



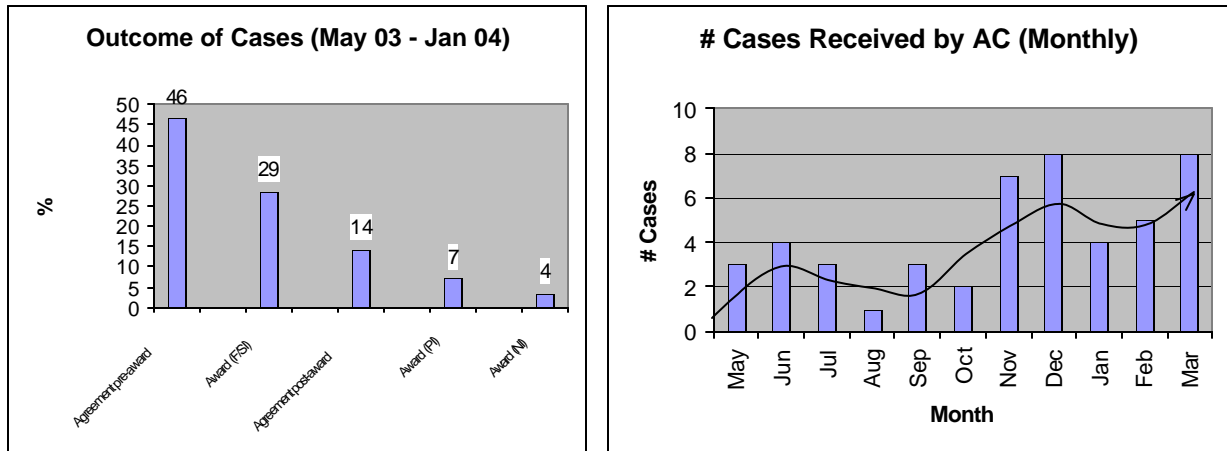
## THE ARBITRATION COUNCIL DIGEST #2 AUG 2003 - JAN 2004

### Introduction

From its establishment in May 2003 until the end of January 2004 the Arbitration Council had processed 28 industrial disputes. Of these, over 85% were resolved through the arbitration process, whether by award (8 cases) or by agreement (17 cases). This is a remarkable success for a new arbitration tribunal, particularly one which is operating within a developing legal framework. See figure 1 below for a graphical presentation of these results and those regarding the Council's overall caseload.

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/>

Figure 1 Summary of activity during the period 01.05.03 - 31.01.04



Key

F/SI	Fully/Substantially Implemented
PI	Partially Implemented
NI	Not Implemented

→	Three month moving average
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### Major cases:

#### Case # 11/03

Parties: Cambodiana Hotel v. Cambodiana Employees Union  
Sector: Hotel industry  
No. of employees: 440  
Nature of Award: non-binding

In this case, workers at the Hotel Cambodiana argued that amounts added to clients' bills and labeled "service charge" were not fully distributed to workers as required by the Labor Law (Art. 134ff). The amount claimed over three years would have exceeded US\$700,000.

The Arbitration Council found that:

1. Percentage amounts added to guests' bills as "service charge" fell within the scope of Art. 134 of the Labor Law;

2. The Hotel had an obligation to distribute these amounts to workers in cash every month; and
3. The Hotel had a duty to provide workers with a clear account of service charge collected and distributed each month.

Examining the total salary packages of workers the Arbitration Council found that, in addition to basic salaries, the Hotel had paid monthly and yearly bonuses which equated to the amount of service charge owed. The Arbitration Council therefore rejected the workers' claim for service charge not paid over the past 3 years.

Nevertheless, the Arbitration Council found that the Hotel had breached the Labor Law by:

1. Paying some of the amount owed in the form of discretionary year end bonuses, rather than as a monthly entitlement; and
2. Failing to provide workers with a clear account of the amounts collected and paid.

For these reasons the Arbitration Council ordered the Hotel to pay each worker compensation in the amount of US\$50. With regard to future conduct the Arbitration Council ordered the Hotel to revise its scheme for payment of service charge in order to bring this into compliance with the law. In doing this the Arbitration Council held that the hotel had to

- a. establish, in consultation with any representative unions, a [clear and transparent](#) method for the distribution of the service charge which ensures that 100% of the service charge collected is distributed to staff each month;
- b. publicize and explain this method to all staff; and
- c. begin providing a monthly account of service charge collected and distributed.

### **Case # 21/03**

Hun Loyal Garment Factory Cambodia Limited v. Khmer Youth Federation of Trade Union

Sector: Garment industry

Number of employees: 420

In this case employees made 8 demands to the Arbitration Council. The parties settled 6 out of these through negotiation and conciliation during the arbitration process. The two demands decided by the Arbitration Council were:

1. The employer should repay (a) amount of US \$ 5 deducted for the cost a workbook and (b) amount of US \$ 15-30 deducted as deposit in the beginning of employment contract; and
2. The workers should be paid wages even in case there is no work to be done.

With respect to the demand 1(a), the Arbitration Council found that the workbook is the property of the worker and the worker should pay for it. (Labor Law; Article 32) Accordingly the Council found that it was valid for the employer to deduct 2,500 riel (the official price for a work book) in cases where the employer had paid for the workbook.

The employer claimed that the remaining amount of the \$5 was deducted from the workers' wages to cover the mandatory medical checks. For the same reasons as given in Case #02/03 (Chou Sing), the Arbitration Council found that the employer must pay the cost of this medical check. The employer was thus directed to repay the amount of US \$ 4 and 1500 riel to the workers

With respect to claim 1(b) the Arbitration Council found that they employer had in the past a practice of deducting amounts in the range of \$15-\$30 from employees' salaries over the first 3 months of their employment as a security for their continuance in the job. Even though the workers had agreed in writing to these deductions, the Council found that they were unlawful and ordered their repayment.

While dealing with the last demand the Arbitration Council observed that unless the employment contract is lawfully terminated or suspended in accordance with Article 71(7) or (11) of the Labour Law, the employer is obliged to pay wages. If the employer wants the employees to present and wait for work during the suspension of the employment contract the Arbitration Council found that it is acceptable for the employer to pay 50% of the basic salary in return for employees presenting for work each day during the suspension.

### **Case # 24/03**

Parties: Top One v. Employees

Sector: Garment

Number of employees: 765

The dispute in Top One arose out of a failure of the collective bargaining process. There were 51 issues referred to the Arbitration Council for resolution. These included issues relating to wages, working conditions and the recognition of union rights. As this dispute arose from the collective bargaining process, it was found that a full resolution of the dispute would require the Arbitration Council to issue provisions for a comprehensive collective bargaining agreement. The employer's position at the Council was that they would not grant any benefits superior to those provided for by the labour law. In issuing its award, the Arbitration Council considered the labour law but also weighed considerations of equity.

The award includes provisions relating to wages, sick leave, maternity leave, union recognition, and work related accidents. It also provides a detailed grievance procedure for the resolution of employment related disputes.

Though the employer initially objected to the award, after less than 1 month of further negotiation, the parties reached agreement and entered into a collective bargaining agreement based closely on the award of the Arbitration Council. This is one of the first such agreements in Cambodia's industrial relations history. It will now serve as a model for future collective bargaining agreements in the garment industry.

### **Case # 25/03**

Parties: Advanced industry v. Employees

Sector: jewelry manufacturing

Number of employees: 130

In this case employees made 2 demands to the Arbitration Council. The parties settled 1 of these during the arbitration process. The demand decided by the Arbitration Council was:

- The employer should pay the employees a seniority increment in the same amounts as provided for in Notification #17 of 2000 (MOSALVY).

In response to this demand the employer argued that:

1. Notification #17, which applies only to garment factories, was not applicable to Advanced Industry which manufactures costume jewelry for the export market; and
2. Advanced Industry only made a small profit and as such was not able to afford the proposed increments.

With respect to these arguments the Arbitration Council agreed that Notification #17 clearly applied only to garment and footwear factories. As Advanced Industry was a factory manufacturing jewelry the Arbitration Council found that Notification #17 did not apply.

However, the Arbitration Council noted that according to Article 312 (paragraph 4) of the labor law, it is not restricted to the consideration of legal arguments in determining labor disputes regarding future interests. In cases where parties are claiming more than what is set out as a minimum under the law, the Council found that it has the power to decide on the basis of what is equitable or fair in the circumstances. In this case it found that working in a jewelry factory was similar to working in a garment or footwear factory. Accordingly the Council decided that it was equitable for workers in the jewelry industry to receive similar seniority increments as those which apply in the garment industry. With regard to the employer's argument that they were unable to afford the suggested seniority bonuses, the Arbitration Council requested them to provide financial records to substantiate this claim. As the employer did not provide these records, the Council was not able to accept their argument that they could not afford the increments.

Thus the Arbitration Council ordered that the Employer pay seniority increments of \$1 per year of work up to a maximum of \$4 for workers who have accrued seniority of more than 4 years. This is slightly lower than the amounts provided for in Notification #17 which provides for seniority increments of up to \$5 for workers who have accrued seniority of more than 4 years. In making these awards the Arbitration Council also noted that the payment of seniority increments to workers would have benefits for the employer in terms of securing the loyalty of its more experienced and skilled workers.

## Summary of Jurisprudence:

When deciding on rights disputes the Arbitration Council is required to decide how the law should be interpreted and applied. (Labor Law Art. 312) The following summary of the Council's jurisprudence during this period is provided for the purposes of information only.

### Wages and deductions

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AA= Arbitral award (No.)

**\* Expenses for workbook to be borne by the employees - Deduction of amount more than those expenses must be repaid to the employees.** AA 21/02

**\* Deduction of amounts to secure workers' loyalty to the employer is improper**

AA 21/03

- Articles 126-29 of the Labour Law contain presumption against validity of such deduction. Such deduction is unlawful and must be repaid. Such deduction also may also result in violations of minimum wage requirements.

**\* Employer liable to pay wages to the employees while the contract of employment is in force**

AA 21/03

- Employer must continue to pay wages of his employees even if there is no work. Liability to pay wages continues during subsistence of contract of employment unless the contract is lawfully suspended under Article 71 of the Labour Law.

### Piece rate work and production targets

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**\* Validity of production targets in piece rate work**

AA 14/03

- An employer can set production targets even in piece rate work - provided the target set is such that an employee with normal ability can achieve it with reasonable rest during working hours.

**\* Overtime work should be voluntary**

AA 14/03

- An employer may not force employees to work overtime.

### Shop stewards' rights and protection

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**\* Suspension of work/ reassignment of duties of workers' representatives**

AA 17-18/03

- Protection available to shop stewards under Article 293 of the Labour Law in case of their dismissal also extends in case of their suspension as suspension also effectively stops them from performing their duties as workers' representatives.

### Right to strike

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**\* Right to strike can be exercised after exhausting all methods of resolving dispute with employer.**

AA 29/03

- During arbitration process the parties must abstain from strike, lockout or any action likely to aggravate the situation.
- Conciliation and arbitration are peaceful means of dispute resolution which must be attempted before conducting a strike.

### Seniority increment in jewelry industry

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**\* Workers in jewelry industry granted seniority increment**

AA 25/03

- There are sufficient similarities between work in the jewelry production and that in garment production to justify similar minimum wages. Continuous service by an employee for the same employer increases his/her value and justifies a seniority increment.

### Employer's prerogative

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**\* Demand for dismissal of officer by union**

AA 17-18/03

- Provisions authorizing an employer to dismiss an employee for serious misconduct confer discretionary power on the employer. Employer not bound to dismiss a worker merely because he has committed an act of serious misconduct.
- Arbitration Council will not ordinarily direct dismissal of an employee unless the concerned employee poses threat to health and safety of other workers. If a worker did pose such a threat to other workers the Council could issue order for transfer or, in a most serious case, dismissal.

**\* Employer's prerogative (cont.)**

**\* Power to reassign workers within an enterprise**

**AA 17-18/03**

- An employer's decision to reassign an employee within an enterprise will not be considered to breach the employment contract provided it does not cause material disadvantage, financial or otherwise, to the worker concerned.

**Powers of the Arbitration Council**

**\* Interim orders**

- The Arbitration Council has power to order striking workers to cease strike and resume work immediately if the strike takes place when the case is in the process of hearing before it.
- For passing such order the Arbitration Council can communicate with parties on telephone in view of urgency.

**Other issues**

**\* Service charge collected by the hotel**

**AA 11/03**

- 10% mandatory service charge is "កម្រៃសេវាបន្ថែម" as defined in Art 134 of the Labour Law.
- Any such service charge collected by the hotel must be fully distributed monthly to the employees who have contact with customers - employees must get that as of right and not at the discretion of an employer.
- Employer bound to provide a clear account of the amount received as service charge to the employees.

**\* Interest disputes**

**AA 14/03; AA25/03**

- Demand for increase in piece rate is an interest dispute. For succeeding in such interest dispute *the employees* need to provide sufficient evidence to substantiate the demand.
- Claim for seniority bonus in jewelry industry is an interest dispute. Arbitration Council can decide such demand under Article 312 of the Labour Law on the basis of what is equitable and fair.

**\* Collective Bargaining**

**AA24/03**

- In a dispute in which parties tried but failed to reach a collective bargaining agreement the Arbitration Council may issue provisions for a collective bargaining agreement in its award.

**\* Employer's failure to produce document directed by the Arbitration Council**

**AA 25/03**

- A failure by a party to produce documents or other evidence requested by the Arbitration Council may lead the Council to assume that such documents are not favorable to that party's case.