) which means any mechanism for dispute resolution other than litigation, which may take place within or outside court system.¹⁸

**Origin of Arbitration**

Many people think that arbitration is a new concept while it actually constitutes a very old method of dispute resolution. Review of the existing literature on arbitration reveals that arbitration has been employed for conflict resolution since the primitive history of mankind. The practice of arbitration may have begun as far back as about 1,000 BC with King Solomon, a figure described in Middle Eastern scriptures as a wise ruler of an empire centered in the United Kingdom of Israel.¹⁹ Legends say that born in Jerusalem in about 1000 BC and reined over Israel from about 970 to 928 BC,²⁰ he was an arbitrator, using dispute resolution procedure similar in many respects to that used by today’s arbitrators.²¹ History also brings to light the fact that Philip II of Macedon, an Ancient Greek king from 359 BC until his assassination, employed arbitration as a means of resolving territorial conflicts with the Southern states of Greece.²²

In England, arbitration has existed since 1224 and it is even older than the common law system.²³ In the United States, the system used by the ethnic American tribes to resolve differences even long before the nation became known as the United States of America.²⁴ George Washington himself was “a staunch believer in arbitration,” specifying an arbitration clause in his will:²⁵

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²¹ Elkouri, *Supra* note 18, at 3.
²³ Id. at 1.
But having endeavored to be plain and explicit in all the Devises—even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if contrary to expectation the case should be otherwise from the want of legal expression, or the usual technical terms or because too much or too little; has been said on any of the devises to be consonant with law, my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two—which three men thus chosen, shall unfettered by Law, or legal constructions, declare their sense of the Testator’s intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.26

In Cambodia, the concept of arbitration might also have been introduced early in its history. Cambodian popular folktales are concerned with dispute settlement, in which a character that is ingenious and highly respected is asked to help other characters solve their problem. For instance, *The Crocodile and the Carter* describes that an old carter had a dispute with the crocodile he saved from a dry pond over whether or not the crocodile should eat the old man who tied him up so tightly to his oxen cart while taking him to another pond with abundance of water. The rabbit, always considered a smart problem solver in Cambodia’s popular folktales, then came to help settle their issue by listening to both sides’ arguments and make judgment which is binding upon the disputants.

In real life, arbitration was practiced as a systematic means of settling disputes between local residents as far back as the 18th century even long before Cambodia came under French colonial rule in 1863.27 The practice was based on customary, rather than written, law. Dr. Bory SAY, a famous legal scholar in Cambodia, explained, in one of his lectures conducted at Nagoya University Graduate School of Law on February 7, 2007, that a mutual agreement between the disputing parties is required for the

26 AAA, ARBITRATION NEWS, No. 2 (1963) (also explaining that the quoted lines of the will are reproduced from a document published many years ago by the federal government).
27 Orn, Supra note 10, at footnote 105 (doctoral dissertation, Nagoya University Graduate School of Law June 2008).
proceedings to be lawfully valid. The arbitral decision had final and binding effect upon the disputants, meaning it was enforceable by law and unappealable because arbitrators were senior citizens or scholars with well-earned reputation in the society.  

The practice of arbitration came to a halt in the late 19th century, about 37 years after France colonized the country and modernized the national administration.

### Development of Arbitration

While arbitration was widely used for commercial disputes in the United States when the Chamber of Commerce of New York set up an arbitration tribunal as early as 1786, labor and employment arbitration was not accepted as a substitute for litigation until the second half of the Nineteenth Century when the country saw an increase in industrial disputes. The system began to grow even more rapidly after the United States became involved in World War II. The organization that has today played a major role in the development of labor and employment arbitration in the United States as well as in a number of other countries is the American Arbitration Association (AAA). Another leading body in the development of the system is the Federal Mediation and Conciliation Service (FMCS). Labor and employment arbitration history began long ago in America although the country was not the inventor of the system.

Cambodia—a Southeast Asian nation which was torn by a series of tragic wars until 1979 and was badly affected by internal political conflicts as far as 1991—has had very few documents with regard to arbitration and its history. The term arbitration in the legal context was heard of again in the late 1950s after the practice of arbitration came to a halt in the late 19th century. Cambodia signed the New York

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28 Email from Bory SAY, Professor, Royal University of Law and Economics, to Y Samphy, the author of this thesis, (Nov. 10, 12, 2008) (on file with author).
29 Nolan, supra note 16, at 4-5. See also Elkouri, supra note 19, at 5.
30 Elkouri, supra note 19, at 5.
31 Massey, supra note 22, at 3. (pointing out that AAA has over 800 employees in 35 offices worldwide and represents over 8,000 arbitrators and mediators worldwide).
32 On 1 May 1991, a ceasefire went into effect in Cambodia, following an appeal by the Secretary-General and the Foreign Ministers of France and Indonesia, according to summary of the mission carried out by the United Nations Transitional Authority in Cambodia (UNTAC).
Convention on the Recognition and Enforcement of Foreign Arbitration Awards in 1960.\textsuperscript{33} In 1962, the country was party to a dispute with Thailand over Preah Vihear, an ancient temple on the border with the two nations, in which arbitration was conducted by the International Court of Justice (ICJ) and in which Cambodia was granted sovereignty over the temple.\textsuperscript{34} Later on, starting from 1970, the development of the legal system modeled upon the French legal system was interrupted by a series of wars, both inter-state and intra-state, until as recently as 1991, when the United Nations intervened. During those periods, very little attention was drawn to the development of the country’s legal system, let alone arbitration.

The term appeared publicly again for the first time after the conflicts in February 1994. Former Cambodian Justice Minister Chem Snguon was quoted by the \textit{Cambodia Times}, a then weekly newspaper printed in Kuala Lumpur for distribution in the war-torn country, as saying that Cambodia was studying the possibility of setting up an arbitration system to resolve trade and commercial disputes in order to boost foreign investor confidence.\textsuperscript{35} The minister also said, “…the arbitration system must be adopted quickly.”\textsuperscript{36} The term \textit{arbitration} may also have been heard in the same year of labor dispute resolution when Cambodia with the support from the International Labor Organization (ILO) was in the process of enacting the 1997 Labor Law currently in effect in the nation. In 1998 Former Secretary of State for Social Welfare, Labor and Veterans Affairs pushed for the setup of a “pilot alternative [labor] dispute mechanism,” the word which he used to obviously mean arbitration among other ways of dispute resolution such as conciliation and negotiation .\textsuperscript{37} However, nothing happened about the establishment of an arbitration body either for labor or commercial disputes.

The importance of the arbitration system especially for labor and commercial disputes was recognized in Cambodia in the early 1990s. However, not until 2003 was the first arbitration body—the

\textsuperscript{33} National Trade Data Bank, \textit{Cambodia – 2002 Investment Climate Statement} (2002).
\textsuperscript{36} \textit{See Id.}
Arbitration Council—established in line with the provisions of the 1997 Labor Law in order to provide a fair and speedy method to settle labor disputes. Since its creation, the AC has gained a great deal of trust and confidence from management and unions in the country. The arbitration organization is now considered by both NGOs, local and international, and the government to be playing a very important role in the labor dispute resolution especially in the absence of a reliable judiciary in Cambodia. The AC has so far brokered settlements of about 600 disputes that might otherwise have led to wildcat strikes and stone-throwing clashes with the management.

The Law on Commercial Arbitration, adopted in 2006, marked another important development in the arbitration in Cambodia. Although the actual body has not been founded, the government in collaboration with the World Bank Group International Finance Corporation through the Mekong Private Sector Development Facility (IFC-MPDF) has been working hard on other necessary regulations. The commercial arbitration center will be up and running by the end of 2008.

From the development and its setting, the evolution of arbitration in Cambodia occurs a little differently from that in other developed countries. Though countries such as United States and England suggested the system as a remedy for an increase in disputes, in Cambodia it has been developed to provide for a reliable dispute resolution mechanism and later on recognized by international donors as a suggested model for legal and judicial reform.

Labor Arbitration and Its Advantages

Labor arbitration is a new concept in Cambodia and conducted by the Arbitration Council, the only body at present that arbitrates labor disputes. The AC was established in 2003 by a ministerial order known as Prakas 338/2002 on the Arbitration Council in accordance with provisions of the 1997 Labor Law.

38 The web address of the Arbitration Council is http://arbitrationcouncil.org.
39 NOLAN, Supra note 16, at 4-5.
40 Adler, Supra note 8.
Prakas was later repealed by Prakas 099/2004 on the Arbitration Council. The ministerial order sets forth *inter alia* the composition of the Arbitration Council and its panel, arbitral proceedings, jurisdiction and remedies, arbitral awards and enforcement, and awards regarding interest disputes.

The Arbitration Council has a tripartite structure, being composed of arbitrators nominated by unions, employer associations and the ministry in charge of labor for a one-year term.\(^{41}\) The appointment is, under Clause 1, made by Prakas of the Ministry. Arbitrators are re-appointed each year except for very few circumstances stipulated in Clause 2 and act impartially and independently. Currently, there are 30 arbitrators on the Arbitration Council.

The minister in charge of labor refers cases to the AC on the request by the Ministry’s conciliators. A panel of three arbitrators (one from the employer list, another from the employee list and the last one from the ministry list) handles the cases by first trying to help parties reach an agreement and then by an arbitration session where there is no deal. At a hearing, the panel may order the disputants under law to submit evidence and witnesses as it deems appropriate. Clause 32 of Prakas 099 stipulates that the panel has jurisdiction to arbitrate any collective dispute referred to it by the Ministry. The tribunal has the power to remedy violation of provisions provided in the Labor Law, regulations, collective bargaining agreements or any other obligations arising from employment relationship.

Unless the parties in question agree otherwise, the Arbitration Council renders non-binding arbitral awards to which the disputing parties may object within eight calendar days. If the parties fail to do so, the award will become enforceable through the competent court. The court may vacate an arbitral award only where it is proved that the complainant was not properly involved in the AC process, the award was not in compliance with the existing law and regulations, or that the council renders an award beyond its jurisdiction.

\(^{41}\) Prakas #099 on The Arbitration Council, Clause 1 (2004).
The AC has gained a great deal of trust from the stakeholders in industrial relations because of its independence, transparency, and fairness in dispute resolution process.\textsuperscript{42} It is also regarded as being highly capable of providing better access to labor justice in Cambodia in the absence of a reliable court system.\textsuperscript{43} Where only 28 disputes were processed during the first nine months since its inception in May 2003, by July 2008 the Arbitration Council has received almost 600 cases, making it a widely employed mechanism for industrial dispute resolution in Cambodia.

There are several advantages of arbitration as a means of labor dispute resolution. An advantage in one country does not necessarily constitute the same thing in another. This section attempts to explore certain advantages applicable under Cambodia’s current circumstances.

Parties to a labor dispute who must “live with” the decision made by the adjudicator stand a better chance of maintaining their common goal of uninterrupted production in arbitration than litigation.\textsuperscript{44} First, parties concerned have better control of the arbitration process than that of the latter. Second, arbitration is in most cases conducted out of parties’ agreement. Finally, arbitrators are experts of labor relations problems; therefore, they are familiar with the needs of the disputants and techniques for better resolving the issues at hand.

Arbitration adds another layer for access to labor justice especially in the absence of a reliable judicial system. For instance, as the only labor arbitration body in Cambodia, the Arbitration Council has since its creation in 2003 brokered settlements of about 600 labor disputes that might otherwise have unnecessary industrial actions which could affect the industry as a whole. While minor disputes can now be dealt with internally between union and management in such sectors as garment and hospitality and

\footnotesize{\textsuperscript{42} Sibbel, \textit{Supra} note 9, at 3.  \\
\textsuperscript{43} Id. at 6.  \\
tourism, serious disputes are forwarded to the AC, according to Van Sou Ieng, the President of the Garment Manufacturers Association.\(^{45}\)

Where fair judiciary does exist, arbitration may still be more satisfactory than litigation. Considering such factors as arbitrator expertise and respective parties’ needs to maintain their labor relations, the Supreme Court of the United States encouraged the use of arbitration for industrial disputes under the collective agreements in *Steelworkers v. Warrier & Gulf Navigation Co.*\(^{46}\) Hence, the strong presumption is that even when Cambodia has an independent and competent labor court, arbitration would do no harm to litigation but merely stand as an alternative for those who dislike the adversary effect of the judicial decision. Furthermore, the law establishing the labor court may even set arbitration as part of its proceedings in addition to litigation or such ADR forms as conciliation or mediation and fact-finding.

Perhaps unique of Cambodia, another advantage is the development of jurisprudence in labor law through arbitration, in which the AC is apparently the role model. Examples include, but not limited to, establishing an apparatus to frame claims of anti-union discrimination; developing the use of an “equity principle;” and drawing distinctions between interest and rights disputes and those between individual and collective disputes.\(^{47}\)


\(^{46}\) ELKOURI, *Supra* note 19, at 11-12.

\(^{47}\) Cases of the AC can be accessed online at www.arbitrationcouncil.org/eng_index.htm.
Chapter Two

Overview of Labor Dispute Resolution in Cambodia

While negotiation plays an important role in labor dispute resolution in Cambodia, three formal mechanisms for labor dispute resolution are contained within the Labor Law and regulations: conciliation, arbitration and litigation. Types of dispute determine which of the three ways parties may or must take in their resolution process. The 1997 Labor Law puts disputes into two categories: individual disputes and collective disputes. This chapter of the thesis presents a brief overview on how the two types of labor disputes are settled by law.

Resolution of individual disputes

By law Voluntary conciliation by the ministry in charge of labor is, the first trajectory parties in individual labor disputes may take in a bid to try and settle their differences. The conciliation is voluntary in that parties can opt for litigation or accept any other procedures directly without going through conciliation as an alternative resolution process if both sides agree. However, if one of the parties in a dispute files a complaint with the labor conciliator, then the other party is obligated to attend the conciliation session.

Upon receipt of the complaint by either party, the labor conciliator must call a hearing within three weeks. Throughout the process, the conciliator tries to help parties resolve their dispute by mutual agreements. Both parties are required to attend the hearing and to provide necessary information and

48 Labor Law, Ch. XII (1997).
49 Id., Art. 300.
50 Prakas #318/01 on Procedures for Settlement of Individual Labor Disputes, (MOSALVY 2001) [hereinafter Prakas #318].
evidence requested by the conciliator. Failure to attend the hearing without appropriate reasons results in complaints being considered invalid on the complaining party. If the responding party is absent without valid reasons, they are deemed vulnerable to the charges made by the complainant.

Conciliation is a success if the parties can reach an agreement or a failure if they cannot. If it is a success, the agreement made before the labor conciliator is enforceable, and both parties are legally bound to fulfill the terms of the agreement. Either of the disputing parties may lodge a complaint with the court within two months if they cannot reach an agreement through the conciliation proceedings. Whether or not the conciliation is successful, the conciliator must write a report which is then signed by the disputing parties. Each party receives an attested copy. The report is then submitted to the Minister of MoLVT.

There is always a possibility that an individual dispute can become a collective dispute as long as it satisfies the criteria of a collective dispute set out above. The 1997 Labor Law does not specify who is given the power to decide whether or not a dispute is individual or collective; however in practice it is the MOLVT’s conciliator who makes this judgment based upon the legal elements provided by the law. A case in relation to the dismissal of a worker has the potential of being either an individual or a collective dispute. For example, if a dismissal does not have anything to do with union and involve the disputant(s) individually, it could be defined as an individual dispute. On the other hand, if it was due to the worker’s membership with the union and has the potential to jeopardize the operation of the enterprise or social peace, the dispute may be classified as a collective, the solution to which will be presented in details in the next section.

53 Labor Law, Art. 301 (1997). Nothing in the Law and regulations mention whether or not parties to a collective dispute may settle their differences by means other than litigation. For further information and analysis with regard to this point, see Ch. 4 of this thesis.
54 DANIEL ADLER ET AL, THE ARBITRATION COUNCIL AND LABOR DISPUTE RESOLUTION PROCESS 14 (Community Legal Education Center 2004).
Resolution of Collective Disputes

The garment industry is well-known for utilizing the most of legal procedures for dispute resolution in Cambodia. This is partly because the sector is the biggest formal sector that employs a lot of Cambodian workforce in the labor market with the number of workers being approximately 300,000 in 2006.\(^{55}\) The procedures for collective labor dispute resolution are stipulated in the following law and regulation:

- The 1997 Labor Law - Section 2 of Chapter XII; and

These legal instruments provide two main steps, in which the parties in question may exploit to have their collective disputes settled free of charge\(^{56}\): conciliation and arbitration. In practice, it should be noted that workplace-level negotiations between the workers’ representatives (in most cases, the trade unions) and the employer representatives are also playing an important role in labor dispute resolution in Cambodia, especially in the garment industry.

**Conciliation of collective disputes**

The free conciliation service by the ministry in charge of labor is mandatory in collective dispute resolution. The parties have to notify their collective dispute to the labor conciliator at their province or


\(^{56}\) Labor Law, Art. 316 (1997).
municipality if no other proposed settlement procedure is agreed upon. The labor conciliator may, under Article 303 of the Labor Law, take legal conciliation proceedings upon learning of the collective dispute.

The labor conciliator must be appointed within forty-eight hours from the moment the dispute is learnt of and then try to conciliate the parties in question within fifteen days unless the parties agree to extend the period. The conciliation process is, under Article 306, a peaceful period of dispute resolution, meaning that the disputing parties may not take any actions of conflict during the process or be absent from any conciliation hearing(s) called by the labor conciliator. Any such absence results in a fine.

The 15-day conciliation leads to two different outcomes: agreement or non-conciliation. If the parties reach an agreement, such agreement has the same status and effect as a “collective agreement” binding upon the parties and the persons they represent. Non-conciliation, which refers to the “absence of agreement” upon the conclusion of the conciliation, must, in accordance with Article 308 of the Labor Law, be recorded and reported to the minister in charge of labor no later than forty-eight hours after the conclusion of the conciliation.

In the case of non-conciliation, a collective dispute must be resolved through one of the following procedures as stated in Article 309 of the Labor Law:

- An arbitration procedure set out in the collective agreement, if any;
- any other procedures agreed upon by the parties; or
- the arbitration procedure set out in the Labor Law.

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57 Id., Art. 303.
58 Id., Arts. 304, 305.
59 Id., Art. 306.
60 Id., Art. 307. Provisions on collective agreement are laid out in Ch. V of the Law.
Arbitration of collective disputes

The Labor Law expressly allows for arbitration of collective disputes in Article 309: an arbitration procedure specified in the collective agreement, or that set out in the Labor Law itself. The former provision is still a myth because there currently is no such an organization. The latter, known as the Arbitration Council, eventually came into existence in May 2003, six years after the promulgation of the 1997 Labor Law in effect. The AC was established in conformity with Prakas no. 338 of 2002 on the Arbitration Council, which was reissued as Prakas no. 099 of 2004 with minor changes. Having received approximately 600 cases, the AC has played an important role in resolving labor disputes, especially between garment workers and their management. The Council is an independent tripartite body of arbitration. The arbitrators are chosen from the following components:

- One third nominated by the ministry in charge of labor;
- One third by employers’ associations; and
- One third by the trade unions.  

One arbitrator chosen from each of the three lists above sits in a panel of three to decide cases. Prior to the actual arbitration, conciliation may be retried out by the Arbitration Council at the request of the parties. It is very common that the parties request the Arbitration Council to conciliate their dispute. The arbitral decision of the Arbitration Council must be made by consensus or, if not possible, by the majority.

The Arbitration Council must try to resolve the case within fifteen days from the date the non-conciliation report is received from the Ministry in Charge of Labor. The AC has the legal power to investigate the dispute and require the parties to present documents it deems necessary for deciding the

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61 Prakas #099, Clause 3 (2004).
62 Id., Clause 36.
case. However, the arbitration body has no duty to decide issues other than those specified in the non-
conciliation report received from the Ministry in Charge of Labor. An arbitration hearing must, under
Article 312 (5) of the 1997 Labor Law and Clause 29 of Prakas no.099 of 2004, be conducted “behind
closed door”. The decision of the Arbitration Council, called an award, must be implemented by the parties
unless either of them lodges an objection with the Secretariat of the Arbitration Council by registered
letter or any other reliable means within eight days.

Litigation of labor disputes

Labor disputes, individual or collective, are finally resolved by courts of competent jurisdiction. An individual dispute is litigated if there is no agreement reached between the parties and when either of them files a complaint to the court. The court of general jurisdiction or a specialized labor court may have the power to adjudicate individual labor disputes. Article 387 of the Labor Law stipulates, “Labor courts shall be created that have jurisdiction over the individual disputes occurring between workers and employers regarding the execution of the labor contract or the apprenticeship contract (emphasis added).”

A collective labor dispute may also be settled through litigation. Clause 40 of Prakas 099 on the Arbitration Council states that if objection is made against an arbitral award resolving dispute over legal rights relating to the application of a rule of law, the other party may bring their case “before the court of competent jurisdiction.” Although there is nothing in the legal text explicitly stating that parties to a labor dispute over interests may have their case settled through litigation, depriving judges with competent jurisdiction from adjudicating such a dispute is an act against the Constitution. Article 128 (3) provides,

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64 Prakas #099, Clause 24 (2004).
66 Secretariat of the Arbitration Council is composed of the staff members from the Ministry in Charge of Labor to provide administrative support for the Arbitration Council. See Prakas #099, Clause 48 (2004).
69 Prakas #099, Clause 40 (2004).
“The Judiciary shall cover all lawsuits including administrative ones.” Article 129 (2) gives judges the exclusive power to adjudicate.

Cambodia has not had specialized labor courts in place; therefore, the jurisdiction over labor disputes rests with the courts of general jurisdiction. If the former is established in accordance with Article 387 of the Labor Law with limited jurisdiction over only individual disputes, the court of competent jurisdiction over collective disputes might be the court of general jurisdiction. However, this is unlikely because Article 385 of the same law obviously gives the specialized court a wide scope of jurisdiction to decide any labor dispute covered by Chapter XII on Settlement of Labor Disputes. At present, courts of general jurisdiction are the only courts which litigate both individual and collective labor disputes in Cambodia.

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**Figure 02: Process for resolving collective labor dispute**

- **Individual**
  - Voluntary conciliation by ministry in charge of labor
    - Litigation

- **Collective**
  - Mandatory conciliation by ministry in charge of labor, if no other agreed procedures
    - Mandatory arbitration by Arbitration Council, if no agreed arbitration procedure
      - Litigation
      - Industrial action
Chapter Three

Individual versus Collective Dispute – Developing Jurisprudence of Arbitration Council

The Arbitration Council has developed a large body of jurisprudence in its settlement of such labor issues as piece rate standards, employment contracts, overtime work, dismissal and termination. Deciding whether a dispute is collective or individual also represents an integral part of its jurisprudence since it refused to decide the latter type of dispute in case 10/03 – Jacqsintex (2003), in which the employer party requested that one of the demands be removed on the basis of individual dispute. The Council did not reason whether or not it had jurisdiction over this category of dispute assuming that Section 2 of Chapter XII of the Labor Law did not give the AC panel the power to hear the issue. While the next chapter carefully reexamines the interpretation from a different perspective, this chapter of the thesis critically reviews the Arbitration Council’s decisions on collective versus individual disputes in order to provide recommendations for future cases.

Individual Dispute

The first category of labor dispute under the Cambodian Labor law is the individual dispute. Article 300 provides, “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 labor contract or apprenticeship contract, or the provision of a collective agreement as well as regulations or laws in effect (emphasis added).” The wording in the provision makes it vitally important that more workers

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70 10 represents case ID. 03 means year 2003, when the case took place. Jacqsintex is the name of the employer party in the case. All of these form the official name of cases before the Arbitration Council.
or apprentices in an individual dispute be involved individually and not collectively. The subject matters attached are also different from those set forth in a collective dispute.

Parties to an individual dispute may opt for voluntary conciliation by the labor conciliator. However, if either party takes the initiative, then it is compulsory for the other party to participate. If conciliation is unsuccessful, the disputing parties may go to court within two months. No existing legal instruments give effect to other trajectories though parties to an individual dispute may choose to have their dispute settled. Similarly, no mechanism exists, except for negotiation through a workers’ union or any other workers’ organization. Clause 32 of Prakas 099 on the Arbitration Council states, “The arbitration panel shall decide on any collective dispute that is referred to it in accordance with Article 309, Paragraph C, of the Labor Law.” Nothing in the effective legal instruments of Cambodia expressly prohibits the Arbitration Council from resolving individual disputes. However, the AC does refuse to hear any dispute it considers that is not collective.

The settlement of individual disputes is not well regulated. Only a few articles contained in the law mention that of individual disputes. Article 300 and 301 of the Labor Law states that conciliation by the labor conciliator is voluntary and that judicial action must be taken within two months in case of non-conciliation. Prakas 318/01 on Procedures for Settlement of Individual Dispute further clarifies how conciliation is conducted by the labor conciliator but fails to set forth other mechanisms other than those provided for in the Labor Law. Article 338 states that the Labor Administration offers conciliatory services to settle both collective and individual dispute. Article 387 provides, “Labor courts shall be created that have jurisdiction over the individual disputes occurring between workers and employers regarding the execution of the labor contract or the apprenticeship contract.”

The law and related regulations are written in such a way that the AC never has to directly decide whether a dispute is an individual dispute. As long as a dispute is not collective, the Council would decide

72 Labor Law, Arts. 300-301 (1997).
73 Prakas #318/01, Clause 01-03 (2001).
74 Labor Law, Art. 301 (1997).
75 See e.g., 10/03 – Jacqsintex, 6 (AC 2003); 41/04 – Micasa Hotel, 9 (AC 2004); 07/05 – Coca Cola, 9 (AC 2005).
that the dispute goes beyond its jurisdiction and therefore order the disputing parties to follow the procedure set forth in Section 1 of Chapter XII of the Labor Law, which means they must file their complaint with the court of competent jurisdiction.\textsuperscript{77} It assumes that a dispute not collective is an individual dispute.\textsuperscript{78} As a result, the AC never has to decide whether a dispute is individual. In all cases to date before the Arbitration Council, none of the disputes unconsidered collective dispute satisfies the third condition, set out in Article 302 of the Labor Law, that a collective dispute must have the potential to disrupt the effective operation of the enterprise or social peace.

**Collective Dispute**

The second category of labor dispute is the collective dispute. Article 302 of the Labor Law states, “A collective labor 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 recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peacefulness.”

Collective labor dispute resolution is better regulated than that of individual ones. The Labor Law provides for more thorough provisions on collective labor disputes and their resolution. There are also ministerial orders on this type of dispute. If there is no mutual agreement on what mechanisms to adopt in dispute settlement, disputants must follow these steps: mandatory conciliation by the Labor Inspectorate; mandatory arbitration by the Arbitration Council; and litigation if the dispute is about legal rights or

\textsuperscript{77} In this case, it is not clear whether the statute of limitation applies. Labor Law, Art. 301 (1997) (“In case of non-conciliation [following attempts by the labor inspector to conciliate the dispute], the interested party can file a complaint in a court of competent jurisdiction within two months, otherwise the litigation will be lapsed.”)
\textsuperscript{78} See e.g., 113/04 – Joeu Star, 6-7 (AC 2004); 20/05 – Fortune, 7-8 (AC 2005); 81/06 – Hong Y, 5-6 (AC 2006); 103/06 – MV III, 7-8 (AC 2004); 119/06 – QSP, 7-8 (AC 2006); 24/07 – Island Glory, 5-7 (AC 2007); 54/07 – Young Wah I, 13-14 (AC 2007).
industrial action if the dispute is about interest. Commonly, management and workers would try to negotiate their disputes before taking them further for conciliation, arbitration or litigation.

Since its inception in 2003, the Arbitration Council has developed a large body of jurisprudence with its arbitral awards deciding a large number of issues ranging from wage claims to union discrimination issues. AC decisions being published for public access on its website and available both in English and Khmer have served as a guide to the Cambodian labor law for both the employer and employee and their professional organizations interested in how particular legal provisions are applied in practice. A good example may be cases involving the interpretation of contract types.\(^79\) The AC decides that if any continuous renewal of a fixed duration contract results in the total period being longer than two years, the contract will become an undetermined duration labor contract.\(^80\) This jurisprudence has resolved the vagueness in law regarding the two types of labor contracts provoking considerable discussion among legal scholars and practitioners.

Whether an issue is collective or individual in nature has also been a burning issue raised by disputing parties before the Arbitration Council. This arbitration body assumes, without questioning the relevant legal provisions, that it does not have jurisdiction over individual disputes,\(^81\) which is an assumption that has turned the AC into a playing field for worker organizations to seek justice and not for individual workers. As a result, some dismissed workers who do not have faith in the judicial system turn to trade unions to help bring their case before the AC in hopes to gain justice. Reinstatement demand is always a burning issue, over which the question of collective versus individual dispute comes into play. This section of the thesis reviews those cases in a bid to bring to light the AC jurisprudence regarding collective disputes and give recommendations on what factors this arbitration body should take into consideration in its future decision making.

\(^{79}\) Ch. IV of the Labor Law (Arts. 65-95) set out two types of labor contracts: fixed and undetermined duration labor contracts. Different procedures are required for contract termination based on this distinction.

\(^{80}\) See, e.g., 10/03 – Jacqsintex, 7 (AC 2003); 02/04 – Hotel Cambodiana, 11-12 (AC 2004). But see 02/04 – Hotel Cambodiana, 25-28 (AC 2004) (One of the arbitrators on the panel rejects the decision, arguing that the length of time in the last renewal only should be taken into account, not that accrued from all the renewals).

\(^{81}\) See 10/03 – Jacqsintex, 7 (AC 2003).
The Three Conditions

The Arbitration Council holds in most decisions that the duty to determine whether an issue relates to a collective or individual dispute rests with the conciliator of the ministry in charge of labor,82 and that all cases the Ministry refers to it are related to collective dispute.83 In most of these cases too, except case 02/04 – Hotel Cambodiana, does the AC interprets the relevant legal provisions mostly at the request of one of the disputing parties. As a result, it has dismissed a number of cases on the basis of an individual dispute.84

A dispute must satisfy three conditions in Article 302 of the Labor Law to be considered a collective dispute:

1- The Parties: The dispute arises between one or more employers and a certain number of their staff;

2- The Subject Matter: The dispute relates to working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers; and

3- The Consequences: The dispute could jeopardize the effective operation of the enterprise or social peacefulness.

82 The Labor Inspectorate under the ministry in charge of labor is the institution that carries out conciliation in accordance with Ch. XII of the Labor Law. It is a voluntary process for individual disputes; however, if one party makes a request, the other party must attend. For collective disputes, conciliation by the Ministry is mandatory.

83 It is unclear as to who has jurisdiction to determine whether an issue is a collective or individual dispute, yet Arts. 309-310 of the Labor Law could be interpreted to mean that the jurisdiction rests with the Labor Inspectorate and the Ministry of Labor.

84 See, e.g., 13/08 – Terratex Knitting; 61/07 – M&V III; 54/07 – Yung Wah I; 24/07 – Island Glory Industrial; 119/06 – QSP; 103/06 – M&V III; 81/06 – Hong Y; 57/06 – Evergreen Garment; 20/05 – Fortune Garment; 113/04 – Joeu Star.
The Parties

The Labor Law provides, *inter alia*, that a collective dispute is one that arises between one or more employers and a certain number of their employees. The number of employers involved has never been the topic for discussion in the reasoning by the Arbitration Council in its decision on individual versus collective dispute. However, what constitutes a certain number of workers seems controversial. First, a trade union representing workers in the issue most likely satisfies this condition although the exact issue directly affects only a single worker. The AC reasons that a trade union represents a group of workers, whether the union is direct party to the issue or if they represent the individual or collective interest of its member(s) in question. As mentioned earlier in this chapter, demand for reinstatement, which constitutes the interest of the dismissed individually may be regarded as a collective dispute as long as a trade union is the one who brings the case before the AC.

Second, a group of workers collectively involved in a single demand over the same subject matter may also fulfill the first condition under Article 302. has so far been the only case where the AC’s arbitral award dated 29 July 2008 makes such reasoning. The café changed its owner after about four years in operation and 30 employees decided not to come to work. The new management dismissed 30 employees because they did not come to work for many days leading to the temporary closure of the café. Finally, the new owner decided to employ new people while still giving priority to the former employees if they applied but none of them did though 14 demanded for reinstatement. In this case, even

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85 *See, e.g., 10/03 – Jacqsintex,*
86 Art. 266 of the Labor Law (1997) provides that employers and workers have the right to form professional organizations to protect the rights and interests, *both collective and individual*, of the persons covered by their organizations. Based on this article, an arbitrator in case 119/06 – *QSP* dissented that the issue is between a single worker and the employer and has nothing to do with union and that the union acts only as representative of the worker for her individual interest as stated in Art. 266 of the Labor Law, and not as the party to the demand.
87 *But see 13/08 – Terratex Knitting, 13* (award in Khmer) (AC 2008) (as trade union has not registered and its leader has resigned from work, the trade union bringing the case before the AC does not satisfy the Parties condition).
88 The findings in the arbitral award did not clearly show why those 30 workers did come to work. The worker party claimed that they did so because they feared that the new owner would not employ them. The employer party argued they did agree to keep the workers’ contracts as they were but still the workers did not come work.
though there was no trade union in the enterprise, the AC decided that the 14 workers demanding reinstatement represented “a certain number” of employees as set out in Article 302.

Finally, one single worker can also be considered “a certain number of workers” as long as his or her demand is supported by other workers or a trade union. In 91/04 – Honey Wear, the employee party demanded reinstatement of only one worker. However, since many others went on strike to support him, the AC decided that although the issue, on the surface, concerned just a dispute between the employer and that single worker, the fact that others were on strike meant that the issue affected a certain number of employees. In 12/05 – P&E, the responding party represented by a trade union demanded that an employee be accepted back to work. In considering whether or not the issue arises from “a certain number of workers,” the panel reasoned that the claim was made by a trade union, which represented employees in the enterprise and therefore, concluded that the issue took place between the employer and the one worker plus the other employees the union represented.

Not all arbitrators agreed that a trade union’s mere involvement in such a demand satisfied the condition under Article 302 that the dispute must arise between one or more employer and a certain number of the workers. Arbitrator Chhiv Phyrum dissented, in 119/06 – QPS, arguing that the issue regarding the demand for reinstatement of a worker in the case “cannot be considered as a dispute between a group of workers and the management.” In reference to Article 266, which stipulates that a trade union may represent the interest of its members, “both collectively and individually,” the arbitrator argued that the union in the case protected the individual, not collective, interest of the worker. If this theory were adopted, any dispute over claim for reinstatement of a single worker would not satisfy the first condition. Even a claim for reinstatement of a number of workers could also be interpreted to not complete the condition where it is justifiable that those workers are dismissed for separate individual reasons.

89 But see 119/06 – QSP, 10-11 (Dissent) (AC 2006) (One of the arbitrator on the panel dissents that the issue is between a single worker and the employer and has nothing to do with union and that the union acts only as representative of the worker for her individual interest as stated in Art. 266 of the Labor Law, and not as the party to the demand).

90 Id.
Employers sometimes argue that an issue involves a number of workers, yet they came in on different grounds and therefore, that the dispute is individual over which the Arbitration Council has ruled it does not have jurisdiction.\(^9\) The definition of the collective dispute in Article 302 of the Labor Law does not specify whether or not employees in question must be involved individually or collectively. Therefore, if the AC does not adopt an appropriate approach to its reasoning, then it will have to determine why the issue arises among each of the workers involved in order to find out if they are involved individually or collectively. For instance, the employer may argue that workers in a reinstatement demand may be dismissed for separate reasons. The AC would, without an appropriate approach, have to discover the truthfulness of the employer party’s claim and interpret the relevant Article 302.

The approach to reasoning by the AC seems to create an impression that the workers’ union or a group of workers is merely representative of the worker or workers in question. The dissent by the arbitrator above could have been made based upon such an impression. The answer to the following question formed following thorough review of the AC cases should develop a better approach to this issue:

Is a worker organization or a group of workers the worker party to dispute or merely the representative in cases before the AC? Presently, arbitral awards of the AC identify at the beginning that they constitute the worker party. Why this is important in the development of a better approach is this common sense that labor disputes occur between the employer and the worker party. Therefore, every issue before the AC concerns a worker organization, which is party to the dispute, plus any other workers whose matter is being settled. This fulfils the first condition under Article 302 on collective dispute regardless of the number of workers concerned in the issue or issues. The only case where this condition may not be satisfied under this approach is when the trade union fails to present workers’ written request for help.\(^9\)

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\(^9\) e.g., 41 – MiCasa Hotel, ; 07/05 – Coca Cola.
\(^9\) See 13/08 – Terratex Knitting, 13 (AC 2008) (the workers’ union fail to present workers’ written request for help).
The Subject Matters

The second condition under Article 302 concerns the Subject Matter and requires that a collective dispute must be the one arising over “working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers.” The AC’s jurisprudence reveals that most relevant demands relate to the recognition of professional organizations or the exercise of their rights. In some other cases, the AC states that the dispute arises over the relationship between the employer and its workers. Whether the issue is about working conditions also represents the focal point in relation to the subject matter criteria of a collective dispute. This second subject matter is so broad that most labor disputes could be interpreted to relate in one way or another to these subject matters.

The AC, in considering this second condition, relies on the claims by the disputing parties to determine the subject matters of the dispute. In 07/05 – Coca Cola, although the panel discovered, later in its decision, that the dismissal of the employees in question had nothing to do with union discrimination as was claimed by the worker party, the arbitrators decided that the Subject Matters condition was satisfied because consideration must be made as to whether or not the termination was about workers’ exercise of rights of professional organization. Thus, it is the parties’ arguments with regard to what causes the dispute that determines whether or not the subject matters laid down in Article 302 are met and not the actual findings of the AC.

In all the demands for reinstatement, the subject matter that may always be applied in most circumstances is “relations between employers and workers”. Employers in claim for reinstatement try to end the employment relationship; employees strive to have it secured. Accordingly, the dispute is regarded

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94 See e.g., 10/03 – Jacqsintex, 7 (AC 2003); 41/04 – Micasa Hotel, 9 (AC 2004); 113/04 – Joeu Star, 6 (AC 2004); 07/05 – Coca Cola, 9 (AC 2007).
95 See e.g., 12/05 – P&E, 6 (AC 2005); 91/04 – Honey Wear, 8-9 (AC 2004); 07/05 – Coca Cola, 9 (AC 2007); 83/08 – Le Grand Café, 15 (award in Khmer) (AC 2008).
96 See 12/05 – P&E, 6 (AC 2005) (Although the award does not state clearly that the issue arises over working conditions, it may be interpreted to mean that the worker in question helping workers in the enterprise to solve their problems with the employer could constitute the dispute arising over working conditions).
as arising over employment relations between the disputants, which fulfills the second condition for a collective dispute. This approach to reasoning was already adopted in 20/05 – Fortune Garment. 97

In issues other than those over reinstatement, the AC should further explain why it considers the dispute arises over one particular subject matter or the other set out in Article 302: “working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers.” The Arbitration Council should build the clear link between the fact-findings and the relevant element of the provision. This will make the AC’s legal reasoning more persuasive to the disputing parties whose dispute it is trying to settle based on fact and law.

The Consequences

Article 302 of the Labor Law requires that to be collective, a dispute must have the potential to jeopardize the effective operation of the enterprise or social peace. Regarding this condition, the AC looks to the possibility of an industrial action. The number of workers supportive of the issue in question plays a vital role in the AC’s decision making. If a strike does not occur, AC will state that workers could go on strike or take other industrial action that affect the effective operation of the enterprise. 98 In most of such cases, the AC does not further explain why workers may go on strike and no investigation is used to support its proposition. A strike already occurring over the issue makes it undeniable to the AC that the third condition under Article 302 is satisfied. 99 Both parties’ agreeing at the hearing that the issue at hand could jeopardize the effective operation of the enterprise is also taken into consideration. 100

97 20/05 – Fortune Garment (2005) implies this proposition but fails to explain it in details.
98 See e.g., 10/03 – Jacqsintex, 7 (AC 2003); 41/04 – Micasa Hotel, 10 (AC 2004); 07/05 – Coca Cola, 9 (AC 2005); 12/05 – P&E, 6 (AC 2005).
99 See e.g., 91/04 – Honey Wear, 9 (AC 2004); 83/08 – Le Grand Café, 15 (AC 2008).
100 See e.g., 113/04 – Joeu Star, 7 (AC 2004); 12/05 – P&E, 6 (AC 2005).
There is no standard formula found in the jurisprudence as to how a dispute could jeopardize the effective operation of the enterprise or social peace. However, the jurisprudence gives emphasis on the disputing parties’ ability or potential to take industrial action, which could disrupt the operation of the enterprise, and not on the nature of the dispute itself. The AC never expressly considers whether or not the dispute nature could disrupt social peace.

This quick recommendation should be taken into account in deciding future cases. Findings of fact should be used to support the legal reasoning. For instance, if the reasoning concludes that workers may go on strike or take other forms of industrial action which could have a negative impact on the operation of the enterprise or social peace, all relevant fact findings that lead to such a conclusion should be exploited as the basis of the reasoning by the Arbitration Council. The AC should, therefore, gather as much concrete evidence as possible at the hearing(s).

**Collective Labor Dispute: A Look beyond Article 302**

The Arbitration Council decides that all the three requirements must be fulfilled in order for a dispute to be considered collective. The decisions were made based on the plain meaning of the text of the Article 302 of the Labor Law, which states,

“A collective labor 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 recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peacefulness. (emphasis added).”^101

The conjunction “and” plays an important role in this interpretation. Reading wording of the article, the AC has ruled that in order to be considered collective, a labor dispute must satisfy all of the three criteria: the parties, the subject matters and the consequences.\textsuperscript{102}

The reading of a combination of various related articles within the law may lead to a different interpretation of what is the definition of a collective labor dispute. Section 2 of Chapter XII on Collective Labor Dispute requires expeditious mandatory conciliation and arbitration for collective labor disputes in order to prevent needless disruption in the operation of the enterprise and social peace. The ministry in charge of labor must, under law, conclude their conciliation proceedings within 15 days and refers the non-conciliated cases to the Arbitration Council within five days following the conclusion.\textsuperscript{103} The whole conciliation process takes only 20 days. Chapter XIII on Strikes and Lockouts lays down several requirements for the conduct of the industrial action which could negatively impact businesses or social peace. Moreover, reading Article 300 and 302 together, it is obvious that the major distinction of the two types of labor disputes is its impact. While an individual dispute should affect only one or a few workers, a collective one should exert greater impact on many interested people, an entire enterprise or industry or even social peace in the country. For these reasons, Article 302 could be interpreted to mean that as long as a dispute could jeopardize the effective operation of the enterprise or social peace, such a dispute should become a collective dispute whether or not it satisfies the first and second condition.

All of the disputes considered collective by the Arbitration Council had the potential to disrupt the effective operation of the enterprise or social peace; all of those considered individual disputes did not satisfy this criterion under Article 302 of the Labor Law. However, there may arise such cases where a dispute is destructive yet involves either a single worker or subject matters not specified in the article on collective labor disputes. The following is only a simple example.

Workers’ Union A in Company B demands that the employer pay Worker C US$1,900 in salary in accordance with his employment contract. The employer asserts that the amount of US$1,900 was wrongly

\textsuperscript{102} See e.g. 113/04 – Jeou Star, 7 (AC 2004); 07/05 – Coca Cola, 9 (AC 2005); 57/06 – Evergreen Garment, 9 (AC 2006).

\textsuperscript{103} Labor Law, Arts. 305, 308, 310 (1997).
typed and that other workers doing the same work get only US$1,800. Many workers support this demand and are ready to go on strike if the employer does not solve the issue with Worker C. Based on the fact, the first condition set forth in Article 302 of the Labor Law may be satisfied because the dispute arises between Company B and Worker C together with Workers’ Union A and a lot other workers ready to go on strike in support of the demand. The second condition may not be fulfilled because the dispute arises over interpretation and enforcement of Worker C’s employment contract and has nothing to do with those subject matters set out in Article 302 of the Labor Law. The third condition is met in this case because there are a lot of workers ready to go on strike. In this case, it may be absurd to argue that the case is about individual dispute. Although the second condition set forth in Article 302 is unsatisfied, the impact would be huge and destructive to the company. Any refusal to offer speedy settlement of the dispute could be construed to defy other provisions aimed at providing speedy mechanism for disputes that could jeopardize the effective operation of the enterprise, and at preventing industrial actions.

If the approaches developed in this thesis are adopted in the decision making of the AC, it is very unlikely that the first two conditions with regard to the parties and the subject matters are unfulfilled in disputes concerning a reinstatement demand. However, if there such cases occur in the future, the Arbitration Council should look beyond the wording of Article 302 of the Labor Law and consider the general purposes of Chapter XII on Settlement of Labor Dispute and Chapter XIII on Strikes - Lockouts.

**Burden of Proof**

The burden of proof issue comes into play in the AC analysis of the third condition under Article 302 of the Labor Law. The worker has to prove that the dispute with the employer has the potential to disrupt the effective operation of the enterprise or social peace. Where the worker fails to so prove, the AC would likely dismiss the case on the basis that the dispute could not jeopardize the effective operation of
the enterprise or social peace.\textsuperscript{104} Such rulings might be against the general rule regarding the burden of proof, “he who asserts must prove.” If the employer brings the action and requests that the AC not consider the issue on the basis of an individual dispute set out in Article 300 of the Labor Law, the party must, in accordance with the principle, prove its argument. The AC should apply the general rule regarding the burden of proof in cases where one party or the other asserts, on the basis of individual dispute, that the Arbitration Council does not have jurisdiction over the dispute.

\textit{45/07 – Wilson Garment} represents the turning point in the AC jurisprudence regarding collective versus individual dispute. The AC expressly put the burden on the employer to prove its proposition that the dispute was an individual dispute. Since the employer failed to provide concrete evidence, the AC rebutted the employer’s action based upon its presumption that all cases forwarded to it by the ministry in charge of labor were collective disputes. The Arbitration Council did not even have to find out whether the dispute in question satisfies the three conditions set out in Article 302 regarding the collective labor dispute. The approach was later employed again in \textit{13/08 – Terratex Knitting} in which the employer was able to prove their assertion, resulting in the issue at hand being considered an individual dispute.

\textbf{Jurisdiction Matter}

The labor conciliator from the ministry in charge of labor conducts conciliation, mandatory in case of a collective dispute and theoretically, voluntary in case of an individual dispute.\textsuperscript{105} The Arbitration Council settles collective labor disputes referred to it by the minister in charge of labor.\textsuperscript{106} A labor court, if

\textsuperscript{104} See \textit{e.g.}, 81/06 – Hong Y, 6 (AC 2006); 57/06 – Evergreen, 10 (AC 2006); 77/06 – PCCS, 8 (AC 2006).

\textsuperscript{105} Labor Law, Arts. 302-308 (1997).

\textsuperscript{106} \textit{Id.}, Arts. 309-317 (1997). The Arbitration Council itself recognizes that it does not have jurisdiction over individual disputes. \textit{See, e.g.}, 113/04 – Joeu Star (2004); 20/05 – Fortune (2005); 57/06 – Evergreen (200); 81/06 – Hong Y (2006); 119/06 – QSP (2006); 24/07 – Island Glory (2007); 54/07 – Young Wah I (2007); 13/08 – Terratex Knitting (2008).
established in accordance with the Labor Law, should have jurisdiction over only individual disputes.\textsuperscript{107} Nothing within the provisions of the Labor Law specifies who or which of the institutions charged with duty to resolve labor disputes is empowered with the exclusive authority to determine whether a dispute is collective or individual.

In practice, both the labor conciliator and the Arbitration Council both make such a determination as to whether a dispute is individual or collective. The minister in charge of labor based on the determination by the conciliator refers only cases considered collective disputes to the Arbitration Council for further settlement in accordance with the Labor Law.\textsuperscript{108} Disputing parties before the Council sometimes argue that the dispute is not a collective and request that it be dismissed as the AC has recognized in various decisions that it does not have jurisdiction over individual disputes. This leads to this arbitration body having to make its own interpretation and dismissing certain cases it considers individual disputes.\textsuperscript{109}

The question that needs answering is who or what institution has the ultimate say in this matter. The labor conciliator has the duty under law to conciliate labor disputes. Article 300-301 of the Labor Law allows the conciliator to conduct voluntary conciliation in individual labor disputes,\textsuperscript{110} whereas Article 303 requires them to take legal conciliation proceedings upon learning of a collective dispute. Although it is compulsory for settlement of collective disputes, conciliation in nature cannot be taken to mean that the conciliator possesses the power to impose its decision upon the disputing parties. Therefore, their decision regarding the category of labor disputes cannot be final; it must be appealable in some way.

\textsuperscript{107} Art. 387 of the 1997 Labor Law states, “Labor courts shall be created that have jurisdiction over the individual disputes occurring between workers and employers regarding the execution of the labor contract or the apprenticeship contract.” To date, no such a court has been established.

\textsuperscript{108} Labor Law, Art. 308-310 (1997).

\textsuperscript{109} See, e.g., 113/04 – Joeu Star, 7 (AC 2003); 20/05 – Fortune, 7-8 (AC 2005); 57/06 – Evergreen, 9-10 (AC 2006); 24/07 – Island Glory, 6-7 (AC 2007); 13/08 – Terralex Knitting, 11-14 (AC 2008).

\textsuperscript{110} The conciliation is mandatory in a sense that if either party makes the request, the other party must participate in the process. Failure to attend conciliation hearings leaves the party vulnerable to a report in favor of the complainant. See Prakas 318/01 on Procedure for Settlement of Individual Labor Dispute, Arts. 3, 4 (2001). It is not entirely clear what the consequence hereof will be, given that the labor inspector is not in a position to impose a settlement on the parties to a dispute.
The Arbitration Council settles cases considered collective and referred to it by the minister in charge of labor. Disputants in the arbitration proceedings sometimes request that the AC not decide certain issues on the basis of individual disputes. The AC may also investigate issues that appear to constitute an individual dispute without party request. Disputants who are not satisfied with the decision by the labor conciliator that their issue constitutes an individual dispute may not file their complaint with the Council. Also, the latter indicates in several decisions that it never has an intention to contest the authority of the former in this matter. The AC decision regarding collective versus individual dispute may be deemed final and unappealable given that courts cannot examine the merits of an arbitral award.

The judiciary seems to be the most appropriate mechanism to appeal the decision of the labor conciliator. Article 128 (new) of the Constitution states in paragraph 3 that, “[t]he Judiciary shall cover all lawsuits including administrative ones.” The complaint against the decision of the labor conciliator may be classified as an administrative suit and therefore brought with an administrative court. While Cambodia does not have such a court, the court of common jurisdiction may, by law, adjudicate all cases including administrative ones. A labor court may be established to resolve only individual labor disputes and not collective ones, in accordance with the provisions of the Labor Law (1997) and does not have jurisdiction to cover administrative cases. The authority to decide the merits of the decision of the conciliator should, therefore, rest with an administrative court, if any, or in the absence of one, the court of general jurisdiction.

Prosecutors in criminal cases can make an investigation and bring the defendant to trial. Litigation proceedings for non-criminal cases take place when one of the concerned parties called the plaintiff bring

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111 Labor Law, Ch. XII, Sec. 2 (B) (1997); Prakas #099, Clause 32 (2004).
112 There have been no cases filed directly by disputants with the Arbitration Council.
113 In almost all of the cases, the Arbitration Council declares that it generally respect the decision of the labor inspector regarding whether a dispute is collective or individual. See, e.g., 113/04 – Joeu Star, 6 (AC 2003); 20/05 – Fortune, 7 (AC 2005); 57/06 – Evergreen, 9 (AC 2006); 24/07 – Island Glory, 5 (AC 2007); 13/08 – Terratex Knitting, 12 (AC 2008). See also 45/07 – Wilson Garment, 11-12 (AC 2007); 13/08 – Terratex Knitting, 12-13 (AC 2009) (as the disputing party bringing the action fail to prove its assertion, the AC follows the decision by the labor inspector).
115 Labor Law, Art. 387 (1997) (“Labor courts shall be created that have jurisdiction over individual disputes occurring between workers and employers regarding the execution of the labor contract or the apprenticeship contract (emphasis added”).
lodges a complaint. Likewise, both collective and individual disputes can be settled through litigation. Article 301 of the Labor Law requires that an individual dispute be filed with a court of competent jurisdiction within two months following voluntary non-conciliation by the labor conciliator. Clause 40 of Prakas #099 on The Arbitration Council (2004) states that disputing parties may bring the case before the court of competent jurisdiction for final resolution where their collective dispute concerns rights relating to the application of a rule of law.

The court can order the labor conciliator to send the non-conciliation report to the minister in compliance with the Labor Law, where the court rules against conciliator’s decision in matters concerning individual versus collective disputes. The minister then must, by law, refer the case to the Arbitration Council for further settlement. The effective Labor Law and regulations do not contain any provisions that permit the Arbitration Council to consider the merits of the ruling by the court and there is no reason why it should do so at all. An appeal against a court decision must be lodged with the Court of Appeal and the Supreme Court respectively, and not with any arbitration organization. For this reason, if unsatisfied with the first instance court’s ruling, the party must follow this proper procedure, in which case arbitration proceedings should be postponed pending the final judicial decision.

116 But see Id., Art. 387 (“Labor courts shall be created that have jurisdiction over the individual disputes occurring between workers and employers regarding the execution of the labor contract or the apprenticeship contract”).
117 Id., Art. 310.
118 The AC has already decided that it does not hear any case that is being settled through litigation. See 54/07 – Yung Wah I, at 12-13 (2007).
Figure 03: overview of recommended process of resolving jurisdiction issues
Summary

The Arbitration Council has brought to light the differences between collective and individual labor disputes under the Cambodian Labor Law. There has already been a large body of jurisprudence regarding collective versus individual disputes. However, there remains room for improvement in the jurisprudence. First, a stronger connection between fact finding and legal provisions should be established more strongly in the reasoning of the definition of the two types of labor disputes. For instance, the AC should state all the relevant fact findings to support its holding in order to reason that a demand for reinstatement of a worker is supported by many other workers. Second, it should collect as much evidence as possible from the disputing parties as to the potential of a dispute to jeopardize the effective operation of the enterprise or social peace.

Third, the general principle, “he who asserts must prove,” regarding the burden of proof, which was already adopted in 45/07 – Wilson Garment and 13/08 – Terratex Knitting, should apply in future cases. Any party who requests that the Arbitration Council not consider a demand on the basis of individual dispute must prove their assertion. Failure to prove should result in the other party being entitled to the presumption that all cases the AC receives from the ministry in charge of labor are collective disputes. Finally, since much confusion is caused by the legal provisions being imprecise in their wording, interpretation may be endless, sometimes contrasting from one case to another. A one-stop solution to the issues is that legislation be amended and made concise as to the distinction between the two categories of labor disputes. The analysis made in this chapter of the thesis should be taken into account if or when this eventually happens.

Analysis also shows that both the Arbitration Council and the court have the final say in matters regarding collective versus individual disputes. Where the Ministry considers a case as a collective dispute and the AC considers otherwise, the ruling by the latter should be final and unappealable. Where a case is considered individual by the labor conciliator, either party may always appeal the decision with the court of

119 Orn, Supra note 10, at 49, 170 (doctoral dissertation, Nagoya University Graduate School of Law June 2008).
competent jurisdiction. The court is authorized by law to order that the dispute follow the procedures set forth in the Labor Law and regulations in case it rules in favor of the complainant. Any appeal against the judicial decision must follow the judicial procedure and not arbitration.
Chapter Four

Statutory Matters and Individual Dispute Arbitration

Background Information

As mentioned in the introduction of this thesis, arbitration conducted by the Arbitration Council has opened up a new door to labor justice in the absence of a reliable judicial system in Cambodia. However, the only arbitration body resolving labor disputes outside the court system, it settles only collective disputes the minister in charge of labor refers to it, although no provisions expressly prohibit it from resolving individual disputes. While the court system does not seem a viable solution in the eye of ordinary Cambodians, it is crucial that another mechanism like that conducted by the Arbitration Council be sought to bring better access to labor justice in the country.

There are statutory matters regarding arbitration of individual labor disputes in Cambodia. Chapter XII of the Labor Law states what trajectories disputants may take to settle their individual disputes, yet voluntary conciliation by the labor conciliator and litigation are the only means specified in the law. No provisions of the Labor Law (1997) or any other concerned regulations mention arbitration as a means for resolving this category of labor disputes. This raises the question as to whether existing laws or regulations of Cambodia impliedly allow or prohibit the establishment of an arbitration association for this purpose. This chapter of the thesis; 1) identifies the statutory issues preventing the Arbitration Council from resolving individual labor disputes and based thereupon, suggest ways in which this arbitration body may be opened up for this type of labor disputes; and 2) argues that the silence in law is not meant to prohibit the establishment of an arbitration organization to resolve individual labor disputes; and 3) recommends legal instruments necessary to make strictly legitimate any such arbitration organization established as either for-profit or non-profit.
Arbitration Council and Individual Labor Dispute Resolution

The jurisprudence of the Arbitration Council reveals that it does not have jurisdiction over individual labor disputes on the basis of Section B of Chapter XII of the Labor Law (1997).\textsuperscript{120} Also, the Council has interpreted that individual disputes should be resolved in pursuance to Article 300 and 301 of the Labor Law.\textsuperscript{121} No arbitral awards of the AC have to date informed the parties in case of individual disputes, to further settle their differences through dispute resolution process set out in their employment contract or any other means mutually agreed to by the concerned parties. Without prior knowledge or experience in the labor dispute resolution process, it is unlikely to read the provisions of the law and regulations to mean that the Arbitration Council does not have jurisdiction over individual disputes.

By law, individual disputes can be settled by the labor conciliator at the initiative of one of the disputing parties.\textsuperscript{122} If the conciliation fails, the parties have two months to file their complaint with the court of competent jurisdiction.\textsuperscript{123} Though the labor ministry issued Prakas #318/01 on Procedures for Settlement of Individual Dispute in 2001, the order only specifies how conciliation by the conciliator is conducted and what disputing parties can expect from this dispute resolution process. The Prakas does not mention any other mechanism in which disputants can choose for the settlement of their disputes.

Certain legal provisions concerning the jurisdiction of the Arbitration Council are contained in the Labor Law (1997) and Prakas #099 on the Arbitration Council issued by the ministry in charge of labor in 2004 in compliance with Section 2(B) of Chapter XII of the Labor Law. Article 312 of the Law states, “The Arbitration Council has \textit{no duty} to examine issues other than those specified in the non-conciliation report or issues which arise from events subsequent to the report [as a result of a] direct consequence of the current dispute (emphasis added).”\textsuperscript{124} According to Black’s Law Dictionary (8\textsuperscript{th} ed., 2004), duty means, “[a] legal obligation […] that needs to be satisfied;” jurisdiction is defined as the “power to decide a case.”

\textsuperscript{120} See \textit{e.g.}, 57/06 – Evergreen, 10 (AC 2006); 54/07 – Yung Wah I, 14 (AC 2007).
\textsuperscript{121} See \textit{e.g.}, 119/06 – QSP, 8 (AC 2006); 24/07 – Island Glory, 7 (AC 2007).
\textsuperscript{122} Labor Law, Art. 300 (1997).
\textsuperscript{123} \textit{Id.}, Art. 301.
\textsuperscript{124} \textit{Id.}, Art. 312.
Therefore, Article 312 should not be interpreted to mean that the AC does not have *jurisdiction* over individual disputes because the term is no synonymous with *duty*.

Another relevant provision is Article 310, which together with Article 312 forms part of Section 2 of Chapter XII on Collective Labor Dispute. The article charges the labor minister with referring collective labor disputes to the Arbitration Council. Then, Article 312 states that the AC has “no duty” to decide issues other than those specified in the non-conciliation report or matters which arise as a result of a direct consequence of the current dispute. Accordingly, the interpretation may be that *where the dispute is collective referred to it by the minister in charge of labor*, the Arbitration Council has no legal obligation to examine issues that are not related to those specified in the non-conciliation report. The articles do not mean the AC does not have jurisdiction over individual disputes.

Although Clause 32 of Prakas #099 stipulates, “The arbitration panel [of the Arbitration Council] shall decide on collective labor disputes that are referred to it in accordance with Article 309, Paragraph C, of the Labor Law;” no clue suggests that the Arbitration Council is prohibited from resolving individual disputes. One of the canons of construction used in statutory interpretation explains, “Remedial statutes are to be read broadly.”¹²⁵ The language of this provision may then mean that it is mandatory that the AC resolve any collective labor dispute the labor minister refers to, but not that its jurisdiction is limited to only this type of labor dispute. In short, none of the relevant provisions should be read so narrowly to interpret that the Arbitration Council may not resolve individual labor disputes.

However, it is not justifiable to argue that the Arbitration Council may resolve individual labor disputes due to the lack of necessary legal instruments. For instance, worker A entered into an employment contract with Employer B. The contract requires that any employment dispute occurring between the worker and employer be resolved through the Arbitration Council. Such a contract may not be valid regardless of the decisions by the AC itself that it does not have jurisdiction over individual disputes. Even without such jurisprudence, the AC does not have in place procedural rules governing individual dispute resolution, and those with regard to collective dispute resolution which forms an Annex to Prakas #099

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cannot be used for settlement of individual disputes. Hence, although the relevant legal provisions may not prohibit the Arbitration Council from resolving individual labor disputes, the AC is yet to be ready to take up such cases.

A separate set of procedures are vitally important to empower the Arbitration Council to hear individual labor disputes. The rules should be established in a way that disputants may file their complaint directly with the AC.\textsuperscript{126} In case a dispute initially considered collective by the ministry in charge of labor, is deemed by the AC as an individual dispute, the disputing parties should be given a chance to bring the complaint in accordance with the rules governing such resolution if they both agree to settle their differences through arbitration and not litigation. If the state cannot afford to financially support the organization and functioning of the Council, arbitration fees may be required in resolution of individual disputes. The procedure should also refer to the Code of Civil Procedure which requires that the courts of general jurisdiction enforce the arbitral award, domestic or foreign. These are only few essential recommendations; a complete procedural rule must contain other necessary provisions which this thesis cannot cover due to its focus and limit.

\textbf{Silence in Law – Prohibition or Non-Prohibition?}

Efforts have been stepped up to introduce legal and judicial reforms in Cambodia, yet studies by both international and local communities show that litigation has yet to earn the trust of ordinary citizens as well as management and workers. As a result, civil societies in cooperation with the government are seeking alternatives to formal litigation in a bid to address disputes which could hinder economic growth and to provide better access to labor justice in Cambodia. The introduction of arbitration as a means of settling labor disputes came in 2003. The Arbitration Council has, since then, brokered settlement of about 600 disputes that might otherwise have led to wildcat strikes and stone-throwing clashes between the

\textsuperscript{126} Currently the AC resolves only cases referred to it by the minister in charge of labor in accordance with Arts. 309-310 of the Labor Law (1997).
management and workers. The nation is in the process of establishing another arbitration body for commercial dispute resolution so that business people do not have to bring their cases all the way to countries like Singapore anymore. The bill proposed in accordance with the 2007 Law on Commercial Arbitration will be approved very soon according to a recent news article.\(^\text{127}\)

Arbitration as one of the forms of Alternative Dispute Resolution is a competitive drive to pave the way for better access to justice in Cambodia.\(^\text{128}\) Arbitration for the settlement of individual labor disputes will provide an alternative to unreliable litigation for both management and workers nationwide. The question remains as to whether or not the existing laws and regulations of the country forbid such a process of dispute resolution. The Labor Law (1997) does not contain any provisions in regard to the establishment of an arbitration center or association providing services for voluntary labor dispute resolution. However, there arise revolutionary implications carried by its certain provisions and those of other laws of the nation—the implications for the apparent legitimacy of the formation of a center or association, for-profit or non-profit, offering arbitration and/or mediation services.

Cambodia signed the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards as far back as 1960.\(^\text{129}\) As a contracting party to the convention, the country has already performed its duties by recognizing and enforcing foreign arbitral awards.\(^\text{130}\) Not only does the convention require that courts of contracting states recognize and enforce arbitral awards, but they must also give effect to an agreement to arbitrate. Article II provides in part, “[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”


\(^{128}\) See UNDP, supra 7.

\(^{129}\) National Trade Data Bank, *Supra* note 34.

\(^{130}\) Hab, *supra* note 130 (the undersecretary of state at the Ministry of Commerce reports that when Cambodia has an arbitration center set up for commercial dispute resolution, companies will not need to go overseas anymore).
In addition, the new Code of Civil Procedure of Cambodia adopted in 2006 is on familiar terms with arbitration as a lawful means of dispute resolution. The code allows for enforcement of arbitral awards whether foreign or domestic. Article 353 (1) stipulates, “[a]n execution ruling of a court must be obtained in order to execute an arbitration award, whether domestic or foreign.” The first instance court or the bailiff seconded to it is charged with this obligation. Article 336 on Execution Organs states with regard to the enforcement of arbitral awards as follows:

1. Execution [of foreign judgments and arbitral awards] shall be carried out by the execution organs on motion by a party.
2. The execution organ shall consist of an execution court or a bailiff.
3. The court of first instance charged with execution in accordance with the provisions of this Book shall be the execution court.
4. The court of first instance to which the relevant bailiff is attached shall render the decision in respect of any motion of objection to any execution measures to be taken by the bailiff.

The code also implies that judges may act as arbitrators. Article 27 (g) provides in part, “A judge shall be excluded from performing his/her duties in case … [he or she] has participated in arbitration in the case....”

The Labor Law (1997) in various provisions recognizes the lawfulness of arbitration regardless of that conducted by the Arbitration Council. The law allows for validity of any arbitral settlement which gives better benefits than what is stated in the law. Article 13 specifies as follows:

The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void.

132 Id., Art. 353 (1).
133 Id., Art. 336.
134 Id., Art. 27 (g) (“A judge shall be excluded from performing his/her duties in case … [he/she] has participated in arbitration in the case…”).
Except for the provisions of this law that cannot be derogated in any way, the nature of public order of this law is not obstructive to the granting of benefits or the rights superior to the benefits and the rights defined in this law, granted workers by a unilateral decision of an employer or a group of employers, by an employment contract, by a collective convention or agreement, or by any arbitral decision. (emphasis added)

Furthermore, the law caters for arbitration procedures other than those by the Arbitration Council among other dispute resolution methods. Article 309 on collective disputes proclaims that if conciliation conducted by the labor conciliator fails to resolve a collective dispute, it is further settled by “any arbitration procedure set out in the collective agreement, if there is such a procedure.” Accordingly, the Labor Law does not aim to forbid the establishment of private arbitration organization.

The right to form an association is also fully guaranteed by the Constitution of Cambodia. Article 42 provides, in part, “Khmer Citizens shall have the right to establish associations. These rights shall be determined by law.” Therefore, an arbitration procedure established in the form of an association is lawfully valid in accordance with the Constitution as well as other laws discussed in the previous paragraphs of this section and the international convention to which Cambodia is a contracting party as long as such an association is created in compliance with the law. This practice has been adopted in the United States for a very long time. The American Arbitration Association (AAA) is just a simple example of arbitration procedures being created in the form of an association. Japan also has a private arbitration association called Japan Commercial Arbitration Association (JCAA), formerly known as the International Commercial Arbitration Committee.

Legal scholars may interpret Article 129 of the Constitution so narrowly as to argue that no persons other than judges are by law granted the power to resolve disputes and therefore any association created for that purpose is not in conformity with the Constitution. The article stipulates that, “[o]nly judges shall have the right to adjudicate” (emphasis added). Arbitrators acting in their profession have duty to

135 The transliteration of the Khmer term for adjudicate is chomreah-kdei.
arbitrate and not adjudicate disputes. In the legal context, adjudication is compulsory for both criminal and non-criminal cases, and the concerned parties do not need an agreement to bring their case up for adjudication. In non-criminal cases, only one party to a dispute may request adjudication, lawfully forcing the other party to participate in the process. However, in criminal cases the state prosecution may bring the accused before the court without the victim’s action. Arbitration is, on the other hand, either compulsory or voluntary. In addition, Cambodia has already adopted laws and regulations which permit private and independent mechanisms for dispute settlement, including the Labor Law, Prakas #099 on the Arbitration Council and Law on Commercial Arbitration.

According to the labor law, it is mandatory in Cambodia that collective labor disputes must be settled before the Arbitration Council if there is no mutually-agreed procedure for settlement. Other arbitration procedures other than those by the AC are voluntary in that it requires mutual agreement between disputing parties concerned. Also, under the Law on Commercial Arbitration, parties must have mutual consent to have commercial disputes settled through arbitration. Thus, any argument on the basis of Article 129 of the Constitution against dispute settlement by means of arbitration is not legally valid.

The Convention, the Code of Civil Procedure and the Labor Law, the Constitution and the fact that the Arbitration Council and the National Arbitration Center constitute evidence sufficient enough for this study to prove that private arbitration procedures can be set up lawfully in Cambodia. The government may not reject any fresh initiative introduced to create an arbitration association to settle labor disputes, collective or individual. However, the country needs a uniform arbitration law for such arbitration procedures to function fully and properly. Without a uniform law, unavoidable controversies will arise over the effect of an agreement to arbitrate and non-waiver; motion to compel or stay arbitration; arbitrator immunity; judicial confirmation and enforcement of pre-award rulings by arbitrators; circumstances in which arbitrators may or may not modify, change or correct their award; arbitral award vacation; to name just a few.

Summary

The Arbitration Council should reconsider its jurisprudence in respect of its jurisdiction over individual labor disputes. The plain meaning of the relevant provisions implies that where the dispute is a collective one as referred to it by the minister in charge of labor, the Arbitration Council is not obliged to examine issues other than those specified in the non-conciliation report or matters which arise as a result of a direct consequence of the current dispute; but not that its jurisdiction is limited to only collective labor disputes. However, a separate set of procedures are indispensable to ready the Arbitration Council for individual labor dispute resolution. The Arbitration Council Foundation (which supports the AC technically and financially) can always to take the initiative and draw up rules governing the arbitration proceedings for this purpose.

An arbitration association, for-profit or non-profit, can be set up to legally offer arbitration services to labor disputants who mutually agree to make use of them to settle their differences in their employment relations. First, Cambodia signed the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards in 1960, which requires its Contracting States to recognize and enforce not only foreign arbitral awards but also arbitration agreements. Second, the new Code of Civil Procedure of Cambodia adopted in 2006 takes cognizance of arbitration as a lawful means of dispute resolution by adjuring that arbitral awards be executed by courts or its bailiffs. Third, the Labor Law (1997), in various provisions, legitimizes arbitration both by the AC and any other as a means to settle all sorts of labor disputes. Last, the Constitution of the nation safeguards the right to establish an association, a form of organization which could be set up so as to arbitrate labor disputes as well as such other types as commercial and consumer-related disputes. With a uniform arbitration law being made in order to fully legalize and govern the arbitration proceedings instituted by all arbitration organizations, Cambodia will surely open up a new door to labor justice of which both management and workers are desperately in need.
Arbitration has ushered in a new era of justice system in Cambodia. Commercial arbitration to soon be established will bring business people fresh hope for expeditious dispute resolution. If successful, the system could also contribute to the improvement of investment atmosphere, which could in turn attract more investors to the country. With the establishment of the Arbitration Council in May 2003 comes better access to industrial justice. The AC safeguards the application of the Labor Law and related regulations. Both management and workers in the country rely heavily on the council’s arbitration proceedings to settle their collective differences. Well-reasoned arbitral awards by the Arbitration Council being easily accessible provides great consultation as to how the Labor Law and related regulations are put into practice.

The AC rulings as to whether disputes are collective or individual shed light on the distinction between two dispute categories. With precise connection of fact-findings to its legal reasoning, the distinction would be clearer and more convincing to legal academics as well as other interested persons. Appropriate application of the burden of proof principle would better maintain the rule of law in industrial relations. No cases before the AC have to date proved that only the third condition concerning the consequences of a collective dispute is fulfilled while the other two conditions regarding the parties and the subject matters are not. The Council would unlikely, if faced with this challenge, hold that such a case constitutes an individual dispute.

The legal matter concerning which institution has the ultimate authority in deciding whether a dispute is collective or individual has not been much of an issue for industrial stakeholders. However, there is room for improvement for possible future controversies. An administrative court or in its absence, the common court is where an appeal must be lodged against the decision of the conciliator of the labor ministry. The Arbitration Council also has the authority to make a determination on this issue where either party argues, at the arbitration hearing, that the issue at hand considered collective by the labor conciliator represents an individual dispute or where the AC is suspicious. Although the AC deems a dispute as individual, it should reconsider matters over its jurisdiction. At least, in addition to its order for disputing
parties to follow the procedures under Section 1 of Chapter XII of the Labor Law, the council should
provide that parties may further settle their differences through other methods agreed to by both parties.
Parties to individual disputes may always opt for other methods to have their differences settled particularly
where they do not trust the current judiciary especially in labor context where management and workers
prefer a speedy means of dispute resolution by which they can maintain their relationship despite
unavoidable differences from time to time.

No relevant legal provisions suggest that the Arbitration Council does not have jurisdiction over
individual disputes. Although the legislative history of the law may suggests otherwise, there remain
discussions regarding which theory of statutory interpretation prevail, particularly where the implications
are evident in various provisions that the AC has the obligation to settle all collective differences but not
that its jurisdiction is limited to individual disputes.

The New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, to
which Cambodia is a Contracting State; the Constitution; the Code of Civil Procedure; the Commercial
Arbitration Law; and the Labor Law itself are written in a way that allows for the establishment of any
other arbitration organization to settle labor disputes. The only legal instrument necessary to govern
arbitration is a uniform arbitration law, which could not only fully legalize arbitration as an alternative to
litigation but also draw a fine distinction in the relationship between arbitration and judiciary. Such a law
would also serve as a model law to which other future arbitration laws and regulations must be in
conformity. Most importantly, the uniform law will mark an epoch of improvement in legal reforms in
Cambodia.

How arbitration system could be initiated to resolve labor disputes, especially individual ones, is
another important question worth considering. The existing legislations do not forbid the founding of an
organization for this purpose. Any individual can always take the initiative to register it with the
government body in charge and start receiving cases filed with them. The acme for a private arbitration
system may be organizations like the American Arbitration Association (AAA), which is a private
enterprise in the business of arbitration among other forms of alternative dispute resolution. Studies of
their rules governing arbitration proceedings, and history could draw on enormous resources necessary to set up a satisfying arbitration body.

The Arbitration Council Foundation, which provides administrative, technical and financial support to the AC is in the best position to take the initiative. The foundation is a veteran of arbitration proceedings in Cambodia. Also, it has considerable experience in regulating the rules and procedures to make an arbitration system provide fair and speedy settlement of labor disputes in the country. Therefore, the foundation possesses a high capacity to create a separate set of rules with regard to arbitration of labor disputes and to start recruiting arbitrators locally or internationally.

Recommendations for Further Studies

As a still-developing alternative method of dispute resolution, the labor arbitration system of Cambodia has great potential for further study. First, a comparative study of the system in Cambodia and that of other countries where it fully functions and contributes a great deal to the resolution of labor disputes is of the essence. Identifying both its advantages and disadvantages is a good way of developing a system that works in the Cambodian context. Another venue for further research may be an investigation into the legal theories behind arbitration as a means of labor dispute settlement. Realization of these could dawn on the expansion of the mechanism into other areas of disputes in an appropriate way.

Classification of labor disputes and their resolution procedures is also an interesting area for further research and may be conducted as a comparative study. Such countries as Cambodia, France, Germany, and Japan categorize disputes into collective and individual while those like Australia and the United States make a distinction between labor and employment disputes. In the latter countries, labor disputes bear similar meaning to collective disputes while employment disputes are similar to individual ones in Cambodia, France, Germany and Japan. Certainly, there are differences in classification which deserve a thorough study. How each of the categories is handled also differs from one country to another.
The theories behind the classification of disputes have their both pros and cons, the discovery of which may enable legal scholars to seek appropriate remedies for the flaws in the models of dispute classification and for the production of legislations that serve the best interest of the interested players in labor relations.
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