

**KINGDOM OF CAMBODIA  
Nation King Religion**

Case number: 11/03  
Date of Award: 29-08-2003

**ARBITRATION COUNCIL**

**ARBITRAL AWARD**

Issued under Article 313 of the Labour Law

Cambodiana Hotel

(the "employer party")

**AND**

Cambodiana Employees Union

(the "worker party")

**details of employer party:**

address: #313, St. Pras Sisovath, Sangkat Chaktomuk, Khan Daun Penh, Phnom Penh  
telephone: (855-23) 218 189, 426 288 .....fax: (855-23) 426 392

representative: Michel G.Horn (Managing Director), Tip Chan -Vibol (lawyer) and other assistants  
address: #313, St. Pras Sisovath, Sangkat Chaktomuk, Khan Daun Penh, Phnom Penh  
telephone: (855-23) 218 189, 426 288 .....fax: (855-23) 426 392

**details of worker party:**

address: #313, St. Pras Sisovath, Sangkat Chaktomuk, Khan Daun Penh, Phnom Penh  
telephone: no,.....fax: no,.....email: no

representative: Ly Kam (Union President), Sun Kak-San (lawyer) and other assistants  
address: #64, St. Pras Sisovath, Sangkat Chaktomuk, Khan Daun Penh, Phnom Penh  
telephone: (855-12) 588 267, 979 721,..... fax: no,.....email: no

## **ISSUES IN DISPUTE:**

This case has only one issue.

- Employees claim that the hotel should pay them 100% of the service charge collected.

## **Jurisdiction of the Arbitration Council:**

The Arbitration Council derives its power to make this Award from Section II B of chapter 12 of the Labor Law (1997); the Prakas on the Arbitration Council (no. 338, of 11 December 2002); and the Arbitration Council Procedural Rules which form an Annex to the same Prakas.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labor Law. That conciliation hearing was unsuccessful and non-conciliation report No.1213 dated July 18, 2003 was submitted to the Secretariat of the Arbitration Council on 21-07-2003.

## **Composition of the arbitration panel:**

Arbitrator chosen by the employer party:	Mar Samborana
Arbitrator chosen by the worker party:	Tuon Siphann
Chair arbitrator (chosen by the two arbitrators):	Ang Eng Thong

## **Hearing and Evidence:**

Date and place of hearing: Monday 11<sup>th</sup> August 2003 (14.00 – 19.00 ), Arbitration Council Secretariat, Phnom Penh Center (A), Sothearos Blvd., Sangkat Tonlebasak, Phnom Penh.

Evidence:

1. Documents on salary and service charge distribution for the year 2002, provided by employer during the hearing.
2. Payroll for the years 2002 and 2003, provided by employer during the hearing.
3. Tip summary for April 2002, provided by employer during the hearing.
4. Documentation of average wage package paid at Hotel Cambodiana for year 2000, 2001 and 2002, provided by employer during the hearing.
5. Table showing the employees' wage increase from 1991 until 2003, provided by employer during the hearing.
6. The sample of employment contract, provided by employer before the hearing.
7. A letter of Hotel Cambodiana to Cambodiana Employees Union dated June 14, 2003 , provided by employer before the hearing.
8. A letter of Personnel Department's Director to Mr. Ly Kam, President of Cambodiana Employees Union, provided by employer before the hearing.
9. Document showing additional benefits in cash and kind, provided by employer during the hearing.
10. Breakdown in cash and kind distributed to employees for year 2000, 2001 and 2002.
11. Document on service charge, provided by employees during the hearing.
12. Letter of H.E Suy Sem, Minister of Social Affairs, Labor and Veteran Affairs dated February 14, 1994, to General Director of Sofitel Cambodiana Hotel, provided by employees before the hearing.
13. Cambodiana Hotel Receipt dated June 14, 2003 to Cambodiana Employees Union, provided by employees before the hearing.
14. The sample of employment contract between Cambodiana Hotel and employee, provided by employees before the hearing.

15. Letter of Legal Aid of Cambodia dated August 04, 2003 to Cambodiana Hotel, provided by employees before the hearing.
16. Document of Cambodiana Employees Union dated July 24, 2003 regarding the union's estimate of service charge receipt for the last three years, provided by employees before the hearing.
17. Document of Cambodiana Hotel dated August 12, 2003 regarding policies on the distribution of service charge in Thailand, Singapore, Malaysia and Indonesia, provided by employer after the hearing.
18. Complaint of Cambodiana Employees Union to Minister of Labor dated April 25, 2003 saying that the hotel failed to pay out the correct amount of service charge and threatened the union leaders, provided by employees before the hearing.
19. Letter of Cambodiana Hotel to Minister of Labor dated June 11, 2003 relating to service charge, provided by employer before the hearing.
20. Conciliation Report of Labor Inspection Department.
21. Internal Rules of Cambodiana Hotel.
22. The testimony of Mr Edwin Butcher, witness called by the employer.
23. Explanation on case history and oral testimony, provided by both parties during the hearing.

### **Summary of the Case:**

The employer is Cambodiana Hotel which started doing its business in 1990 and now it employs about 440 workers. Since the commencing business, the hotel has developed policies for managing the performance of its workforce. As part of this system, the hotel developed the practice of adding a service charge of 10% into the receipt paid by clients.

The hotel also has internal rules which were developed with the employees and which are recognized by Labor Inspection Department. According to these internal rules, there are three kinds of bonus: first is monthly service collection bonus (equal to a share of 30% of the service charge collected), second is annual bonus which depends on the sole discretion of the employer and the performance of hotel and employees, and third is end of contract/severance bonus which is paid every three years or two years. These three kinds of bonus are also mentioned in employment contracts. Beside what is mentioned in the internal rules, both employer and employees recognize that the hotel has provided employees with a service bonus of \$10 per month for each year employment seniority up to a maximum of \$90 per month. However, this service bonus is not provided to all employees in the hotel.

As there is no clear mechanism in service charge distribution, employees think that they have only received 30% of service charge, not 100% like the labor law stipulates.

In 1994, the hotel sent a letter on service charge to Minister of Social Affairs, Labor and Veteran Affairs; and the Minister replied back via a letter dated February 14, 1994.

From 1990 until the promulgation of the labor law, the hotel had performed as follows:

- when there was not yet labor law, Cambodiana Hotel, the first international standard hotel in Cambodia, had spent many years to prepare its policies similar to those of other countries. The hotel had distributed 30% of service charge to employees equally; as for the rest of service charge, the hotel had spent for other advantages like meals, running staff canteen, uniforms and shoes, laundry expenses, breakage and spoilage, training, transportation, medical expenses and employee relation. Totally the hotel had provided employees the advantages about 72,20% (of service charge collected). This method of payment became accepted and at that time there was no any objection or claim from employees.
- In 1990, the wage was composed of basic salary, service charge and other advantages.
- In 1991, service bonus was introduced in order to keep employees working in the hotel because the hotel's employees who had been already trained, were attractive to many organizations like UN, embassies, and corporations which needed to recruit staffs. The success of the hotel in keeping its staff was due to the increase of salary and other benefits provided.
- In the early of 90s, the seniority bonus was introduced as an added incentive to employees. Under this scheme employees received an annual salary increase of \$10 per month in addition to the basic salary for every year of continuous employment. This bonus stopped scheme was stopped in 2001 when the maximum seniority was 10 years.

- The basic salary rate had increased gradually until 1997. Since 1997, the hotel has made a loss every year; particularly in 2003 after the war in Iraq and SARS.
- The end of contract/severance bonus is paid at the rate of one month per year of service each time employees finish a two year contract.
- For some employees, the hotel has not provided the additional seniority bonus because they are supervisors.

**Findings of Fact:**

Arbitration Panel has found the facts as follow :

1. The number of employees in Cambodiana Hotel is 440 persons. This number is based on the verbal answer of employees.
2. Employer has added in the receipt 10% of payment as service charge.
3. All employees have equally received monthly bonus, 30% of service charge which the employer has taken from the clients.
4. Employer has provided the employees a seniority bonus of \$10 per month for each year of service added to their basic salaries. This seniority bonus has been increased to \$90 per month for ten years employment. This bonus has not been provided to employees whose position is supervisor or above.
5. Employer has provided the employees annual bonus according to his discretion.
6. Employer has provided employees other advantages such as meals, running staff canteen, uniforms and shoes, laundry expenses, breakage and spoilage, training, transportation, medical expenses, employee relations, annual bonus and seniority bonus.
7. Before 1997, the employer had provided employees a (three month) bonus at the end of each three year contract, and then after 1997 this changed to (two months) at the end of each two years after 1997. But this point is not related to service charge because both parties, employer and employees agree that this bonus is severance pay.
8. Related to hotel tourism industry in other countries, there is no law on the method and time that employer needs to provide employees service charge and they perform according to the agreement stipulated in Collective Bargaining Agreement or in employment contract.

**Reasons for Decision:**

1. Article 134 of the Labor Law 1997 specifies that remunerations “made by clients to personnel of certain establishments such as hotels, restaurants, cafés, bars, and hair salons, and received by the employer as a mandatory percentage added to the client's bill with a note “for service” must be collected by the employer and distributed in full to the personnel in contact with the clientele.” These amounts are referred to in Khmer as *prak thonianikruah*.

In practice the bills issued to clients at the Cambodiana Hotel have a mandatory 10% added to the original amount marked “service charge”. The confusion regarding this point seems to stem from the use of the English word “Tip” in the translation of the law. The usual translation of the word “Tip” in Khmer is *prak tik tae* and not *prak thonianikruah* as used in the law. As such the employer is correct to point out the distinction between tips, *tik tae*, and Service Charge. However, even though the line on the bills in question is not marked *somrap seva* in Khmer or “for service” in English, it seems clear to the AC that this mandatory percentage cost added to guests’ bills is equivalent to a charge *somrap seva*. Thus in the opinion of the Arbitration Council any percentage amount added to guests’ bills as ‘service charge’ is clearly *prak thonianikruah* as defined in Article 134.

As a consequence the 10% service charge added by Cambodiana Hotel must be paid *in full* to staff who have contact with clientele (Art. 134). As to the method of distribution, the law only provides that the Hotel must follow ‘professional practice’. (Art 136).

Further Art. 135 of the Labor Law provides that the employer must provide a clear account of the amount received and distributed as *prak thonianikruah*.

2. In deciding whether the Cambodiana Hotel has met its obligation to distribute 100% of *prak thonianikruah* the Arbitration Council notes that *prak thonianikruah* should be considered to be part of wages as defined in Articles 102 and 103 of the Labor Law. Thus, the Arbitration Council finds that the employer must pay *prak thonianikruah*:

- i. in full every month (Art 116(2));
- ii. in cash (and not in kind) (Art 113); and that
- iii. the employer must account to its employees for the amount collected and distributed (Art. 135).

Arbitration Council finds that an employer can comply with the requirement to pay 100% of *prak thonianikruah* by:

- i. paying this amount in full in addition to a basic wage; or
- ii. by establishing a system, either by agreement or accepted practice, which includes all or part of the *prak thonianikruah* in a wage package. This wage package might include a basic wage, bonuses and other payments. Such a system would be valid so long as:
  - A. wages are paid in full every month;
  - B. wages are fully paid in cash;
  - C. there is a clear and transparent method for the calculation and distribution of the of 100% of *prak thonianikruah*;
  - D. the employer accounts to the employees every month for the amount of *prak thonianikruah* collected and distributed; and
  - E. the amount actually paid to staff is not less than any guaranteed minimum wage or 100% of *prak thonianikruah*, whichever is greater.

The Cambodiana Hotel issues employment contracts which include a basic wage plus a “variable Monthly Service Collection Bonus” to be paid “together with the basic wage each month end.” Thus the Cambodiana Hotel’s payment system seems to require them to pay 100% of *prak thonianikruah* in addition to the basic wage (as in (i) above).

In deciding whether or not an employer is in breach of its obligations to pay 100% of *prak thonianikruah*, the Arbitration Council must consider both the method which is used to calculate wages and the total amount of wages received.

According to undisputed evidence the Cambodiana Hotel distributed, in addition to basic wages, an amount equal to:

- 30% of the amount collected as service charge as a Monthly Service Collection Bonus,
- 75 – 85% of the amount collected as service charge paid as monthly seniority bonuses and year end bonuses<sup>1</sup>

In these circumstances it is not decisive that the employer labeled as “bonuses”, entitlements which should have been clearly attributed as *prak thonianikruah*. The fact remains that the total amount of wages received by the employees was greater than the amount to which they were entitled under law. For this reason the Arbitration Council cannot grant the employees request for back-payment of *prak thonianikruah*.

Nevertheless, the Arbitration Council finds that the Cambodiana Hotel has breached the labor law by using an incorrect method for the calculation of wages, particularly by:

- not establishing a method for the distribution of *prak thonianikruah* which is clear and transparent to employees;
- not providing clear statements to employees each month as to what *prak thonianikruah* was collected and how this was distributed;

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<sup>1</sup> Uncontested figures presented by the employer relating to the years 2000 – 2002 presented to the Arbitration Council during the hearing on 11 August 2003.

- paying some of the amount collected as *prak thonianikruah* in the form of yearly bonuses rather than as monthly wages;
- labeling as *bonus* amounts to which employees were entitled as a share of *prak thonianikruah*.

Having decided that the employer did not comply with the law it falls to the Arbitration Council to decide what remedy is appropriate in the circumstances. In deciding on a remedy, the Council follows Article 34 of *The Prakas on the Arbitration Council* (#338 of 2002). This Article states that the Arbitration Council has the full power to remedy any violation of the law providing “any civil remedy or relief which it deems just and fair.”

The harm suffered by the employees because of the above breaches is as follows:

- Economic loss because of delayed payment (part of the [*prak thonianikruah*] was paid in the form of end of year bonuses rather than monthly); and
- Uncertainty (due to the fact that end of year bonuses were paid at the employer’s discretion rather than as of right);

**Decision & Orders:**

On the basis of the above the arbitration panel makes the following decisions and orders in full resolution of the dispute regarding “the claim to receive 100% of *prak thonianikruah* which the employer collected.”

1. The amounts identified as “service charge” are *prak thonianikruah* within the meaning of the law.
2. The employer shall, on or before 31 October 2003, pay damages in the amount of US\$50 to all of its employees who in the past received the 30% service bonus and who worked during the past three years (including those workers whose employment has been terminated in 2003)
3. The employer shall notify all workers who have a right to receive this money at their last known address.
4. The employer shall pay the above damages to each worker directly and in full unless the employer and the workers’ representatives come to a different agreement.
5. With regard to the future the Cambodiana Hotel shall revise its scheme for payment of *prak thonianikruah* in order to bring this into compliance with the law. In doing this the Hotel must, within 2 months of the date of this award:
  - a. establish, in consultation with any representative unions, a clear and transparent method for the distribution of *prak thonianikruah* which ensures that 100% of the *prak thonianikruah* collected is distributed to staff each month;
  - b. publicize and explain this method to all staff who are entitled to receive a share of *prak thonianikruah*; and
  - c. begin providing all staff who are entitled to receive a share of *prak thonianikruah* with a monthly account of service charge collected and distributed in accordance with the above method.

**Other Issues:**

Arbitration Council records in its minute that this issue has reached arbitral process.

Arbitration panel has tried to resolve the issue which is the object of its award through a conciliation on August 08, 2003 at the Arbitration Council Secretariat from 14.00 until 17.30. This conciliation was conducted in accordance with Article 30 of Prakas of MoSALVY No. 338 dated December 11, 2002 on the establishment of Arbitration Council.

Then the arbitration panel also helped to search and nominate an independent and neutral mediator among the members of Arbitration Council, and delayed many days in order to help parties to reach an agreement. This mediation finished in August 25, 2003 when both parties failed to reach the agreement on their issue.

**Signatures of Members of the arbitration panel:**

Arbitrator chosen by the employer party:

name: Mar Samborana

signature: .....

Arbitrator chosen by the worker party:

name: Tuon Siphann

signature: .....

Chair of arbitration panel:

name: Ang Eng Thong

signature: .....

*This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition with the Secretariat of the Arbitration Council within this time period.*

*This Award is immediately binding upon the parties if parties have agreed as such in writing before the notification of the Award, or if parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.*