



THE ARBITRATION COUNCIL

**THE ARBITRATION COUNCIL DIGEST
#2 OF 2005 (July – December 2005)**

Introduction

In the period from 1 July to 31 December 2005, 42 cases were filed with the Arbitration Council. 23 of the 42 cases resulted in an arbitral award being issued. Again, the Arbitration Council successfully resolved the majority of disputes registered. In 22 percent of registered cases an arbitral award was fully implemented by the parties in dispute and in eight percent there was partial implementation of the issued award by the parties in dispute. In addition, in 51 percent of the registered cases a settlement agreement was able to be reached between the parties prior to an arbitral award being issued.

Copies of arbitral awards in Khmer and English as well as detailed information regarding the law and procedures governing the Arbitration Council are available from the Secretariat of the Arbitration Council or on the internet at <http://www.arbitrationcouncil.org/>.

Number of cases filed	42
Number of cases settled without an award	19
Number of cases in which an award was issued	23
Number of cases where an objection was filed against the award	14
Number of cases where strikes were involved and return to work order issued	7
Number of cases where return to work order was complied with by employees	7

Figure 1 represents statistics from cases registered with the Secretariat of the Arbitration Council during the period from 1 July – 31 December 2005 only.

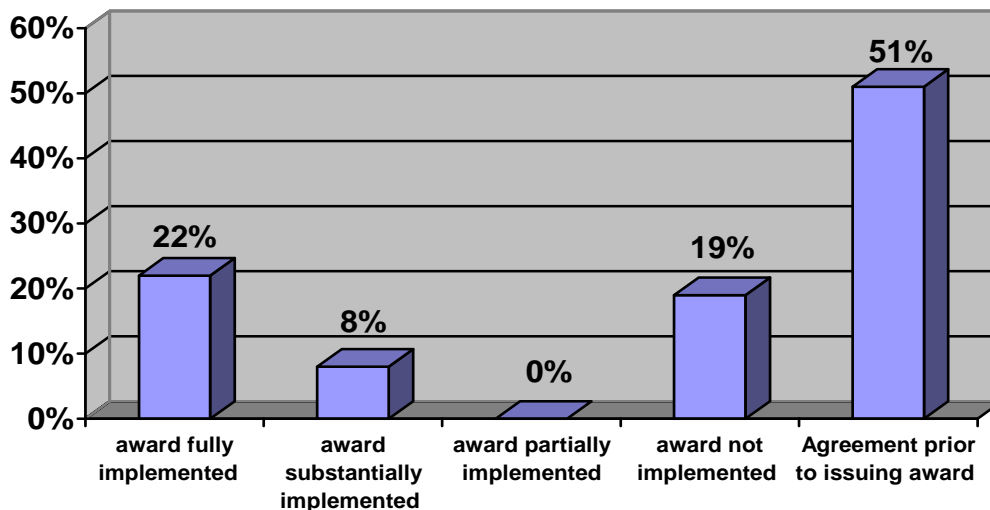


Figure 2 represents the outcomes of cases registered with the Secretariat of the Arbitration Council in the period from 1 July - 31 December 2005.

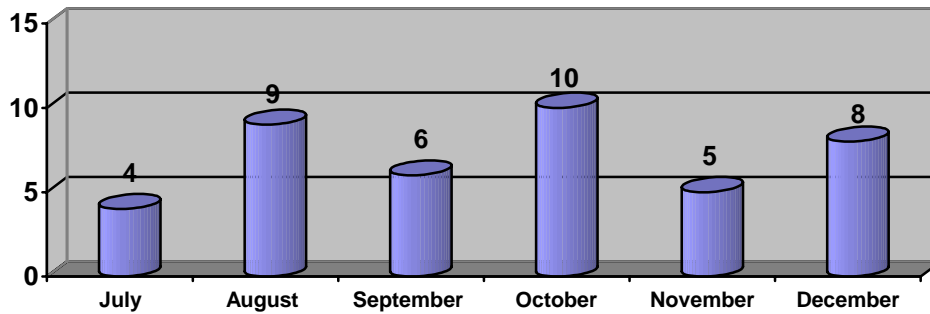


Figure 3 represents the number of cases registered with the Secretariat of the Arbitration Council each month during the period from 1 July – 31 December 2005.

Case summary:

The following summary concerns awards issued by the Arbitration Council in respect of cases registered with the Secretariat of the Arbitration Council from 1 July to 31 December 2005. This summary is provided for informational purposes only and should not be considered legal advice. This is a summary only and may not represent a complete summary of all legal points considered by the Arbitration Council.

Arbitration Council Jurisdiction and Procedure

The Arbitration Council may consider using equity principles in the determination of an award if three conditions are met: 1) the Labour Law does not offer any provision in respect of the matter; 2) relevant implementing regulations are unclear in respect of the matter; and 3) the internal work rules of a company do not provide for the matter.

41/05

The Arbitration Council cannot make a decision on a rights dispute which may occur in the future because the Arbitration Council cannot know what scenarios may occur in the future, including which parties may be involved, or which provisions of the law, of the contract, or of any collective bargaining agreement may be relevant.

42/05

Rights disputes relate to legal rights which result from or are stated in contract, collective bargaining agreements or provisions of law. An interests dispute is a dispute related to a benefit in the future and is not related to rights resulting from or stated in contract, collective bargaining agreements or provisions of law.

42/05; 53/05

To decide a rights dispute, the Arbitration Council needs specific evidence of actual events to compare with the provisions of the law.

42/05

The Arbitration Council cannot issue an award which provides inferior benefits to the workers than what the law guarantees.

45/05

According to Article 43 of Prakas 99/04, if the Arbitration Council issues an award that settles an interests dispute, it will have the same status as a collective bargaining agreement which will apply to all workers in the factory.

45/05; 49/05; 59/05; 76/05

The Arbitration Council can decline to decide a dispute if it is an interests dispute brought by a union without most representative status because the union does not have the requisite legal status.

45/05; 49/05; 53/05; 59/05; 76/05

The complainant party's request to close a case may be considered a withdrawal of the complainant's demand therefore justifying the Arbitration Council closing that case.

47/05; 59/05

If an agreement is found by the Arbitration Council to give workers inferior benefits than the Labour Law provides, then such agreement will be rendered null and void.

48/05

In cases where the Arbitration Council has already issued an award on the same dispute and involving the same company, but a different complainant brings the dispute, then the Arbitration Council can consider the dispute

59/05

Where many workers' interests may be affected, but the claimant party fails to provide the exact number of workers and relevant evidence in respect of all those whose interests were affected, then the Arbitration Council will consider only the evidence provided and limit any remedy accordingly.

59/05

The complainant must provide valid and clear evidence in support of their allegations.

59/05

Where the Arbitration Council explains the arbitration procedures to the parties, provides both parties the opportunity to ask questions before choosing whether or not to be bound by an award, and authorized representatives understand the meaning of binding versus non-binding awards, have chosen to be bound by an arbitral award and have signed an agreement to choose a binding award prior to the hearing, then the Arbitration Council will not change the award from binding to non-binding without the agreement of both parties.

59/05

Where a party provides documents in support of his or her testimony, but refuses to allow the documents to be shown to the other party or to answer any question about them in front of the other party, then such documents will not be considered as evidence by the Arbitration Council.

61/05

The Arbitration Council does not have the power to order the employer to assure workers that s/he will not close down the factory.

72/05

Whenever the content of any law is not clear, the law can be explained based on the purpose of the Labour Law, principles of law, and equity.

75/05

The Arbitration Council does not possess the authority to order the termination of employees, unless there is a risk to the health or safety of other employees.

76/05

If a party fails to provide evidence to support assertions made by that party in the hearing, an adverse inference can be drawn.

79/05

An agreement between the employer and workers which complies with the law shall be binding between the parties.

81/05

Internal Work Rules can provide workers with more, but not less, favourable benefits than the Labour Law. Any rule providing benefits to the workers less favorable than the Labour Law is null and void.

81/05

Discipline and Dismissal

The employer cannot impose disciplinary measures on piece rate workers who cannot make the minimum wage through completion of piece work, unless there is clear evidence that they are lazy and slacking off during working hours.

41/05

Workers shall receive the protections from dismissal under Article 293 of the Labour Law when they meet the following requirements: (i) workers are the type of workers stated in the Prakas 305/01, (ii) the dismissal is made during the protection period, and (iii) workers inform the employer of the identity of workers to be protected by a reliable means.

50/05

An employer should take disciplinary action as established by their Internal Work Rules rather than penalize workers by paying them inadequately.

52/05

An employer who dismisses a worker based on alleged serious misconduct must consider all facts in the particular case and consider whether the disciplinary action is appropriate or not.

59/05

Although a worker may be entitled to reinstatement, the Arbitration Council can also consider whether the relationship between the worker and employer has broken down beyond repair in determining whether reinstatement is an appropriate remedy.

59/05

Where the employer does not provide a valid reason for dismissal, a worker is entitled to full compensation pursuant to Article 91 of the Labour Law. Disciplinary action not in proportion to the relevant misconduct contravenes the requirement for a valid reason for dismissal.

59/05

Where an employer (1) dismisses union leaders without following the legal procedures (in obtaining permission from the Labour Inspector) and (2) cannot provide evidence or witnesses to support their decision, such workers may be reinstated.

61/05

An employer who accepts the conduct of a worker cannot subsequently impose a sanction against the worker for such conduct.

63/05

Any disciplinary sanction against an employee by the employer must be proportional to the employee's misconduct.

64/05; 76/05

The employer cannot terminate the undetermined duration contract of a worker unless s/he has a proper reason regarding the worker's aptitude or behaviour.

64/05

In order to receive the protection from dismissal for union leaders and/or candidates, the union must duly inform the identity of the candidates to the employer by a reliable means.

64/05

The employer must follow the procedures under its Internal Work Rules when dismissing a worker.

64/05

The Arbitration Council does not possess the authority to order the termination of employees, unless there is a risk to the health or safety of other employees.

76/05

Misconduct is generally only "serious misconduct" when it is repeated and is supported by concrete evidence or is clearly specified in the Labour Law or the Internal Work Rules of the company.

76/05

Employers' right to manage

The employer's right to manage and supervise his or her business includes the right to modify or maintain lot prices.

41/05; 81/05

The employer has the right to determine when to pay the workers, provided that such determination is consistent with the law, which mandates that payment be made to workers at least once per month.

81/05

Employment books

The employment book is an asset of the worker who must possess it for the purpose of obtaining a job. Each worker is responsible for paying for their own employment book.

45/05

The obligation to obtain an employment book rests solely with the worker.

79/05

Any unilateral decision of the employer to require a worker to pay for any amount in respect of employment books that is in excess of the official fee set forth in legal regulations is not in compliance with the Labour Law.

79/05

Labour contracts

The parties to a labour contract have the sole right to cancel such contract.

41/05

A labour contract can be made when there is an agreement between the worker and the employer; no other party can force those contracting parties (the employer and the worker), to sign a labour contract.

53/05

The employer cannot terminate the undetermined duration contract of a worker unless s/he has a proper reason regarding that worker's aptitude or behaviour.

64/05

Labour rights of women

There are at least three duties that the employer owes to female workers who have children. These are as follows: (1) provide leave of one hour per day during working hours for female workers to breast-feed their babies until such baby is one year old, (2) provide a nursing room to female workers who breast-feed their children, and (3) provide a day-care center for all children, but for those who are over 18 months the employer can pay for the cost of an external day-care center.

45/05

The employer has a legal obligation to arrange and build a day-care center and nursing room under the supervision of the Ministry of Labour and Vocational Training or pay for a babysitter according to receipts provided by the female workers who send their children to day-care centres outside the factory.

71/05

Giving milk formula or payment instead of providing a nursing room is not allowed under the Labour Law. Parents have an obligation to feed their children, and such obligation cannot be transferred to a third party/employer.

71/05

Leave

The employer is not obligated to allow an employee who has worked less than one year to take accrued paid annual leave; however, the employer may choose to do so at their own discretion.

45/05

Workers with seniority of more than one year are entitled to use their annual leave.

45/05

Workers must be allowed to use their annual leave during Khmer New Year.

45/05

Parties have an equal right to negotiate when annual leave will be taken each year.

45/05

Workers can use their annual leave at anytime with the agreement of their employer. In the case where the employer and employee agree that leave will not be taken at Khmer New Year, and will be taken at other times, the employer has an obligation to notify the Labour Inspector of the agreement. If there is no such agreement, the annual leave can only be used at the Khmer New Year.

45/05

A demand for payment in lieu of taking annual leave is contrary to the provisions of the Labour Law and therefore unlawful.

45/05

An employer cannot force workers to use annual leave during periods of no work, unless there is such an agreement freely entered into with those workers.

45/05

An employer may deduct the attendance bonus proportional to the number of days a worker is on special leave during the working month.

45/05; 48/05

The employer must provide workers absent on sick leave certified by a qualified doctor with a portion of attendance bonus in proportion to the number of their working days per month. The attendance bonus of US\$5 may only be deducted based on the number of days of the authorized leave.

48/05; 76/05

Attendance bonus should be paid in full during the period when a worker is on annual leave.

52/05

Workers whose absence is authorized, in circumstances other than annual leave, are still entitled to a proportion of the attendance bonus for the days they attended work.

52/05

Under Article 166(4), a worker who has worked for three years is entitled to 19 days of annual leave in the 4th, 5th and 6th year of service; and 20 days of annual leave in the 7th, 8th and 9th year of service, and the same increase shall be applied every three years.

68/05; 75/05

Regarding workers who have taken sick leave, a medical certificate is recognized when it is issued by a hospital properly authorized by the competent authority, irrespective of whether the hospital is public or private.

81/05

Restricting workers who have taken sick leave to obtain medical certificates from only public hospitals is unlawful.

81/05

Medical checks

The employer is obliged under the law to pay for workers' medical check fees.

41/05; 59/05; 81/05

Article 247 of the 1997 Labour Law provides sufficient basis to conclude that the employer is obliged to pay medical check fees for workers.

41/05; 59/05; 81/05

A company's requirement for workers to pay medical check fees in advance does not exempt the employer from his or her legal obligation under the law.

41/05

Occupational Safety and Health

The law does not require the employer to provide a health allowance to workers to fulfill occupational safety and health requirements.

53/05

The Arbitration Council does not possess the authority to order the termination of employees, unless there is a risk to the health or safety of other employees.

76/05

Overtime

Article 140 of the Labour Law refers to making-up for hours lost following mass interruptions in work or a general slowdown from either accidental causes or acts of God (notably bad weather or because of holidays, local festivals, or other local events notified by the Ministry of Labour) it does not refer to voluntary overtime work.

53/05

Workers have the right to voluntarily work overtime for more than two hours per day.

53/05

Regardless of whether overtime work is more or less than two hours, workers are still entitled to receive a 1,000 riel meal allowance or to receive a free meal.

53/05

Piece rate

The employer's right to manage and supervise his or her business includes the right to modify or maintain lot prices.

41/05; 81/05

The employer cannot impose disciplinary measures on piece rate workers who cannot make the minimum wage through completion of piece work, unless there is clear evidence that they are lazy and slacking off during working hours.

41/05

Article 108 is the basis for calculating piece rates; pursuant to the Labour Law, the price of piece rate work must permit the worker of average skills working normally - during normal working hours, 8 hours a day (48 hours a week) - to earn at least the minimum wage (US\$45 a month for garment worker).

52/05

There is no provision in the Labour Law that would permit an employer to pay a worker less than the minimum wage, regardless of whether the worker is paid according to a piece rate or monthly salary.

52/05

Pursuant to Article 112, the employer must be aware of the piece rate/wage and inform the workers before assigning the job to them.

81/05

When the working conditions, in particular the wage rate of workers changes, the employer must ensure that the workers are clear about the wage they are going to receive, in advance of the work commencing.

81/05

To determine the piece rate of a worker of average skills under Article 108, the employer should arrange a test, with a specific time length, in which workers of varying skills have participated. On this basis, the piece rate must be determined which allows a worker of average skills to earn at least the minimum wage.

81/05

Strike action

Striking workers are entitled to attendance bonuses during the period of a strike provided that the strike follows the legal procedures set out in the Labour Law.

49/05; 53/05

Striking workers are not entitled to their wages during the strike period even if the strike follows the legal procedures set out in the Labour Law.

49/05; 53/05

Suspension

An employer is not required to pay any wages during a lawful suspension; however, if the suspension is unlawful, the employer is required to pay 100 percent of wages

45/05

An employer cannot force workers to use annual leave during periods of no work, unless there is such an agreement freely entered into with those workers.

45/05

Suspension of a labour contract under Article 71(11) of the Labour Law is procedurally proper once the Labour Inspector grants permission of such suspension.

46/05; 49/05; 59/05

Notification of a suspension of labour contracts is proper when the employer immediately posts such notification on receipt of the Labour Inspector's permission for the suspension.

46/05; 49/05

No response from the Ministry of Labour, upon request of authorization for suspension of operations from an employer, means that the Ministry has not authorized the suspension.

72/05

Unions and Worker Delegates

A union without most representative status may only represent its own members.

41/05

A union which does not have most representative status does not legally represent workers in order to settle an interests dispute involving the common interests of all workers in an enterprise before the Arbitration Council.

45/05

The Arbitration Council can decline to decide a dispute if it is an interests dispute brought by a union without most representative status because the union does not have the requisite legal status.

45/05; 49/05; 53/05; 59/05; 76/05

To determine whether an employer has committed unlawful discrimination against workers, workers must prove that the employer knew such workers were members of the union and that they were dismissed because they were members or activists of the union.

50/05

An employer can ask the union to prove that workers have authorised a deduction of their wages for union fee contributions by requiring the union to send in a list of names of those workers who authorised such deduction; by doing this, the employer is guaranteed that workers are really members of the union.

60/05

Where an employer (1) dismisses union leaders without following the legal procedures (in obtaining permission from the Labour Inspector) and (2) cannot provide evidence or witnesses to support their decision, such workers may be reinstated.

61/05

The employer is required by law to deduct union fee contributions from a worker's wage if the worker makes such a request in writing.

62/05

The intention of Article 281 is to protect workers' rights by prohibiting the employer from influencing the affairs of the union.

62/05

If a worker delegate resigns, the worker with the most votes in the waiting list will replace him/her for the remaining term of office.

76/05

Wages and Bonuses

As a general rule, the attendance bonus is to be given to those working regularly and attentively in addition to their actual monthly wage.

41/05; 52/05

Where a company's internal work rules are legally registered and include clear provisions regarding circumstances for payment of the attendance bonus, then workers must abide by such provisions in order to obtain the attendance bonus.

41/05

The longer a worker works, the greater the seniority the worker has and the more seniority bonus he or she will be entitled to (the first year equals an additional US\$2 per month, the second year increases to an additional US\$3 per month, the third year to an additional US\$4 per month and the fourth year to an additional US\$5 per month).

41/05

According to Article 103 of the Labour Law, the seniority bonus is included as part of the legal definition of "wage." Therefore, the workers' right to make a complaint in respect of seniority bonus is subject to the statute of limitations under Article 120 of the Labour Law.

41/05

Workers who do not attend work, regardless of their motives, and whose absence was unauthorized are not entitled to the attendance bonus.

42/05

An employer may deduct the attendance bonus proportional to the number of days a worker is on special leave during the working month.

45/05; 48/05

An employer is not required to pay any wages during a lawful suspension; however, if the suspension is unlawful, the employer is required to pay 100 percent of wages

45/05

Demand for reimbursement for wages for night work is subject to the statute of limitations under Article 120 of the Labour Law.

48/05

The employer must provide workers absent on sick leave certified by a qualified doctor with a portion of the attendance bonus in proportion to the number of their working days per month. The attendance bonus of US\$5 may only be deducted based on the number of days of the authorized leave.

48/05; 76/05

Striking workers are entitled to attendance bonuses during the period of a strike provided that the strike follows the legal procedures of the Labour Law.

49/05; 53/05

Striking workers are not entitled to their wages during the strike period even if the strike follows the legal procedures of the Labour Law.

49/05; 53/05

The attendance bonus should be paid in full during the period when a worker is on annual leave.

52/05

Workers whose absence is authorized, in circumstances other than annual leave, are still entitled to a proportion of the attendance bonus for the days they attended work.

52/05

There is no provision in the Labour Law that would permit an employer to pay a worker less than the minimum wage, regardless of whether the worker is paid according to a piece rate or monthly salary

52/05

An employer should take disciplinary action as established by their Internal Work Rules rather than penalize workers by paying them inadequately.

52/05

Regardless of whether overtime work is more or less than two hours, workers are still entitled to receive a 1,000 riel meal allowance or to receive a free meal.

53/05

The term "seniority" is the length of successive service which adds more rights or privileges for the worker based on the length of service provided by the worker. Seniority provides rights and privileges that will not be lost unless the worker stops working for the enterprise.

68/05; 75/05

The employer has the right to determine when to pay workers, provided that such determination is consistent with the law which mandates the employer pay workers at least once per month.

81/05

Pursuant to Article 112, the employer must be aware of the piece rate/wage and inform the workers before assigning the job to them.

81/05

When working conditions, in particular the wage rate of workers changes, the employer must ensure that the workers are clear about the wage they are going to receive in advance of the work commencing.

81/05