



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអន្តរាគ្នា**

**THE ARBITRATION COUNCIL**

**Case number and name: 84/08-Trinunggal Komara**

**Date of Award: 4 August 2008**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Ly Tayseng**

Arbitrator chosen by the worker party: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

#### **DISPUTING PARTIES**

##### **Employer party:**

Name: **Trinunggal Komara Garment Industry Co., Ltd.**

Address: Chongthnol Khanglich Village, Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh

Telephone: 012 361 899

Fax: N/A

Representative:

- |                        |                         |
|------------------------|-------------------------|
| 1. Mr. Lim Chhorkhay   | Company advisor         |
| 2. Mr. Tep Chharavan   | Chief of administration |
| 3. Ms. Nop Chan Leakna | Company lawyer          |

##### **Worker party:**

Name: **Cambodian Union Federation (CUF) and Local Union of Garment Worker Union at Trinunggal Factory (GWU)**

Address: Chongthnol Khanglich Village, Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh

Telephone: 012 658 129

Fax: N/A

Representative:

- |                       |                                 |
|-----------------------|---------------------------------|
| 1. Mr. Chuon Mom Thol | President of CUF                |
| 2. Mr. Mom Thon       | Officer of CUF                  |
| 3. Ms. Khiev Savy     | President of GWU at the company |

|                      |  |
|----------------------|--|
| 4. Ms. Ngak Somaly   | Vice-president of GWU at the company   |
| 5. Mr. Yon Sokha     | President of Free Trade Union of Workers of Kingdom of Cambodia at the company       |
| 6. Mr. Som Vy        | Vice- president of Free Trade Union of Workers of Kingdom of Cambodia at the company |
| 7. Mr. Sim Tainghong | Secretary of Free Trade Union of Workers of Kingdom of Cambodia at the company       |
| 8. Mr. Mao Por       | Worker representative  |
| 9. Mr. Suos Pheakdey | Worker representative  |
| 10. Mr. Prum Vattey  | Worker representative  |
| 11. An Oun           | Worker representative  |
| 12. Lim Sokha        | Worker representative  |
| 13. Heang Sary       | Worker representative  |
| 14. Kong Lorm        | Worker representative  |
| 15. Hun Phalla       | Worker representative  |
| 16. Prak Sichooun    | Worker representative  |
| 17. Chen Srey        | Head of sewing group   |
| 18. Hak Rortryak     | Head of sewing group   |
| 19. Neak Sophy       | Head of sewing group   |
| 20. Thach Sokha      | Head of sewing group   |
| 21. Men Vanna        | Worker   |
| 22. Mr. Leng Thol    | Worker   |
| 23. Mr. Khun Sally   | Worker   |
| 24. Khem Nearea      | Worker   |

### **ISSUES IN DISPUTE**

(In the Non-Conciliation Report)

- 1- The workers demand that the Company terminates their employment contract and pay them indemnity for dismissal before the Company moves to a new location. The Company party states that it does not have a policy to terminate workers' employment contract. The employer will maintain the workers' current seniority and benefits.

### **JURISDICTION OF THE ARBITRATION COUNCIL**

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor Law (1997); the Prakas on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same

Prakas; and the Prakas on the Appointment of Arbitrators No. 076 dated 10 May 2007 (Fifth Term).

An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and the non-conciliation report No.708 KB/AK/VK, dated 7 July 2008 was submitted to the Secretariat of the Arbitration Council on 7 July 2008.

### **HEARING AND SUMMARY OF PROCEDURE**

**Place of hearing:** The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

**Date of hearing:** 14 July 2008 from 8:00 a.m. to 12:00 p.m.

#### **Procedural issues:**

On 4 July 2008 the Department of Labour Disputes received a complaint by phone regarding a demand from 1,500 workers that the company terminate their employment contracts and pay them indemnity for dismissal. After receiving this case, the Department of Labour Dispute assigned an expert official to settle this dispute and the last conciliation was held on 4 July 2008 on one non-conciliation issue with no conciliation result. The one non-conciliation issue was referred to the Arbitration Council on 7 July 2008 through the non-conciliation report of collective labour dispute resolution No. 708 KB/AK/VK, dated 7 July 2008.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party to the hearing and conciliation on the one non-conciliation issue on 14 July 2008 at 8:00 a.m.

Both parties were present at the arbitral hearing. The Arbitration Council asked for information relevant to this dispute and attempted to further the conciliation on the one non-conciliation issue but did not achieve a conciliation result. Thus, the Arbitration Council will consider and settle this dispute based on the evidence and findings of fact as follows:

### **EVIDENCE**

**Witnesses and experts: N/A**

#### **Documents, Exhibits and other evidence considered by the Arbitration Council**

Provided by the employer party:

1. Authorization letter to Mr. Lim Chhorkhay, advisor of Trinunggal Komara Company, as a representative of the company to settle all affairs of the company, dated 31 March 2008.

2. Certificate of commercial registration of Trinunggal Komara Company, dated 12 January 1999.
3. Investment license of Trinunggal Komara Company, dated 20 September 1999.
4. Internal Work Rules of Trinunggal Komara Company, dated 2 July 1999.
5. Statute of Trinunggal Komara Company, dated 14 December 1998.
6. Summary statement by the company, dated 8 July 2008.
7. Notification by the location lessor, Oknha Hann Khean, to the Company, who leases the location to the Company to inform that the Company's lease is being discontinued from the date of notification. The notification afford the Company 5 months company to look for new location to continue its business, dated 30 March 2008.
8. Announcement by the company to inform workers to come back to work to wait for decision from the Arbitration Council, dated 4 July 2008.
9. Rental contract regarding the rent of factory building located in Tuol Pongror Village, Sangkat Chom Chao, Khan Dangkor, Phnom Penh with 5 years of rental period from 1 July to 30 June 2013, dated 6 June 2008.
10. Minutes of meeting regarding request for the company to pay seniority bonus, dated 11 June 2008.
11. Minutes of meeting regarding invitation of head of group and vice-head of group for a meeting, dated 13 June 2008.
12. Minutes of meeting one continued discussion meeting about changing the factory location, dated 24 June 2008.
13. Minutes of meeting regarding workers' request to terminate their contract before changing to a new location, dated 30 June 2008.
14. Minutes of meeting regarding continued discussion meeting, dated 1 July 2008.
15. Minutes of meeting regarding discussion meeting about changing the factory location, dated 3 July 2008.

Provided by the worker party:

1. Complaint by workers in Trinunggal Komara factory, dated 4 July 2008.
2. Letter by the chief of the Department of Labor Dispute to the president of GWU at Trinunggal Komara factory regarding recognition of the union leadership in the third mandate, dated 4 July 2008.
3. Letter by the president of CUF to the Arbitration Council request to change its procedure regarding case of Trinunggal Komara company from binding arbitral award to non-binding arbitral award because the company continued to violate the arbitral award by transporting machine out of the company and recruit new workers.

Provided by the Ministry of Labour and Vocational Training [MoLVT]:

1. Report of collective labour dispute resolution at Trinunggal Komara Company No. 708 KB/AK/VK, dated 7 July 2008.
2. Minutes of collective labour dispute resolution at Trinunggal Komara Company, dated 4 July 2008.

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to invite the worker party to attend the hearing No. 424 KB/AK/VK/LKA, dated 8 July 2008.
2. Letter of invitation to invite the employer party to attend the hearing No. 423 KB/AK/VK/LKA, dated 8 July 2008.

**FACTS**

- Having reviewed the report of collective labour dispute conciliation
- Having listened to statements by the worker party and the employer party
- Having examined additional documents

**The Arbitration Council finds that:**

- Trinunggal Komara Company commenced operation in 1999 and currently employs approximately 1,500 workers.
- The claimant is a GWU local union, representing both its own members and a number of members from the National Industrial Trade Union of Cambodia (NITUC). The claimant party represents approximately 800 workers who have undetermined duration contracts and demand that the company terminate their employment contracts and pay them according to the Labour Law before changing the company's location.
- On 30 March 2008 the company received a notification from Oknha Hann Khean, the Company's landlord, explaining that he was canceling the Company's lease, starting from the notified date, and permitting the owner a period of five months time to look for a new location for its business.
- The Company explained in the hearing that it notified worker representatives about the above notification and that it was unable to inform them about the new location, because it had not yet determined where it would relocate. The worker party objected, claiming that they were not aware of this.
- The Company added that after being notified it started looking for a place to which it could relocate. While it was looking for new location, on 7 June 2008 the workers submitted a letter to the Company to request a negotiation and requested that the Company pay their seniority payment and other payment before relocating.

- On 11 June 2008 the Company met with union and worker representatives to present the planned factory relation. The workers rejected the plan. The two parties met again a number of times in order to negotiate an agreeable compromise, but were unable to reach an agreement.
- On 16 June 2008 the company decided to rent a new location (rental contract of a factory building located in Tuol Pongror Village, Sangkat Chom Chao, Khan Dangkor, Phnom Penh with five year lease from 1 July to 30 June 2013, dated 6 June 2008).
- The worker party states that the new and the old locations are located approximately 10 kilometers apart. The company states that they are 8.2 kilometers from each other.
- From 4 to 7 July 2008 the workers went on strike. On 8 July 2008 they went back to work after the Arbitration Council issued an interim order dated 7 July 2008.
- The worker party demand that the company terminate their contract and pay them before changing to the new location for the following reasons:
  - a. The fact that the company changes its location from Chong Thnol Khanglich Village, Sangkat Teuk Thla, Khan Russey Keo to the new location in Tuol Pongror Village, Sangkat Chom Chao, Khan Dangkor is a violation of the employment contract by the employer because the employment contract, in addition to mentioning the workers' name, age, sex, date of birth, it also contains the company's address. This is [one of the] reasons for the request for termination of contract.
  - b. Workers who have been working for 5 to 10 years need 2 months prior notification about changing to new location.
  - c. Rental prices around the new location are more expensive than at the old location and some workers have family and children who need to move with them.
  - d. The workers demand that the company pay them according to Articles 116, 75, 91, 89, 75 and 77 and, after the company has terminated their old contract, they can enter into a new employment contract at the new location.
- The Company claims that it did not violate the employment contract because the factory relocated only in response to notification from the lessor of the old location. The company tried to look for new location near the old factory but was not able to find an available space. For that reason, the company decided to rent a new location in Kan Dangkor. The company observes that the new location provides better location to workers than the old location because it is near a populated area and the rental fee is not different from the old location, i.e., around US\$ 25 to US\$ 30 per month.

However, in order to provide relief to workers who would move to the new location, the company provided the following benefits for a period of three months:

- a. US\$ 7 to US\$ 9 per month for gasoline allowance for those workers who do not use the company's transportation or travel in the company's van from the old location to the new location.
  - b. US\$ 6 allowance included into main wage.
  - c. US\$ 5 in addition to US\$ 5 attendance bonus.
- The Company planned for all workers to go to work in the new location from the beginning of August to the end of September 2008 according to their sections and promised to ensure that wages, position, function, seniority and benefits would remain the same.
  - The two parties agree that the Company does not have agreement or CBA with the workers regarding changing to new location and there is no clause in the employment contract related to changing of location.

#### **REASONS FOR DECISION**

The Company was notified by the owner of the old location about discontinuing the lease and that the Company needed to look for a new location. The Company rented a new location in Tuol Pongror Village, Sangkat Chom Chao, Khan Dangkor, Phnom Penh (the old location is in Chong Thnol Khanglich Village, Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh). The company could not continue its business at the old location because it needed to move to a new location, and encouraged the workers to work in the new location by ensuring that the wage, work and benefits would remain unchanged. The worker party, however, demand that the company terminate their employment contracts and pay severance payment before going to work in the new location (see findings of fact).

Thus, the Arbitration Council will consider whether the Company has a right to require workers to go to work in the Company's new location and whether the workers have a right to demand that the company terminate their employment contracts and pay them before asking them to go to work in the new location.

The Arbitration Council finds that the Labour Law does not have express provisions concerning factory relocation that the Arbitration Council might use as a basis for interpretation and consideration. However, Article 2 of the Labour Law states, "*All natural persons or legal entities ... are considered to be employers ... within the meaning of this law, provided that they employ one or more workers, even discontinuously. Every enterprise ... etc., under the supervision and direction of the employer.*"

In previous cases, the Arbitration Council has interpreted Article 2 to mean that the employer party has a right to supervise and direct the company as long as the supervision

and direction is both in accordance with the law and is reasonable. For example, in case 10[8]/06-Trinunggal Komara (reasons for decision), the Arbitration Council held that the employer has the right to **transfer workers from one building to another building** as long as the transfer:

1. does not result in a wage reduction,
2. is not to a location that is a significant distance from the original location ,
3. maintains the worker's day- or night-shift status
4. does not affect specific professional skills.

In case 17/03 and 18/03-Ho Hing, the Arbitration Council states, *“In making this decision the Arbitration Council is mindful not to interfere with the right of supervision and management of activities for business and general authorities of the company as employer in managing and changing the works of employees of the company provided **it does not result into reduction of wage, changing of working place to the far place from original one, changing of day shift to night shift or night shift to day one and does not affect the specific professional skills.** If these things are affected, it is considered as a violation of employment contract that requires to be respected. If the change of shift is made **without reduction of wage, if it does not affect the time and place of work and if the change of work involves use of similar (and not complex) skills by the employee, the employer can lawfully do so.**”*

In previous cases, the Arbitration Council held that an employer needs to maintain workers at their former work place or terminate the former employment contracts by paying according to the Labour Law if it requires the workers to go to work in new branch. The Arbitration Council interprets the fact that a company requires workers to work in its new branch and considers as unreasonable the Company's argument that the new work site is a new branch, rather than a change in location. The Arbitration Council finds that the salient element in the change in a company's location is the relocation of both the workers' work stations working place to the new place and [changing of a Company's location] is not limited only to the change of the Company building. Thus, the Arbitration Council considers the fact that the Company requires the workers to work in a new branch and moves the equipment used to perform their job to a new place is a change of the company's location because it is the total abolishment of assembly line in the old location which leads to the moving of assembly line to the new branch.

Generally, the Arbitration Council reasons in accordance with previous Arbitral Awards if it is reasonable with similar findings of fact.

In this case the Arbitration Council reasons differently from previous Arbitral Awards because in this case the company changes its location to a new place (the old location is in Chong Thnol Khanglich Village, **Sangkat Toeuk Thla, Khan Russey Keo**, Phnom Penh, to

the new location in Tuol Pongror Village, **Sangkat Chom Chao, Khan Dangkor**, Phnom Penh) which are around 8 to 10 kilometers away from each other. This affects the employment contract because the employment contract needs to be implemented at the factory's old location.

Article 65 of the Labour Law states, *"A labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties."* According to this Article, the Arbitration Council considers that Sub-decree 38, dated 28 October 1988, is applicable to the employment contract in factory.

Article 29 of the Sub-decree states, *"Obligations in the contract shall be carried out in a timely and proper manner particularly with regard to quality, quantity, place, and duration prescribed."* The Arbitration Council considers that the employment contract needs to be implemented at the old location of the company and if the workers are transferred to a new location without agreement and this causes any loss of benefits to workers the employer is to be considered in breach of the contract.

The Arbitration Council considers that the fact that the company needs to move from the old location to the new location also affects the company because there are expenses associated with the location change. Additionally, it affects the workers because the old location and the new one are at different addresses (**the old location at Sangkat Toeuk Thla, Khan Russey Keo, the new location at Sangkat Chom Chao, Khan Dangkor**), which violates the content and a clause of the old contract. In addition, the long distance between the old and new location may affect workers' transportation and accommodation. Thus, it is up to the workers whether to accept the impact on their employment contract, and by extension, whether to agree to go to work in the new location, since the company has appropriate reasons - the old location is rented, and the lessor is discontinuing the rent; the workers may alternatively disagree to work in the new location, requesting that the company terminate their contract and pay them according to the Labour Law.

The Arbitration Council considers that among the 800 workers who demand that the company terminate their contract and pay them before they agree to go to work in the new location, some have a **permanent address in Sangkat Toeuk Thla** while others have a **permanent address in the provinces** and rent a place near the factory. Those workers whose permanent address is in Sangkat Toeuk Thla will surely be affected by this in terms of their transportation and accommodation because the place they are living in is not a rental place thus it is not easy for them to change their address. The company party as well as the worker party photocopied ID cards or residential books of workers for the Arbitration Council to consider which workers have a permanent address in Sangkat Toeuk Thla and which of them have a permanent address in the provinces. This is for the Arbitration Council to use as

a basis for decision. However, the Arbitration Council found that it is unable to use the photocopied ID cards and residential books to determine which workers have a permanent address in Sangkat Toeuk Thla, and which of them have a permanent address in the provinces and rent a place near the factory in which they are working. Moreover, the Arbitration Council considers that among the 800 workers some of them agree to go to work in the new location while some of them do not agree. The workers who agree to work in the new location are those who rent their accommodation so when they go to work in the new place they will also need to rent a place (both parties stated in the hearing that the rental prices at the old location and the new location are similar, which is around US\$ 25 to US\$ 30) if the company's provision to the workers is reasonable.

Hence, the Arbitration Council considers that the workers can chose between two options [each begging a question of the Council]: (1) If the workers agree to go to work in the new location, the Council must consider what kind of accommodation and transportation the Company should provide to the workers; (2) If the workers do not agree to go to work in the new location, the Council must consider whether they can demand that the company terminate their employment contract and pay them according to the Labour Law.

**1. If the workers agree to go to work in the new location, what should the company provide regarding accommodation and transportation of the workers?**

Based on the reasons described above, the Arbitration Council considers that among the 800 workers some of them agree to go to work in the new location if the company provides a reasonable solution because the company's reason - that the lessor of the location wishes to discontinue the rental contract – is appropriate. In this case, the company agrees to provide the following to those workers who agree to go to work in the new location (1) either **US\$ 9** allowance or transportation from the old location to the new location; (2) the company adds US\$ 6 on the workers' main wage; and (3) the company provides US\$ 5 in addition to attendance bonus. **This provision is for a period of 3 months.** However, the workers do not agree to the above provisions.

Article 312(2) of the Labour Law states, *“The Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes.”*

Prakas 099 SKBY, dated 21 April 2004, Clause 34(h) states, *“...the Arbitration Council has the power and authority to provide any civil remedy or relief which it deems just and fair, including:*

*h. such other relief as is appropriate...”*

According to the Article and Prakas above, the Arbitration Council can resolve [a dispute] in equity. In this case, the company needs to rent a new place because it is unable to continue its business at the old location because the company was notified by the owner

of the building that the lease would be discontinued. Thus, the Arbitration Council will consider and resolve this issue based on equity as follows: (1) [the Arbitration Council] decides that the company can allow the workers to choose either an additional US\$ 1 allowance [on top of what] the company [has agreed] to provide], which means **US\$ 10**, or choose [to use the] means of transportation provided by the employer from the old location to the new location (2) The company adds US\$ 6 on the workers' main wage and (3) the company provides US\$ 5 in addition to the US\$ 5 attendance bonus. **This provision is for a period of 6 months.** In addition, the company needs to ensure workers' wage, position, function, seniority and benefits remain the same.

**2. If the workers do not agree to go to work in the new location, can they demand that the company terminate their employment contract and pay them according to the Labour Law?**

The Arbitration Council considers that among the 800 workers, some workers do not agree to go to work in the new location and demand that the company terminate their employment contract before they go to the new location because they do not rent their houses so it is difficult for them to change their address.

The Arbitration Council considers that, because the distance from the old location to the new location is a distance of approximately 8 to 10 kilometers, the relocation affects the employment contract since the contract is meant to be implemented at the factory's original location. Thus, if the workers do not agree to go to work in the new location of the factory, they can request the company to terminate their contract and provide payment in accordance with the Labour Law.

#### **Indemnity for dismissal and damages**

Article 90 of the Labour Law states, *"Indemnity for dismissal must be granted to the workers and, if applicable, he can also claim damages even though the contract was not terminated by the employer, but the latter, through his incitements, pushed the worker into ending the contract himself. If the employer treats the worker unfairly or repeatedly violates the terms of the contract, he also has to pay indemnities and damages to the workers."*

Article 91 of the Labour Law states, *"The termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages."*

Based on the above Articles, the termination of an employment contract by the employer without proper intentions, or the termination of an employment contract without a valid reason, entitles the workers to make a demand for damages. On the other hand, the workers cannot demand damages under a contract that they terminated, if their justification was that the contract changed, but the employer had a valid reason to change the contract. Workers who have themselves terminated a contract may nevertheless receive an indemnity for dismissal for termination of employment contract, since their employment contract has

been violated. In this case, the company's reason for relocation was clear and reasonable, since the company was notified by the owner of the building that the lease would be discontinued and that the company would need to find a new location as it cannot continue its business at the old location. In this case, the workers can receive indemnity for dismissal for termination of contract by the worker party because the change of the company's location affects their contract. However, **the workers cannot demand for damages** because the reason given by the company is reasonable. Thus, the Arbitration Council considers that if the workers chose to terminate the contract, they are entitled to indemnity for dismissal according to Article 89 of the Labour Law as follows: workers who have been working for 6 months to 12 months (first year) are entitled to 7 days of wages and benefits and workers who have been working for more than 12 months (2<sup>nd</sup> year on) are entitled to 15 days of wages and benefits for each year of employment from the 2<sup>nd</sup> year on.

### **Prior Notification**

The workers party mentioned in the hearing that the company did not notify them about the change of the company's location and demanded that the company pay them damages according to Article 91 of the Labour Law. Those workers who have been working from 5 to 10 years require 2 months prior notification about the change of location. However, the company refuted this claim and stated that the company informed the workers about the change of the company's location on 30 March 2008 and the company had looked for a [suitable place] to rent in many locations. While it was looking for a new location for rent, on 7 June 2008, the workers submitted a letter to the company requesting to negotiate, and proposed that that the company pays their seniority and other payments before it would move to a new location. On 11 June 2008, the company met to negotiate with the union and worker representatives, and discussed moving the company to the new location. The two parties met to negotiate a number of times thereafter, but failed to reach an agreement as mentioned in the minutes. Based on the evidence submitted and reasons provided above, the Arbitration Council considers that the workers received notification from the employer about changing the company's location either at the end of March 2008 or early June 2008. This means that the workers were provided with two and a half months notice about the fact that the company was looking for a new location and one and a half months notice regarding moving to the new location. Thus, the Arbitration Council considers that the workers do not have sufficient reason to demand that the company pay them damages as mentioned in Article 91 of the Labour Law.

### **Annual leave**

Article 167 of the Labour Law states, *"If the contract is terminated or expires before the worker has acquired the right to use his paid-leave, and indemnity calculated on the basis of Article 166 above is granted to the worker."*

Based on this Article it means that in case of early termination of a contract, the workers are entitled to payment in lieu of annual leave. Thus, based on the reasons described above, the Arbitration Council considers that in this case if the workers choose to terminate their contract because the company's relocation affected their contract, the workers are entitled to payment in lieu of annual leave.

Therefore, the Arbitration Council decides that if the workers do not agree to go to work in the new location of the company, the workers can ask for the company to terminate their employment contract by paying their last wages and other payments according to Article 89 of the Labour Law and payment in lieu of annual leave according to Article 167 of the Labour Law.

**Additional Issue: The union requests to change the type of Arbitral Award from binding award to non-binding award**

The worker party requested to change the type of Arbitral Award from binding award to non-binding award. The Arbitration Council will consider [this issue] as follows:

In the hearing on 14 July 2008, the Arbitration Council explained to the employer party and the worker party about the Arbitration Council's procedure, of the types of Arbitral Awards, as well of the differences between the two types of awards. The Arbitration Council then allowed time for the parties to ask questions regarding the procedure and type of Arbitral Award before the choosing the type of award. In this case, the two parties did not have any questions and then signed the agreement to choose binding Arbitral Award.

In previous cases, the Arbitration Council rejected the employer's request to change the type of Arbitral Award from binding award to non-binding award, since the parties had already signed an agreement to choose a binding award. (See Arbitral Awards 59/05-Tack Fat, additional issue and 123/07-E Garment, additional issue).

In this case, the Arbitration Council agrees with Arbitration Council's previous jurisprudence. The worker party cannot request to change the type of Arbitral Award from binding award to non-binding because the parties had already agreed to a binding award. A change cannot be made unless both parties agree. Changing the arbitral award is a violation of the agreement between the two parties.

Therefore, the Arbitration Council decides to reject the workers' request to change the type of Arbitral Award from binding to non-binding award.

Based on the above facts, legal principles, and evidence the Arbitration Council makes its decision as follows:

**DECISION AND ORDER**

**If the workers do not agree to go to work at the new location of the factory (termination of contract):**

- Order the company to pay to the workers their last wages and indemnity for dismissal according to Article 89 of the Labour Law and payment in lieu of annual leave according to Article 167 of the Labour Law.

**If the workers agree to go to work in the new location of the factory (do not terminate the contract):**

- Order the company to provide either US\$ 10 or means of transportation for the workers to travel from the old factory location to the new location
- Order the company to add US\$ 6 on the workers' main wage
- Order the company provides US\$ 5 in addition to the US\$ 5 attendance bonus.

This provision is for a period of 6 months and the company should ensure workers' wages, position, function, seniority and benefits remain the same.

**Additional Issue:** Reject the workers' request to change the type of Arbitral Award from binding to non-binding award.

**Type of Award: Binding award**

This Award is immediately binding upon the parties after the notification of the award.

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party:

Name: **Ly Tayseng**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....

## **Annex to Arbitral Award 84/08-Trinunggal Komara**

I, Ly Tayseng, an arbitrator from the employer list would like to dissent Arbitral Award 84/08-Trinunggal Komara in its entirety as follows:

### **Reasons for Decision**

The Arbitration Council reached consensus regarding the findings of fact in this case, specifically the fact that the company was notified by the company's landlord that the company needed to move out within five months and that the distance to the new location is approximately 8 to 10 kilometers away from the old location.

In previous Arbitration Council awards the employer had the right to manage and supervise according to Article 2 and Article 3 of the Labour Law. In addition, I consider that the right to manage and supervise includes the employer's rights to chose [the factory] location and arrange its business.

I agree that the change of location of the factory to the new location affects the conditions in the employment contract according to Article 65 of the Labour Law and Article 22 and 29 of Decree 38. **However**, I do not agree with the Arbitration Council on the following points:

1. Regarding the point *"The Arbitration Council considers that employment contract needs to be implemented in the old location of the company and the employer is be considered to be **in breach of the contract if the violation cause any lose of benefits to workers** through the transfer of them to work in a new place without their agreement."*

I consider that the Arbitration Council should consider the intention of the employer regarding its failure to implement the contract in order to determine whether a party fails to follow the contract. We should ask if the change of the factory location, the place where an employment contract is supposed to be implemented, is a violation of the contract in all cases. I consider that the discontinuance of lease by the owner of the factory is an incident which does not put the employer at fault, because the employer does not have any other choice but to move its business to a new location. As a legal principle, a party cannot be held responsible for a contract breach caused by **outside factors which are unintended by, and outside of the control of, the party.** In this case, we can apply the Act of God principle according to Article 133 of Decree 38. In this circumstance, I consider that contract implementation should be suspended temporarily and both parties should cooperate and negotiate to find a solution to the employment problem in the new location in an atmosphere of trust and honesty and respecting social ethics, particularly with regard to eliminating the exploitation of human beings (according to Article 2 of Decree 38). Article 71 of the Labour Law also allows an employer to suspend workers' employment which effectively means suspending the implementation of an employment contract when [the company] faces

economical problems and when there is an Act of God (paragraph 10 and 11). If both parties do not agree on the revised condition in the agreement based on the new legal situation and new request by one party, the party that does not intend to continue the contract can withdraw itself from the obligation in the old contract following the legal procedure such as providing notification to terminate the contract.

Moreover, if we look at the intentions of the parties, we can see that the workers were taking advantage of the employer's need to change to a new location **by demanding that the employer terminate their contract and pay them before they would enter into a new contract according to the conditions suggested by the employer.** Such demand manifests bad faith on the part of the workers in implementing the contract. The employer did not intend to not implement its obligation in the contract. By contrast, the employer attempted to find a solution by providing a means of transportation, an attendance bonus and money additional to the workers' main wage as a temporary solution to the problem. Such provisions clearly indicate good intent on the part of the employer in order to continue to implement the contract.

The new location of the factory is better than the old location because it is near a township area, which will allow the workers to live more comfortably. Both parties also agree that there are sufficient houses for the workers to rent. The location is approximately ten kilometers and in different district of Phnom Penh. This is not so unreasonably far as to be a source of great difficulty in the workers' lives.

If talking about the loss of [workers'] benefits, the Arbitration Council should also consider the employer's benefits when the workers seek to discontinue the contract as requested by the employer. We should ask: who is responsible in this case? Does the discontinuation of the contract by the worker party lead to a violation of the employment contract by the worker party? I consider that both parties should have the same rights and obligations in the situation described above, which means that the workers should also have responsibility for the loss of benefits of employer acting in good-faith.

Therefore, the Arbitration Council should not have considered the above **reasonable** change of location as a violation of the contract by the employer. Such decision is totally against the intention and principle of truthful and proper implementation of contract (Article 29 of Decree 38).

2. Regarding the point that *"the workers can receive indemnity for dismissal for termination of contract by the worker party because the change of the company's location affects their contract. However, the workers cannot demand damages if the change of location by the company was for a reasonable reason. Thus, the Arbitration Council considers that if the workers chose to terminate the contract, they are entitled to indemnity for dismissal according to Article 89 of the Labour Law"*.

I consider this conclusion and consideration by the Arbitration Council on this point is incorrect. We should consider the content and intention of Article 90 and Article 91 of the Labour Law.

Article 90 of the Labour Law states, "Indemnity for dismissal must be granted to the workers ... even though the contract was not terminated by the employer but through his incitements the employer pushed the worker into ending the contract himself". I consider that based on the findings of fact in this case it does not prove any incitement by the employer. On the other hand, the factory relocation was because the lessor discontinued the lease. The Arbitration Council considers that the employer's reason for changing the factory location was **clear and reasonable**.

Article 91 prohibits the unilateral termination of a contract without appropriate reasons. It is clear from the findings of fact in this case that the workers demand that the employer terminate their employment and pay them according to the Labour Law, while the employer claims that it does not have an intention to terminate the workers' contracts but arranges for provisions of benefits as described in the findings of fact for the workers.

Therefore, based on the above interpretation, it should not have been decided that the employer is responsible for payment of termination payments to the workers because the workers' demand that the employer terminate their contract is similar to a worker resignation, that is, it cannot be considered as termination of employment at the initiative of the employer. On the other hand, the workers have an obligation to give prior notice according to Article 75 of the Labour Law and provide a **legally valid reason** for the discontinuation of the contract at the new location, otherwise it is considered a violation of the employment contract, since they have not followed the contract honestly and in good faith. The employer even can demand damages caused by the violation of the contract by the worker party.

**3.** I do not agree with the decision by the Arbitration Council which provides benefits to those workers who agree to continue the contract, based on the principle of equity. The Arbitration Council considers: *"the Arbitration Council will consider and resolve this [issue] based on equity as follows: (1) [the Arbitration Council] decides that the company can allow the workers to choose either an additional US\$ 1 allowance [on top of what] the company [has agreed] to provide, which means **US\$ 10**, or choose [to use the] means of transportation provided by the employer from the old location to the new location (2) The company adds US\$ 6 on the workers' main wage and (3) the company provides US\$ 5 in addition to the US\$ 5 attendance bonus. **This provision is for a period of 6 months.** In addition, the company needs to ensure workers' wages, position, function, seniority and benefits to remain the same."*

I consider the above decision deviates from the demand of the workers for termination of their employment contract and payment of termination benefits before the

company changes its location, as listed in the non-conciliation report and the issues in dispute. Hence, the Arbitration Council should have decided whether the workers are entitled to demand the termination of their contract and termination payments. The decision regarding the amount of the benefits to be granted [to the workers] was not raised as an issue in the hearing. Moreover, the Arbitration Council does not have actual evidence in writing or any study about the situation and distance to the new location [of the factory] or about any other issues related to worker livelihood and transportation difficulties in order to assess how much should be a reasonable benefit to provide to the workers. The disputed issues meant to be settled in this case can be sufficiently resolved based on the above legal bases. Thus, I find that it would be more appropriate for [the Arbitration Council] to allow the parties to discuss and negotiate, in order to understand benefits to be provided to those workers who wished to continue their employment contract and consider the actual situation of both parties. In the above mentioned situation, the workers can decide whether to continue their contract as requested by the employer. The decision to put the entire burden only on the employer party does not do justice to the employer.

In conclusion, I consider that the employer has the right to determine whether to allow those workers, who do not wish to continue their contract according to the conditions suggested by the employer, to resign from work and pay benefits which they are entitled to by law if they resign. In addition, for those workers who wish to freely and in good faith continue their contract, both parties are allowed to negotiate a new employment contract based on the new legal situation.

**SIGNATURES OF THE ARBITRATOR:**

Arbitrator chosen by the employer party:

Name: **Ly Tayseng**

Signature: .....