



ONLINE LIBRARY

(www.onekhmer.org/onlinelibrary)

Title: Strategies To Sustain The Cambodian Labour Arbitration Council: A Critical Analysis

Name of Author	Vichhra Mouyly
Name of University	University of Melbourne
Country of Study	Australia
Major	Law
Degree	Master
Course Title	Alternative Dispute Resolution
Type of Document	Assignment
Year	2014

Subject: Alternative Dispute Resolution

Student Name: Vichhra Mouyly

Due: 05 March 2014

Declaration:

1. In submitting this form with my paper, I confirm that this paper is my own work. It does not:
 - (a) Contain any material published or written by another person, except where proper acknowledgement is made in the text;
 - (b) Contain any material written by me (whether individually or in collaboration with others) in the course of my employment, except where proper acknowledgement is made in the text;
 - (c) Contain material written by me which has already been submitted for assessment in this or any other subject at this University or any other institution; or
 - (d) Contravene the University's policies on academic honesty (available at <http://academichonesty.unimelb.edu.au>) in any other way.
2. I also give the assessor of this assignment the permission to reproduce this assignment and provide a copy to another member of staff; and Take steps to authenticate the assignment, including communicating this assignment to a checking service (which may retain a copy of the assignment on its database for future plagiarism checking).
3. By completing this form you signify your understanding of the terms above.

STRATEGIES TO SUSTAIN THE CAMBODIAN LABOUR ARBITRATION COUNCIL: A CRITICAL ANALYSIS

I. INTRODUCTION

The Arbitration Council of Cambodia (The Council) is a national institution, which is mandated by the *Cambodian Labour Law 1997 (Labour Law)* to resolve collective labour disputes.¹ The Council was established in 2003 and has now been operating for a decade. It has been carrying out its mission successfully despite a country with a weak judicial system and poor law enforcement.² The Cambodian judiciary has been strongly criticised for its corruption, long delays and for acting under political influence.³ The endemic corruption in the judiciary has taken away people's trust and has lowered the confidence of millions of Cambodian people to use the court system to resolve their disputes.⁴

This weak judicial system provides an opening for an alternative mechanism to be accepted. In collective labour disputes, if employers and employees are unable to resolve differences through negotiation, the only resolution that both parties can rely on is the Council, which provides quick, cost effective and more effective resolution.⁵ The Council decisions are based on the law and evidence presented.⁶ It has also been acknowledged by the users of the system, as well as the public, for its independence, transparency and consistency in resolving disputes.⁷ It has also contributed to a reduction in the number of worker strikes and helped to increase industrial harmony and stability.⁸ So far, the Council has heard around 1500 cases,

¹ *Labour Law* (Cambodia) adopted by the Parliament on 13 March 1997, art 309 ('*Labour Law*').

² Daniel Adler and Hans Hwang, 'From Law on the Books to Law in Action: A Note on the Role of Regulation in the Production of Good Jobs in Cambodia's Garment Sector' (The World Development Report, 2013) 7.

³ *Ibid.*

⁴ *Ibid* 8.

⁵ Cambodia's Leading Independent Development Policy Research Institute, 'Study on the Contribution of AC Services to Improving Industrial Relations in Cambodia: The Case of Garment Factories' (Report, 2013) 2.

⁶ CDRI-PARD Team, 'Study on the Contribution of AC Services to Improving Industrial Relations in Cambodia: The Case of Garment Factories' (Cambodia's Leading Independent Development Policy Research Institute, 2013) iv.

⁷ The Arbitration Council, 'Arbitration Council Sustainability Strategy 2014-2017' (Report, 2012) 1 ('*Council's Sustainability Strategy*').

⁸ *Ibid.*

which have involved approximately 650,000 employees mostly from the garment industry.⁹ The success of the Council makes it a promising model for a new commercial arbitration system in Cambodia (National Arbitration Center).¹⁰

Under the *Labour Law*, the Council provides its services free of charge to parties with collective labour disputes.¹¹ This no-fee model poses an existential challenge for the Council because the Cambodian government has provided limited resources and expressed little political interest to channel its support to this national institution. The Council has survived primarily with support from international donors including: the International Labour Organization (ILO); Levi Strauss Foundation; InterChurch Organisation for Development Cooperation; The Asia Foundation; and Adidas Sourcing Limited.¹² Currently, the World Bank is the main funder of the Council, but its funding is not sustainable and the current agreement expires in March 2014.¹³

The Council is now deeply concerned over the institution's future given the inability to secure ongoing funds from other donors.¹⁴ It is thus critical to consider strategies to sustain this important institution through self-reliance and sustainability.¹⁵ The primary question is: how to do that?

This paper will offer a range of responses to this important question. My interest in working on this paper is not only because I am concerned about the survival of the only independent institution in my country, but also because I was part of the Council where I had the opportunity to observe the way in which the Council operated. I have spent more than three years assisting the Council to resolve more

⁹ Cambodia's Leading Independent Development Policy Research Institute, above n 5.

¹⁰ Ibid.

¹¹ *Labour Law*, above n 1, art 316.

¹² The Arbitration Council, 'The Arbitration Council 2012: Moving Towards a Sustainable Future' (Annual Report, 2012) 25 ('*Council's Annual Report 2012*').

¹³ Simon Henderson, 'At 10th Anniversary, Arbitration Council Faces Funding Shortage' *The Cambodia Daily* (22 May 2013) <<http://www.cambodiadaily.com/archives/at-10th-anniversary-arbitration-council-faces-funding-shortage-25887/>>.

¹⁴ Ibid.

¹⁵ Ibid.

than 300 cases. However, the views expressed in this paper are my views only and not those of the Council.

The structure of this paper is as follows: In Part II, I briefly provide a historical background of the Council which explains the reason why the Council was established and provides an overview of its current legal framework. In Part III, I analyse the impact of the Council's work on industrial relations, the rule of law, and social and economic progress in Cambodia, which ultimately demonstrates the success of the Council in resolving collective labour disputes. In Part IV, I examine the possible strategies for sustaining this important institution through income generation. In Part V, I conclude the discussion by emphasising the importance of sustaining the work of the Council through government funding, amendment of the law to allow user pays, and the hybrid system.

II. BACKGROUND TO THE ARBITRATION COUNCIL'S WORK

A. *Industrial Relations in Cambodia*

Cambodia has suffered from three decades of conflict.¹⁶ During that period, the country's infrastructure and its public institutions were destroyed.¹⁷ The country also lived through a genocidal regime from 1975 to 1979 where more than a million people died due to systematic killing, starvation and widespread disease.¹⁸ The number of people that died during that time constituted around 21 % of the population.¹⁹ After the regime collapsed, there were only ten surviving law graduates in the country.²⁰ The low survival rate of educated people was due to a deliberate targeting by the regime of intelligentsia and past knowledge was considered illegal.²¹ Many reporters and writers refer to this as 'Year Zero'.²² This

¹⁶ Hugo van Noord, Hans Hwang and Kate Bugeja, 'Cambodia's Arbitration Council: Institution-Buidling in Developing Country' (Working Paper, International Labour Organisation, 2011) 2.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Cambodian Genocide Program, *The CGP, 1994-2013* (2010) < <http://www.yale.edu/cgp/> >.

²⁰ John A. Hall, 'Human Rights and the Garment Industry in Contemporary Cambodia' (2000) 36 (1) *Stanford Journal of International law* 119, 174.

²¹ Noord, Hwang and Bugeja, above n 16.

²² Yoseph Yapi Taum, 'Collective Cambodian Memories of The Pol Pot Khmer Rouge Regime' (Paper presented at the Fifth Annual Conference, Bangkok, 25-26 July, 2005) 1.

regime also caused a breakdown of the social order, infrastructure and the trust of citizens in the state.²³

The Vietnamese army overthrew the Khmer Rouge regime, which led to the regime collapse in 1979.²⁴ However, the Vietnamese troops remained in Cambodia until 1989 and the civil conflict finally ended in 1991 with the signing of the Paris Peace Accords,²⁵ which resulted from United Nations intervention.²⁶ The United Nations took over responsibility for the transition of the country, arranged elections and took the lead in drawing up the new *Cambodian Constitution* in 1993 for the creation of a constitutional monarchy and a free market state.²⁷ The violence completely ended in 1998 when the last Khmer Rough troops in the western part of the country put down their weapons.²⁸

As the country became relatively stable in 1998, it began investing in its economy.²⁹ Garment producers from Hong Kong, Taiwan, Malaysia, and Singapore began to establish garment-manufacturing operations in Cambodia.³⁰ The garment sector grew significantly from seven garment factories in 1994³¹ to over 100 factories in 1998.³² This exponential growth was fueled by low initial capital costs and a low domestic wage rate.³³ Another factor was an abundance of low skilled workers for cutting, sewing and trimming operations.³⁴ Most women who originate from the countryside have a primary school education or less, and end up working in labour

²³ Joakim Ojendal and Mona Lilja, 'Beyond Democracy in Cambodia: Political Reconstruction in a Post-Conflict Society?' in Joakim Ojendal and Mona Lilja (eds), *Beyond Democracy In Cambodia* (Nordic Institute of Asian Studies, 2009) 1.

²⁴ Noord, Hwang and Bugeja, above n 16.

²⁵ Ibid 3.

²⁶ Ojendal and Lilja, above n 23, 2.

²⁷ Arnold M. Zack, 'How Labour Arbitration Has Changed the Workplace Landscape in Cambodia' [2009] *Dispute Resolution Journal* 77, 78.

²⁸ Ojendal and Lilja, above n 23, 2.

²⁹ Paul Deuster, Barry MacDonald and Don Zimmerman, 'Labour/Industrial Productivity: Activity Evaluations' (Report, The United States Agency for International Development, 2009) 16.

³⁰ Zack, above n 27.

³¹ Sokty Chhair and Luyna Ung, 'Economic History of Industrialization in Cambodia' (Working Paper, United Nations University, 2013) 19.

³² Deuster, MacDonald and Zimmerman, above n 29, 18.

³³ Ibid 19.

³⁴ Ibid.

intensive production areas.³⁵ In addition, many investors had decided to invest in this sector because of its lack of quota restrictions, proximity to raw materials in China and Vietnam and because of the country's political stability.³⁶

Since 1998, these low cost producers have employed more than 400, 000 workers.³⁷ Approximately 80-90% of the workers are rural women who send money home to support their families in the provinces.³⁸ Thus, the income generated by garment factories' work not only supports workers but also their families who are dependent on their income.³⁹ The income generated by this industry supports an estimated 20% of the population.⁴⁰

The garment industry has become the leading export industry in the country and comprises approximately 17% of Gross Domestic Product.⁴¹ From 2001 to 2008, the garment sector comprised approximately 70-75% of Cambodia's annual export volume, which about 70% of these exports went to the U.S. market.⁴² This made Cambodia become a leading supplier for garments to the U.S.⁴³

B. *Reasons for Establishing the Council*

There were at least two main reasons for establishing the Council. First, despite the significant growth in the garment industry, working conditions in this sector pose serious concerns for workers.⁴⁴ Workers frequently strike to demand better working conditions and rights protection. For example, according to a report from the Ministry of Labour, there were only 17 collective labour disputes in 1997, three

³⁵ Günseli Berik and Yana Van Der Meulen Rodgers, 'Options for Enforcing Labour Standards: Lessons from Bangladesh and Cambodia' [2010] 22 *Journal of International Development* 56, 62.

³⁶ Noord, Hwang and Bugeja, above n 16, 3.

³⁷ International Human Rights and Conflict Resolution Clinic Stanford Law School & Worker Rights Consortium, 'Monitoring in the Dark: An Evaluation of the International Labour Organization's Better Factories Cambodia Monitoring and Reporting Program' (Report, 2013) 4.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Dennis Arnold and Toh Han Shih, 'A Fair Model of Globalisation? Labour and Global Production in Cambodia' (2010) 40 (3) *Journal of Contemporary in Asia* 401, 401.

⁴¹ International Human Rights and Conflict Resolution Clinic Stanford Law School & Worker Rights Consortium, above n 37.

⁴² Arnold and Shih, above n 40, 402.

⁴³ Ibid.

⁴⁴ Noord, Hwang and Bugeja, above n 16.

years later in 1999, the number of disputes increased to 126.⁴⁵ This remarkable rise in disputes posed a serious threat to industrial peace. There were different types of disputes, including disputes over long hours and forced overtime,⁴⁶ wage violation,⁴⁷ and violations against freedom of association and the right to organise.⁴⁸ This industrial unrest that the country was witnessing was part of the reason to establish the Council.

Second, during that time the system for collective dispute settlement did not function properly, within both the Ministry of Labour and the courts. The conciliators from the Ministry were poorly trained and poorly paid.⁴⁹ Conciliators received approximately US\$40 per month.⁵⁰ This payment was below the minimum needed to support a family.⁵¹ Such a scenario created fertile ground for bribery by factory owners. This situation seriously undermined the credibility of the conciliator as a neutral party and destabilised trust toward resolutions suggested by conciliators. As noted by Noord et al, rightly or wrongly some unions believed that the Ministry aligned with employers' interests.⁵² This perception resulted in ineffective dispute resolution from the Ministry. In addition, there was also a conflict of interest issue. For example, the ILO's report on *National Strategy on Labour Dispute Prevention and Settlement in Cambodia* published in 2004 states that in practice, conciliation at the Ministry of Labour was conducted by the Labour Inspectors within the Department of Labour Inspection.⁵³ The non-separation of these two bodies posed concern about the neutrality of the conciliator. For example, when a conciliator had already inspected the factory in their role as labour inspector and was aware of the issues in the factory and then performed the role of conciliator.⁵⁴

⁴⁵ Ibid 3.

⁴⁶ Kolben Kevin, 'Note From the Field: Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories' [2004] 7 *Yale Human Rights and Development Law Journal* 79, 83.

⁴⁷ Ibid 84.

⁴⁸ Ibid.

⁴⁹ Ibid 7.

⁵⁰ Adler and Hwang, above n 2.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Robert Heron and Hugo van Noord, 'National Strategy on Labour Dispute Prevention and Settlement in Cambodia' (Report, International Labour Office, 2004) 19.

⁵⁴ Ibid 17.

Indeed, conciliation and inspection have little in common. A conciliator performs his or her role as an independent third party to encourage the disputing parties to make compromises in resolving their differences and to reach an agreement.⁵⁵ Inspectors, on the other hand, are mainly focused on ensuring compliance with the *Labour Law* and its related regulations.⁵⁶ The practice of having the inspector as conciliator caused confusion for the disputant parties and had a negative effect on the confidence the parties reposed in the dispute resolution system.

Besides the confidence that was lost in resorting to conciliation that was conducted by the inspector, the judiciary was also generally incapable of resolving labour cases.⁵⁷ The judiciary was ill equipped and did not have enough expertise in labour law. At the time of writing this paper, Cambodia has not yet established a labour court, therefore ordinary courts also have jurisdiction to resolve labour disputes.⁵⁸ However, the ordinary courts in Cambodia have been targets for domestic and international criticism for being corrupt and biased, politically dependent and ineffective.⁵⁹ As noted by the review of the United States Agency for International Development on the court system in Cambodia:

The courts are perceived by private sector and NGO representatives as uniformly unreliable, plagued by corruption and lacking in commercial sophistication and political independence...and private sector representatives...said they would seek to use the court system only as a last resort...⁶⁰

The U.S. Department of State also supported this proposition by stating that the judiciary system in Cambodia is perceived to be corrupt, politically biased which results in many Cambodians deciding to avoid using the court process because of the expense of bribing judges and police.⁶¹

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Heron and Noord, above n 53, 13.

⁵⁸ *Labour Law*, above n 1, art 389.

⁵⁹ Kheang Un, 'The Judicial System and Democratisation in Post-Conflict Cambodia' in Joakim Ojendal and Mona Lilja (eds), *Beyond Democracy In Cambodia* (Nordic Institute of Asian Studies, 2009) 94.

⁶⁰ Extracts are from Alastair Henderson, 'Enforcement of Arbitral Awards in Indochina' (2006) 26 (6) *Journal of International Arbitration* 841, 851.

⁶¹ United States Department of State, *2010 Human Right: Cambodia*, (8 April 2011) <<http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154381.htm>>.

Industrial unrest and ineffective dispute resolution were the two main reasons that triggered many complaints from labour unions, students and consumers, which pressured the U.S. government to review labour rights violations in the Cambodian garment industry.⁶² In June 1998, labour groups in the U.S. filed a complaint to the U.S. government requesting review of the rights violations. The Clinton government considered that it was an opportunity to prove to the world that trade and export-orientated policies could be used to reduce poverty in developing countries and could play an important role in development processes.⁶³ Besides, the U.S. government was under pressure to protect its local producers against the large import of garments to the U.S. market.⁶⁴

To remedy the situation in Cambodia, the U.S. government signed a trade agreement with the Cambodian government in 1999.⁶⁵ The agreement was designed to use market incentives rather than punitive measures to encourage the Cambodian government and employers to comply with labour standards, which included both local law and core international labour standards.⁶⁶ Under the terms of the agreement, annual quotas for export would be increased on the condition that the Cambodian garment industry improved its working conditions.⁶⁷ However, during that time, there was no agency that could measure the compliance with labour standards; therefore, the U.S. and the Cambodian governments turned to the ILO for assistance.⁶⁸

The reason that both governments turned to the ILO for its assistance was because of the ILO's long history of setting labour standards and its vast experience in supervising compliance.⁶⁹ In response, the ILO initiated two projects, which were mainly funded by the U.S. government.⁷⁰ These were 1) Better Factories Cambodia,

⁶² Lor Sok and Samborana Mar, 'Regional Conference for Judges and Arbitrators on Employment Dispute Resolution Systems in Asia and the Pacific' (Country Paper, 2012) 5.

⁶³ Arnold and Shih, above n 40, 407.

⁶⁴ Bob Hepple, *Right at Work: Global, European and British Perspective* (London Sweet & Maxwell, 2005) 8.

⁶⁵ Don Wells, 'Best Practice in the Regulation of International Labour Standards: Lessons of the U.S.-Cambodia Textile Agreement' (2005) 27 *Comparative Labour Law and Policy Journal* 357, 360.

⁶⁶ Ibid.

⁶⁷ Ibid 361.

⁶⁸ Deuster, MacDonald and Zimmerman, above n 29, 21.

⁶⁹ Ibid 21.

⁷⁰ Noord, Hwang and Bugeja, above n 16, 3.

which was to monitor working conditions in the Cambodian garment industry and 2) Labour Dispute Resolution Project (The ILO Project) which was to resolve collective labour disputes.⁷¹ The latter was created because workplace labour disputes could easily lead to strikes and demonstrations, which interrupted production and delayed the delivery of garments.⁷² Concerns about legal enforcement agencies such as the Ministry of Labour's conciliators motivated the stakeholders to demand a new adjudicatory body that would be perceived as competent and neutral in resolving industrial disputes.⁷³ That institution was called The Arbitration Council, a body that was provided for in the *Labour Law* but had never been established.⁷⁴

The Council was finally established in 2003⁷⁵ according to the *Prakas* (Ministerial regulation) number 388 in 2002. The *Labour Law* provides the authority to the Cambodian Minister of Labour to issue *Prakas* to detail the function and operation of the Council.⁷⁶ It is also important to note that during that time, to sustain the work of the Council in becoming independent and to avoid political intervention, the ILO assisted to establish—The Arbitration Council Foundation (The Foundation) in 2004. The Foundation is a non-government organisation that is mandated to ensure technical, legal and financial management of the Council.⁷⁷

C. Current Legal Framework of The Council

The first important piece of legislation that oversees the work of the Council is the *Labour Law* 1997. It is important to note that this law was the consequence of technical support provided by the ILO to the Cambodian government in 1994.⁷⁸ The ILO assisted the government in revising its *Labour Law* 1992 by drafting the new *Labour Law*, which was largely adopted by the Cambodian parliament in 1997.⁷⁹

⁷¹ Ibid.

⁷² The International Labour Organization, 'International Labour Organization Programme of Technical Cooperation Project Document: Labour Dispute Resolution in Cambodia' (Project Document, 2000) 2.

⁷³ Deuster, MacDonald and Zimmerman, above n 29, 21.

⁷⁴ Adler and Hwang, above n 2.

⁷⁵ Cambodia's Leading Independent Development Policy Research Institute, above n 5, 3.

⁷⁶ *Labour Law*, above n 1, art 317.

⁷⁷ Cambodia's Leading Independent Development Policy Research Institute, above n 5, 3.

⁷⁸ Arturo Bronstein, 'The Role of the International Labour Office in the Framing of National Labour Law' (2005) 26 *Comparative Labour Law & Policy Journal* 339, 341.

⁷⁹ Ibid 364.

To this end, the *Labour Law* 1997 was largely influenced by the ILO and it has been recognised as one of the most progressive pieces of legislation in the country as well as in the region because it encompasses many international labour standards and fundamental labour rights.⁸⁰ The law also recognises the freedom of association, which is largely protected under this regulation.⁸¹ The law was adopted and declared as a matter of urgency, with implementation commencing immediately after adoption.⁸² The *Labour Law* contains many provisions relevant to the settlement of collective labour disputes. For example, the whole of Chapter XII from articles 300 to article 317 deals particularly with procedures for resolving labour disputes.⁸³

Besides this, the *Law* empowers the Ministry of Labour to issue *Prakas* to facilitate or ensure the effective application of the *Labour Law*.⁸⁴ The ILO assisted in the drafting of the *Prakas*.⁸⁵ During the establishment of the *Prakas*, the ILO Project identified that the *Prakas* was the main regulation to operate the Council; therefore the ILO offered assistance in drafting this piece of regulation to ensure that the Council could operate independently, credibly and effectively.⁸⁶ The ILO head office was the preliminary drafter of the *Prakas* and the draft was then presented at a tripartite stakeholder seminar to collect the feedback.⁸⁷ The draft was extensively revised for a period of five months.⁸⁸ The Ministry of Labour at that time also prepared a separate version of the *Prakas* and these two versions of the *Prakas* were reviewed and finally amalgamated into a single *Prakas* in 2002.⁸⁹ This piece of regulation represents a detailed blueprint of the power, function and the main operation of the Council.

⁸⁰ David Tajgman, 'Extending Labour Law to All Workers: Promoting Decent Work in the Informal Economy in Cambodia, Thailand and Mongolia' (Report, International Labour Office, 2006) 52.

⁸¹ Ibid.

⁸² *Labour Law*, above n 1, art 396.

⁸³ Ibid Ch XII, arts 300 to 317.

⁸⁴ Ibid art 317.

⁸⁵ Bronstein, above n 78, 365.

⁸⁶ Noord, Hwang and Bugeja, above n 16, 9.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid 10.

1. *The Arbitrators*

The arbitrators are appointed annually by the *Prakas* and they are reappointed, unless they have resigned, committed professional misconduct or died.⁹⁰ The first group of arbitrators comprised 21 people who were appointed by the *Prakas* number 338 of 2002. The first group was properly and carefully selected by the ILO Project in consultation with the Ministry of Labour.⁹¹ During that time, the Project determined that in order to maximise or to ensure the independence of the Council, the recruitment of arbitrators had to be done carefully.⁹² The project searched for individuals of integrity, experience and skills that deemed important to become arbitrators.⁹³ The Ministry of Labour also agreed that it would follow the ILO recommendations as to which arbitrators should become member of the Council.⁹⁴

Currently, the Council consists of 30 part-time volunteer arbitrators.⁹⁵ Although arbitrators work voluntarily, each arbitrator on the case receives US\$120 if he or she is selected by parties to settle a case.⁹⁶ This flat payment (US\$120 per case) is given to each arbitrator irrespective of the amount of time that they actually spend on the case.⁹⁷ Initially the reason behind this model was to offset the costs for the long and complicated cases with straightforward cases.⁹⁸ Although this appears to be a rational approach, in reality it does not happen this way. Complex cases are normally handled by a small number of arbitrators, who are motivated to work on the cases even though they are getting paid less compared to those arbitrators who are working on straightforward cases. This method of payment should be reviewed to ensure that all arbitrators are still motivated to work on complicated cases.

Arbitrators are well educated and have expertise in resolving labour disputes.⁹⁹ To maintain and increase the capacity of the arbitrators in assisting parties to resolve

⁹⁰ *Prakas* (Ministerial regulation) on the Arbitration Council No. 99 (21 April 2004), art 51 ('*Prakas*').

⁹¹ Kong Phallack, 'Labour Arbitration in Cambodia: Law And Practice' in Kuong Teilee et al (eds), *Cambodian Yearbook of Comparative Legal Studies* (Cambodian Society of Comparative Law, 2010) 165.

⁹² Noord, Hwang and Bugeja, above n 16, 10.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Phallack, above n 91, 164.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ The Arbitration Council, 'Arbitration Council 2020' (Report, 2012) 14.

⁹⁹ Phallack, above n 91, 165.

disputes, various training programmes are also organised. For example, in 2009, arbitrators received training from international experts in conciliation and arbitration skills including hearing management, techniques of drafting legal decisions, legal analysis, and statutory interpretation.¹⁰⁰ In 2010, arbitrators participated in international study tours and overseas training to increase their capacity to resolve labour disputes.¹⁰¹ Industrial relations experts from Canada also conducted training on conciliation and arbitration from the Canadian perspective to the Council in 2011.¹⁰² Ongoing training is designed to increase the capacity of arbitrators and help them to be more effective in resolving labour disputes.¹⁰³

The Council operates without a president or staff.¹⁰⁴ It administers cases with support from the Secretariat of the Council. The Secretariat is responsible for the case registrations and clerical work of the Council with a few staff members from the Ministry of Labour.¹⁰⁵ The Council also receives technical and financial support from the Foundation. As mentioned earlier, many international organisations and corporations have provided grant funding to the Foundation.¹⁰⁶ The Cambodian government, however, so far has not funded the operation of the Foundation. The government has taken the position that the Foundation is a local non-governmental organisation and cannot receive funds from the state. Whether this is based on a legislative restriction or any policy restriction is not clear.¹⁰⁷ In any case, the government's position has overlooked the important fact that the Foundation is the key institution that supports the work of the Council. This links to the next section, in which I demonstrate the Council's jurisdiction.

2. *The Council's Jurisdiction*

¹⁰⁰ The Arbitration Council, 'Annual Report 2009' (Report, 2009) 22 ('*Council's Annual Report 2009*').

¹⁰¹ The Arbitration Council, 'Annual Report 2010: Labour Disputes Resolved Industry Benefits' (Report, 2010) 27 ('*Council's Annual Report 2010*').

¹⁰² The Arbitration Council, 'The Arbitration Council Alternative to Strike in the Garment Sector' (Annual report, 2011) 19 ('*Council's Annual Report 2011*').

¹⁰³ *Council's Annual Report 2009*, above n 100, 22.

¹⁰⁴ Phallack, above n 91, 164.

¹⁰⁵ Noord, Hwang and Bugeja, above n 16, 5.

¹⁰⁶ *Council's Annual Report 2011*, above n 102, 25.

¹⁰⁷ Henderson, above n 13.

According to article 302 of the *Labour Law*, the Council has jurisdiction to resolve collective labour disputes throughout the country, across different types of industries.¹⁰⁸ Although the Council has legislative power to hear collective labour disputes from different sectors throughout the nation, so far the large majority of the cases come from the garment and footwear industries, which make up approximately 90% of cases.¹⁰⁹

Disputes must meet three criteria to be considered as a collective labour dispute.¹¹⁰ The first criterion is related to the parties to the dispute.¹¹¹ The disputes have to be a conflict between one or more employers and a group of workers.¹¹² The *Labour Law*, however, does not specify how many workers can be considered as a 'group of workers'. Some argue that more than one worker is sufficient to constitute a group.¹¹³ Second, the subject matter of the dispute must relate to:

Working conditions, the exercise of the rights of professional organisations, the recognition of professional organisations within the enterprise, and issues regarding relations between employers and workers.¹¹⁴

Third, the dispute should result in disrupting the enterprise or threatening social peace.¹¹⁵

The Council has no power to resolve individual labour disputes. Only the court has jurisdiction over this type of conflict.¹¹⁶ Individual conflicts are considered by the *Labour Law* as a dispute that occurs between an employer and one of their workers individually.¹¹⁷ These disputes relate to the interpretation or the enforcement of the terms of an employment contract, a collective bargaining agreement or laws and regulations in effect.¹¹⁸ Perhaps the *Labour Law* is concerned more about collective labour disputes rather than individual disputes as the former involves more

¹⁰⁸ *Labour Law*, above n 1, art 302.

¹⁰⁹ *Council's Annual Report 2012*, above n 12, 5.

¹¹⁰ *Labour Law*, above n 1, art 302.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Daniel Adler, Susie Brown, Lee U Meng and Hugo van Noord, 'The Arbitration Council and the Process for Labour Dispute Resolution in Cambodia' (Community Legal Education Centre, 2004) 9.

¹¹⁴ *Labour Law*, above n 1, art 302.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* art 300.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

workers and the consequences can be more serious. Due to this concern, the *Labour Law* requires mandatory collective labour dispute procedures.¹¹⁹ Individual labour disputes can be resolved by voluntary conciliation at the Ministry of Labour or going directly to the court.

3. *The Process of Resolving Collective Labour Disputes*

A collective labour dispute can threaten the operation and efficiency of an enterprise and it could also jeopardise social peace. Keeping in view such consequences as well as the imbalance of bargaining power in employment relationships, the *Labour Law* requires a structured and mandatory labour dispute resolution process.¹²⁰

There are three main processes in resolving collective labour disputes. First, when the dispute occurs, normally, the employer and workers attempt to negotiate their differences in the factory or at the enterprise level. If this negotiation fails and there is no agreed settlement procedure in a collective agreement between parties, then parties are required to communicate the collective labour dispute to the labour inspector of their province or municipality.¹²¹ This second process involves conciliation at the Ministry of Labour. Of note, the terms ‘mediation’ and ‘conciliation’ have been confused for many years.¹²² For most people these two terms have been used interchangeably. Although some have attempted to draw a distinction on the meanings of mediation and conciliation, there is still no common international legal authority defining how the terms might differ.¹²³ The two terms have been used generally to refer to ‘a negotiation process facilitated by a neutral third party’.¹²⁴ For the purposes of this paper the term conciliation will be used to refer to either conciliation or mediation.

¹¹⁹ Ibid art 303.

¹²⁰ Scott Brown, Christine Cervenak and David Fairman, ‘Alternative Dispute Resolution Practitioners Guide’ (Report, 1900) 31.

¹²¹ *Labour Law*, above n 1, art 303.

¹²² Steven M. Austermiller, Esq. *Alternative Dispute Resolution: Cambodia: A Textbook of Essential Concepts* (American Bar Association’s Rule of Law Initiative, 2010) 82.

¹²³ The National Alternative Dispute Resolution Advisory Council (NADRAC), *NADRAC Publications* <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

¹²⁴ Austermiller, above n 122.

In different nations and cultures, there is a wide variation in the degree of involvement by the conciliator or mediator in resolving the conflict.¹²⁵ In some cultures, the mediator or conciliator is given freedom to actively participate in the discussion with parties and promote settlement and suggest specific solutions.¹²⁶ In other traditions, the mediator or conciliator takes a more passive approach by allowing parties to control the process or the discussion.¹²⁷ In Cambodia, the degree of involvement varies from conciliator to conciliator.

Either workers or the employer can communicate the unresolved dispute to the labour inspector. However, in practice it is normally the workers or the trade union who is the complainant that communicates the matter to the labour inspector for further settlement. The Ministry of Labour's conciliator will attempt to resolve the dispute by conducting conciliation¹²⁸ and parties are required to attend all meetings conducted by the conciliator.¹²⁹ Unjustified absence from any such meeting is punishable by fine.¹³⁰ If the demand is successfully conciliated by the Ministry then the agreement between parties will become a collective agreement.¹³¹ However, if the conciliation fails, then the dispute will be referred by the Ministry via its Secretariat to the Council for further settlement.¹³²

If the conciliation fails under the facilitation of the Ministry of Labour, the third process involves the case being forwarded to the Council for further resolution. At the Council, both employer and worker parties are required to select an arbitrator from their respective lists to hear the case. For instance, the employer party selects one arbitrator from the ten arbitrators who are sitting on the employer's list.¹³³ The worker's party selects one arbitrator from the ten arbitrators on the employee's

¹²⁵ M. Jaganadha Rao, *Concepts of Conciliation and Mediation and Their Differences* (2002)

<http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf>.

¹²⁶ Austermiller, above n 122, 83.

¹²⁷ *Ibid.*

¹²⁸ *Labour Law*, above n 1, art 303.

¹²⁹ *Ibid* art 306.

¹³⁰ *Ibid.*

¹³¹ Kong Phallack, 'Cambodian Labour And Employment Law' in Hor Peng, Kong Phallack, Jorg Menzel (eds), *Introduction to Cambodian Law* (Konrad Adenauer Stiftung, 2012) 290.

¹³² *Labour Law*, above n 1, art 309 (c).

¹³³ *Prakas*, above n 90, art 12 (A).

list.¹³⁴ The two selected arbitrators have to select the third arbitrator from the ten arbitrators on the Ministry of Labour's list to form an Arbitration Panel (the Panel).¹³⁵ In cases of disagreement regarding selection of the third arbitrator, the arbitrator is chosen by lot from the Ministry's list.¹³⁶ Although parties select arbitrators from their own list, this does not mean that an arbitrator represents those who nominated them.¹³⁷ This tripartite system is designed to generate trust among the parties and stakeholders to use the arbitration system by allowing them to choose who should hear their case. After the appointment is made, each arbitrator is required to resolve the case independently according to the law and the merits of the case.¹³⁸

The hearing of the Council is conducted in a closed session¹³⁹ and before proceeding with arbitration, the panel normally tries to conciliate the dispute again if both parties agree to do so. Normally the parties agree to this further conciliation conducted by the arbitration panel. This is because if they reach an agreement then it will become a collective agreement that binds parties and it may also better serve both parties' interests, whereas arbitration relies on the arbitrators and is out of the control of the parties. In addition, the Panel is considered capable of providing expert advice on labour matters and encourages the participants to reach an agreement. The Council's Annual Report in 2012 indicated that 34% of cases have been successfully conciliated during the hearings.¹⁴⁰ It would be a worthy comparison to look at the success rate of conciliation between the Ministry and the Council; however, the data from the Ministry is not accessible. The success rate of the conciliation conducted by the Council is remarkable. This is largely due to the high respect that the institution commands, its skills in conciliation, its independence, transparency and expertise in labour matters as well as its free of corruption status.

¹³⁴ Ibid art 12 (B).

¹³⁵ Ibid art 12 (C).

¹³⁶ Ibid.

¹³⁷ Adler, Brown, Meng and Noord, above n 113, 19.

¹³⁸ Ibid.

¹³⁹ *Labour Law*, above n 1, art 29.

¹⁴⁰ *Council's Annual Report 2012*, above n 12.

Sometimes at the end of the conciliation process, parties still do not agree on any settlement. In such cases, the same panel will become arbitrators and require parties to defend their cases again. The panel in arbitration will not consider what has been said in the conciliation process. Although the Panel tries to explain to the parties the differences between the conciliation and arbitration and requires parties to present their cases again, it remains unclear how the Panel distinguishes between what they have heard previously during conciliation and now during arbitration and to what extent parties understand the differences between conciliation and arbitration. It is worth pointing out that ‘the arbitrators rarely visit and inquire into the enterprises or professional organisations where disputes arise in order to clarify evidence due to budget constraints and neutrality issues’.¹⁴¹ The absence of visits to the enterprise to clarify evidence due to financial constraints also can play a part in reducing the effectiveness of the Council. The Council would be well better off if they have enough resources to carrying out the investigation so that it can help them to make a better judgment.

4. *The Arbitral Award*

‘Award’ is an official name for the final written decision of the Council.¹⁴² The three arbitrators should attempt to reach consensus on the decision. However, if a consensus cannot be reached then the decision has to be made according to the majority,¹⁴³ and the minority has the right to offer a dissenting opinion explaining why he or she does not agree with the other two arbitrators. Phallack Kong, a highly experienced labour arbitrator from the Ministry’s list, states that most arbitral awards are written by the arbitrator from the Ministry’s list with assistance from the legal support staff of the Foundation and then communicated to the other two arbitrators.¹⁴⁴ As mentioned earlier, the arbitrator from the Ministry’s list is chosen by the two arbitrators. This rule creates a tendency for the arbitrator from the Ministry’s list to be more active, in particular in drafting the award; otherwise it is probably hard for him or her to be selected again.

¹⁴¹ Phallack, above n 91, 166.

¹⁴² *Prakas*, above n 90, art 12.

¹⁴³ *Ibid* art 36.

¹⁴⁴ Phallack, above n 91, 167.

Under the *Prakas*, the award must include certain sections. These include a summary of the procedure, a description of the claims and counter claims and, if applicable, the panel's reasons for the decision with reference to relevant legal provisions, wherever applicable.¹⁴⁵ In practice, beside these requirements, the Council also refers to the Council's previous decisions if the facts of the case are similar. References to precedents are intended to ensure consistency of the decisions. At the present the Council is the only tribunal in Cambodia to publish reasons for all its decisions and to make its decisions publicly accessible.¹⁴⁶

Under article 313 of the *Labour Law*, the Panel must issue an arbitral decision within fifteen days starting from the date of that they have received the case.¹⁴⁷ The parties can choose to be bound by the decision or not to be bound by the arbitrators' decision. If both parties choose a decision then the decision is binding and final.¹⁴⁸ Zack notes that the strategy to use both binding and non-binding options is to eliminate the incentive for corruption. This means that if a party bribes the arbitrators or the whole panel then the other party can easily reject the decision by choosing a non-binding decision.¹⁴⁹

However, the Council has no control over the implementation of its decision. To enforce the award, the interested party has to go to the ordinary court for the decision to be recognised and enforced.¹⁵⁰ In this regard, the Council appears like a toothless tiger because it does not have any enforcement powers. This also limits the success rate of the Council. As Lew at el state:

Unless parties can be sure that at the end of arbitration proceedings they will be able to enforce the award, if not complied with voluntarily, an award in their favour will be only a pyrrhic victory.¹⁵¹

¹⁴⁵ *Prakas*, above n 90, art 38.

¹⁴⁶ Adler, Brown, Meng and Noord, above n 113, 30.

¹⁴⁷ *Labour Law*, above n 1, art 313.

¹⁴⁸ *Prakas*, above n 90, art 42.

¹⁴⁹ Zack, above n 27, 80.

¹⁵⁰ *Prakas*, above n 90, art 46.

¹⁵¹ Julian Lew, Loukas Mistelis, and Stefan Kroli, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 687.

III. IMPACT OF THE COUNCIL'S WORK ON INDUSTRIAL RELATIONS, RULE OF LAW, ECONOMIC AND SOCIETY

A. *Improve Industrial Relations*

The Council has had an impact that transcends labour issues. For example, both workers and employers receive direct assistance from the Council to solve their collective labour problems. Arbitrators use conciliation and arbitration skills to help parties resolve their differences, maintain workplace relations, ensure safe and productive working conditions and allow individuals and businesses to resume work.¹⁵² The Council has produced a consistent record of effective decision-making by referencing domestic laws and in some instances also international labour standards. The Council has also used their previous decisions as a guidance or jurisprudence for dealing with new cases that have similar facts.¹⁵³

The publication of the Council's decisions has helped increase the understanding by employers, employees, law students and the public about the *Labour Law* and its relevant regulations. This is a brand new practice in Cambodia, a civil law country, where court decisions have never been published. The published decisions of the Council also help both employers and employees to develop a better understanding of their rights and obligations under the law, and it also strengthens the trust of the users in the arbitration system. The Council's practices in this regard have had an influence on the judicial reforms in the country that make judicial decision making processes more transparent.¹⁵⁴

B. *Rule of Law Impacts*

The structure of the Council is designed to be open, clear, and accessible, which is intended to provide guidance to both employers and workers in dealing with their disputes—to develop better understanding of what types of activities are considered as unlawful and what types of actions are considered legal. The Council's decisions are written in the local language with English translation, and the

¹⁵² Deuster, MacDonald and Zimmerman, above n 29, 60.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

language is simple which ensures that those who do not have legal background can understand the decision. The Council's decisions are also consistent. This consistency in the decisions generates predictability. It also helps to ensure that parties with similar disputes will receive similar outcomes from the Panel,¹⁵⁵ although a different arbitration panel will hear the case.

C. *Economic and Social Impacts*

The Council has resolved collective labour disputes in cases where the dispute prevention mechanism was not yet effective in the garment and footwear factories. The disputes have been resolved quickly, within 15 working days. Expedited resolution has enabled the Council to effectively respond to the needs of stakeholders and has prevented case overloading. As Phallack notes, the arbitration process at the Council is considered one of the fastest in the world.¹⁵⁶

The Council also has power to issue interim orders to suspend strikes or lockouts and request both parties to wait for the resolution from the Council before continuing to undertake strikes or lockouts.¹⁵⁷ This cooling off period is designed to prevent industrial unrest and prevent potential damages to both employers and employees. For example, according to the *Labour law*, workers are not entitled to a wage during the period of a strike because they do not work; therefore, no payment is provided.¹⁵⁸ Fortunately, 80% of the orders placing strikes on hold were respected and implemented by the parties.¹⁵⁹ When workers decide to suspend their strike action and participate in resolving the dispute, it has assisted the firm or factory to continue to focus on production, whilst workers can concentrate on income generation. This resolution helps to promote productivity and increases income for both the enterprise and workers, which ultimately promotes a healthier investment climate by improving industrial relations, social and economic impacts.

¹⁵⁵ Ibid.

¹⁵⁶ Phallack, above n 91, 166.

¹⁵⁷ Prakas, above n 90, art 20.

¹⁵⁸ *Labour Law*, above n 1, art 332.

¹⁵⁹ Phallack, above n 91, 167.

The Council also helps to ensure that both employers and workers implement their rights and obligations under the law. For example, the Council has ensured that workers receive a minimum wage and requires employers to pay those wages to workers. This has a significant impact not only on workers themselves but also on their families who are living in the rural countryside and rely on their support.

D. Vote in Confidence/ Moving from Non-Binding to Binding Decision

At the Council the parties can choose to be bound or not to be bound by the arbitrators' decision. If both parties choose a binding decision then the decision is final. However, in 2010, both employers and workers in the garment and footwear sector agreed to a landmark memorandum of understanding that provided for a binding arbitration at the Council concerning matters of rights violation.¹⁶⁰ The memorandum has been implemented since 1 January 2011.¹⁶¹ This is a major development, which can be considered as a vote of confidence for the system after a decade of work. Both trade unions and enterprises give the assurance that the system provides acceptable services that is why they generate such the confidence. The work of the Council is exceptional and different from the judges who selling their judgments.¹⁶²

The Council has received positive recognition because users of its services view the Council as independent. Since the landmark memorandum mentioned above, the Council has received around 200 cases per year with the majority covered by the framework of the memorandum of understanding compared to around 100 cases before signing of the memorandum.¹⁶³ This explains the increase in the demand for labour dispute resolution.

Although the movement from non-binding decision to binding decision explains the confidence of the parties in the arbitration process, it is still a matter of concern that

¹⁶⁰ *Council's Annual Report 2012*, above n 12, 3.

¹⁶¹ *Council's Annual Report 2010*, above n 101.

¹⁶² Zack, above n 27, 80.

¹⁶³ *Council's Annual Report 2011*, above n 102, 10-11.

the binding decision itself is not enforceable. The interested party still needs to go to the court to seek judicial enforcement.¹⁶⁴ Given the fact that the Cambodian judiciary is not a reliable option, there is potential to undermine the Council's decision as the court can always overturn the decision.

Perhaps, to maintain the credibility and effectiveness of the Council in dispute resolution, the *Labour Law* has to change to allow for a very limited intervention by the court into the Council's decision. The limitation of the intervention of the Court into the arbitration system is not a new concept, and occurs in commercial arbitration. For example, article 46 of the *Commercial Arbitration Law* in Cambodia allows the court to intervene in the commercial arbitration decision in very limited circumstances such as an error of arbitration process or errors in appointing the arbitration panel.¹⁶⁵ The court intervention is designed to ensure that the arbitration system is not corrupted which results in a lack of natural justice. In this event, the court should maximise positive assistance and minimise negative interference on the Council's decision. A change to the *Labour Law* should ensure that the binding decision of the Council would be implemented without undermining the Council's decision.

E. *More than Resolving Labour Disputes/Educational Role*

It is now a recognised fact that a lack of knowledge of the *Labour Law* and its relevant regulations is a major obstacle to good industrial relations and the success of the Council; keeping this in mind, the Council organizes many training workshops to improve the knowledge and capacity of workers, managers and other relevant bodies concerned with industrial relations in Cambodia. The training includes various topics ranging from labour dispute resolution, case preparation as well as garment industry memorandum of understanding and binding arbitration.¹⁶⁶ The Council's foundation has organised 21 training workshops, which has reached around 700 workers in 2011.¹⁶⁷

¹⁶⁴ Noord, Hwang and Bugeja, above n 16, 12.

¹⁶⁵ *The Commercial Arbitration Law of the Kingdom of Cambodia* (Cambodia) adopted by the Parliament on 06 March 2006, art 46 (1), (2) ('*Commercial Arbitration Law*').

¹⁶⁶ *Council's Annual Report 2011*, above n 102, 17.

¹⁶⁷ *Ibid* 18.

IV. POSSIBILITIES OF SUSTAINING THE WORK OF THE COUNCIL

Despite the important function it plays in improving Cambodia's industrial relations, rule of law, social and economic development of the country, the Council's biggest challenge at the moment remains funding. Many workers' representatives and employers have expressed their serious concern over the sustainability of the Council. One of the employers' representatives stated that if the Council ceases operations, it will significantly affect workers and employers, as there is no other forum in which labour disputes can be heard fairly and independently.¹⁶⁸ The president of a local union, The Coalition of Cambodian Apparel Worker Democratic Unions, believes that, without the Council, the number of collective labour disputes would increase drastically.¹⁶⁹ This means that, when a dispute occurs, workers will suffer from transaction costs to resolve their demands. These costs will be significant and the outcome will be very unpredictable. The workers will have less remedy, thus increasing the power of employers. Furthermore, an employers' representative of Ocean Garment Co., Ltd, (a garment factory) recognises that the labour dispute resolutions conducted by the Council are efficient and reliable; without the Council, cases will be sent to the Court by the Ministry of Labour.¹⁷⁰

Indeed, the Council has to survive and obviously does not want to experience what has happened in Sri Lanka. In Sri Lanka, the mediation boards that were considered successful alternative dispute resolution bodies were jeopardized due to low levels of financial support, which ultimately increased the burden on volunteer mediators.¹⁷¹ They not only performed their work without payment but also paid for their own office supplies.¹⁷² Despite the fact that this system had operated successfully, the burdens that mediators had to carry forced them to resign and ultimately resulted in the collapse of the system.¹⁷³ In most parts of the developing world, justice would be difficult to access without enough administrative, technical and financial support.

¹⁶⁸ *Council's Annual Report 2012*, above n 12, 5.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Brown, Cervenak and Fairman, above n 120, 30.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

The current funding model of the Council, which is mainly funded by international donors, is not sustainable for at least two main reasons. Firstly, most of the donors provide funds with a view to their specific agenda. This agenda varies from donor to donor. For example, the initial funds provided by the ILO during the establishment of the Council from 2003 to 2009¹⁷⁴ focused mainly on supporting the Council in resolving collective labour disputes, whereas under the current World Bank's funding, the Council also needs to focus on other activities to promote good governance, which the Bank believes will ultimately sustain economic growth and poverty reduction.¹⁷⁵ The different requirements set by different donors has sometimes driven the work of the Council to different directions and, wanted or not, the Council has to facilitate the donor's demands if they want to get donors' funds. This funding model also creates burden on the institution to do fundraising, which takes a lot of effort, and it can be very stressful and to some extent diverts time and resources from implementing the Council's own agenda. Secondly, it is hard to find a donor who would come to fund the Council for the lifetime period. Donors come in and out under their own time frames. Clearly, this current practice is not sustainable in the long term and the Council has to evolve a strategy to make this important institution sustainable.

This paper now continues to explore different strategies that can make the Council sustainable. There are three positions that I am advocating for under the following sections: 1) government funding 2) change the law to allow user pays and 3) hybrid. I acknowledge that there may be more possible strategies to sustain the work of the Council, but due to the limitation of this paper, I will only discuss these three options.

A. Government Funding

The Cambodian government has to fund its own public institution if they wish that institution to operate in a sustainable manner. Article 316 of the *Labour Law* states

¹⁷⁴ *Council's Annual Report 2010*, above n 101, 35.

¹⁷⁵ Economic Institute of Cambodia, 'Baseline Study for the Arbitration Council Foundation (ACF)' (Report, 2010) 1.

that ‘The procedure for conciliation and arbitration shall be carried out free of charge’.¹⁷⁶ The basic intention behind this provision is that the Council has to operate as a public institution, which provides a no fee service to its users. However, this provision is incompatible with the current position of the government to not fund the Council. How can an institution provide free service under the law if the government denies financial support for its operations?

The free of charge approach in resolving collective labour dispute is not a new concept and occurs in other countries including Singapore, Thailand, South Africa, and Australia where labour arbitration is primarily funded by the government.¹⁷⁷ Despite this funding structure, and despite the fact that the governments want to have a lot of say in the operation of those institutions, they still manage to maintain their own independence. In other developing countries, the dispute resolution services are also fully publicly funded entities and provide a free of charge service to the public.¹⁷⁸ Why is Cambodia not able to emulate these models?

The Cambodian government at the moment has been heavily criticised for outsourcing its main responsibility of funding public institutions to both local and international donors.¹⁷⁹ This practice has been going on for over two decades since 1991.¹⁸⁰ Official development assistance, which is funded by donors, makes up around 15% to the gross domestic product.¹⁸¹ This high figure translates into the fact that the government relies heavily on foreign aid and has taken very slow steps to take care of or be responsible for its own institutions. The legacy of this practice perhaps influenced the decision of the ILO project to establish the Foundation to generate income from international donors to support the operation of the Council because it was unlikely that the government would contribute financially to this important institution. Moreover, during the establishment of the Council, the donors were also not confident enough to provide funds through the Ministry of Labour to

¹⁷⁶ *Labour Law*, above n 1, art 316.

¹⁷⁷ The Arbitration Council, above n 98, 29.

¹⁷⁸ The Ministry of Interior DFGG Project, ‘Project Implementation Manual’ (Report, 2011) 29.

¹⁷⁹ Hall Hill and Jayant Menon, ‘Cambodia: Rapid Growth with Weak Institutions’ (Working paper, Asian Development Bank, 2013) 4.

¹⁸⁰ *Ibid* 2.

¹⁸¹ *Ibid*.

support the Council.¹⁸² The ILO during that time should have helped to make the Council more reliant on the national budget by recommending the passage of a law that allowed the Council to get some financial support from the state. For example, recently Cambodia has established a commercial arbitration body (National Arbitration Center), which will receive financial support from the government at least for its operations,¹⁸³ until the institution can generate its own income from hearing commercial matters. It still remains unclear why commercial arbitration can get state funds whereas the Council cannot.

Opponents of government funding for the Council claim that the government is running out of money and tax is not properly collected. The argument is not sufficient because according to Cambodian government's national budget for 2014,¹⁸⁴ the money allocated for the Ministry of Defense and Interior is constantly increasing and is much higher than the budget allocated for the Ministry of Justice; approximately US\$1.37million and US\$27.80 million respectively.¹⁸⁵ This figure is not surprising if we compare it with the national budget from a decade ago. In 2003, the government budget for the Ministry of Justice, which also included the financial support for the judiciary across the country, received around US\$2.4 million from the national budget, while the Ministry of Defense and Interior received US\$91.2million.¹⁸⁶ This significant difference suggests that the government has limited interest in supporting the Ministry of Justice and considers support to the Ministry of Defense and Interior as a matter of importance and priority.¹⁸⁷ It does not mean that the government does not have enough budget for the institution, but rather the willingness and commitment from the government is lacking. According to the International Transparency Report, the Cambodian judiciary is the most corrupt institution in the country.¹⁸⁸ The lack of financial support from the

¹⁸² Noord, Hwang and Bugeja, above n 16, 19.

¹⁸³ *Commercial Arbitration Law*, above n 166, art 10.

¹⁸⁴ The NGO Forum on Cambodia, *Budget Law Series* <<http://cambodianbudget.org/budget-law-series.php>>.

¹⁸⁵ The NGO Forum on Cambodia, *Budget Law: Promulgated by King on 28 November 2013*

<<http://cambodianbudget.org/userfiles/file/Left%20Menu/Budget%20Government%20Documents/Budget%20Law%20Series/The%20Law%20on%20Financial%20Management%202014.pdf>>.

¹⁸⁶ *Ibid.*

¹⁸⁷ Un, above n 59, 75.

¹⁸⁸ Heng Reaksmeay, 'In Survey, Many Cambodians Report Corrupt Public Officials' *Voice of America* (online news), 10 July 2013 <<http://www.voacambodia.com/content/in-survey-many-cambodians-report-corrupt-public-officials/1698269.html>>.

government creates a tendency in judicial staff to resort to corruption. In Cambodia, the public sector, which is managed by the government, is highly corrupt. According to Transparency International, in 2013 Cambodia ranked number 160 among 177 countries around the globe and received a score of just 20 out of 100.¹⁸⁹

It is now time for the government to take responsibility for its own institutions and to fund them properly.

I acknowledge that funding from the government can have both positive and negative impacts on the work of the Council. On the positive side, it is true that funding from the government will reduce the burden on the Council in searching for funding and the increased certainty of long-term funding will mean that users of the system will be confident that there is a forum that they can refer to if conflict occurs at the workplace. This will ultimately create more sustainable industrial peace and will help to attract more investment to the country.

On the negative side, funding from the government poses a concern for the independence of the Council. For example, it is not clear whether the Council can ensure its high degree of independence in making decisions if it is fully funded by the government.¹⁹⁰ The Council needs to be cautious because the remarkable success of the Council's work so far is largely due to its independence in making decisions, which has earned it a lot of trust from the users of the system as well as the general public.

In order to put pressure on the government to be responsible for its own institution, the Council has to work closely with workers, employers, buyers, consumers and relevant stakeholders to advocate for national financial support and at the same time remain independent. It is important to stress that receiving funds from a certain donor or government does not necessarily mean that the institution is controlled and manipulated by them. The Council should also be tested for its level of independence if it receives funds from the government, as this is the key

¹⁸⁹ Transparency International, 'Corruption Perception Index 2013' <<http://cpi.transparency.org/cpi2013/results/>>.

¹⁹⁰ Deuster, MacDonald and Zimmerman, above 29, 62.

component to sustain trust from the public and generate confidence in the system. A survey or research should be carried out by an independent evaluator to test the level of independence and its perceived neutrality from the users of the system.

B. *Amendment to Cambodian Labour Law to Allow User Pays*

If the government cannot fund the institution, then the *Labour Law* has to be amended so that the Council can generate the necessary income to support its operation such as with a user pays system. The Foundation has indicated that it will adopt a bipartite funding model as the key strategy to sustain the Council's labour dispute resolution services.¹⁹¹ Under this model, both employers and workers would have to pay a small amount of money to the Council, with this money going to cover the cost related to the labour dispute resolution.¹⁹² The Foundation is advocating for the money to be directly deducted from workers' wages and paid by the employers on behalf of the workers.¹⁹³ For example, each worker has to pay around US\$0.05 per month to the Council and the employer also has to pay US\$0.05 per worker that the employer has employed.¹⁹⁴ Both contributions have to be managed and transferred by the employer to the Council's account. Under this model, it is clear that the union has no control over the payment by its members to the work of the Council.¹⁹⁵

In using this model, the Council has to be careful that the limitation of involvement of the trade union in this process does not jeopardise the perceived neutrality and independence of the Council.¹⁹⁶ The experience from the Ministry of Labour can be an example, when the unions do not trust the work of the inspectors or conciliators they perceive them rightly or wrongly as aligned with employers' interests,¹⁹⁷ which has negative impacts on the resolution process. In addition, this model also needs to deal with the fact that the Council has no enforcement power to implement its own decisions. Parties can easily choose not to be bound by the decision. And what use is

¹⁹¹ *Council's Sustainability Strategy*, above n 7, 3.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* 7.

¹⁹⁷ Noord, Hwang and Bugeja, above n 16, 10.

it to parties if they pay the Council and yet cannot be sure that their dispute will be resolved and the award implemented? Furthermore, how does one keep a check on the employer, if it takes all the money from the workers and does not pay it to the Council? And who is going to monitor the accuracy of the payments and the accurate deductions by the employer from the wage of workers?

The minimum wage of workers in the garment industry is currently a big concern. Many strikes and demonstrations have taken place demanding an increase to the minimum wage.¹⁹⁸ This situation is enough to indicate that the wage of garment workers is not even enough to support their basic living needs and to request a contribution from workers will not be a successful strategy. Although these are challenges, it does not mean that this funding strategy is impossible. Perhaps the Council needs to work closely with the employers' association and the trade unions to develop financing agreements as well as mechanisms that need to be implemented under the bipartite system. The Council also should bear in mind that any change to the existing practice must consider the expectations users have regarding the independence and neutrality of the Council.

The Cambodian government can also help to ensure the sustainability of the Council by providing a tax incentive such as a percentage reduction of business or corporate taxes for those firms or factories who adopt and comply with the Council's decisions. In this case, the enterprises and workers will be more confident that the decision from the Council is final and the implementation will occur straight away. This should generate the incentive for both employers and employees to pay a minimal amount of their wage to support the Council in its dispute resolution mission.

Any legal amendment takes time and requires strong political will, but it does not mean it is impossible. With the strong push from the Council, consumers, buyers,

¹⁹⁸ Sean Teehan, 'Brands Call for Trade Union Law' *The Phnom Penh Post* (online), 20 January 2014 <<http://www.phnompenhpost.com/national/brands-call-trade-union-law>>.

employers and workers, the *Labour Law* can be amended to allow the user pays system to exist.

C. *The hybrid*

The hybrid system is another option to sustain the Council. This system will involve different donors to support different activities of the Council. This will include financial support from international donors, government and user pays system.

If the Council is concerned about the independence of its work if it receives government funds then perhaps the area that involves the neutrality of the Council will be funded by the international donors such as the payment for the arbitration panel in resolving the labour cases. International donor funding in this area is important because it will help the Council to maintain its independence, which is the key element when operating in a weak rule of law country where people have very little trust in public institutions because of widespread corruption, intervention of powerful people and political influence on the work of the judiciary. The donor's funds can help to move the Council away from existing powerful elites and results in earning respect from the users as the only institution that is free from corruption, and is independent and transparent.¹⁹⁹ It is very fortune that since the beginning of the operation of the Council in 2003, there are no reports of any payment given by parties to facilitate their demand or to bribe the Council for its decision.²⁰⁰ As mentioned earlier, international donors' support in this area remains important for the Council's independence and it has been proved that the independence has remained over the decade that the Council has been supported by the international donors. Although it is a burden for the Council to do a fundraising, the benefits of remaining independence far outweigh any fundraising burden.

The government funding can be used for operational purposes such as payment for the rent of the building or the electricity supply for the Council's work. This type of funding will minimise the involvement of the government in the independence of the Council in making decisions on labour cases, which is the main part of its

¹⁹⁹ Noord, Hwang and Bugeja, above n 16, 24.

²⁰⁰ Ibid.

mission. The users of the system, on the other hand, can contribute to the training costs that are designed by the Council to increase the awareness of the user on the labour arbitration system. This will reduce the cost to the workers, which is important given their low wages. As stated, the mechanisms for collecting employer and employee contributions will need to be negotiated.

This hybrid system will help to sustain the Council and to deal with some important concerns that currently encounter to maintain the independence of the Council.

V. CONCLUSION

Cambodia completely recovered from civil war and became politically stable in 1998 and since that time, the country has concentrated on its economic development. Garment and footwear industries have become one of the leading export sectors in the country. While these industries have grown rapidly, labour disputes are inevitable. Workers and employers are reluctant to bring their cases to the court due to its corruption, long delays, and complicated and expensive procedures. The only institution that has earned the trust of both employers and employees in resolving their labour disputes is the Cambodian Labour Arbitration Council. The demand for the services of the Council is also expected to grow due to the slow pace of judicial reform in the country.

Under the *Labour Law*, the Council has to provide a free of charge service to the disputing parties in resolving their collective labour disputes. The Cambodian government has not allocated any funding to this national institution. The institution has survived for a decade due to the support largely given by international donors. This funding, however, is not sustainable. The limitation to donors' support and the lack of commitment from the government, together with the *Labour Law* requirement of no fee service pose serious threats to the sustainability of the Council. This important institution has to stay and it will ultimately contribute to economic growth and will promote industrial peace. As

Professor Arnold Zack, an experienced arbitrator in over 5,000 cases in the U.S. comments on the Council:

Cambodia has a good and a successful system. I would encourage other countries in the world who do not have an established system of labour dispute resolution to look at Cambodia's Arbitration Council as a model institution.²⁰¹

This paper has discussed various strategies that the author considers important in making the Council sustainable. These include the funding from the government; the amendment of the *Labour Law* to ensure that to some extent the Council can generate its own income from the services it provides; and the hybrid system which is the mix of support from different donors for different activities of the Council. Each strategy cannot be operated without considering the negative impacts it can generate on the credibility, independence and transparency of the Council, which are keys to the success of this institution.

Indeed, there is no silver bullet to resolve the problems of the sustainability of the Council quickly. Long term, the solution lies in judicial development that fosters the ability, experience, and will to enforce the Council's decisions. Meanwhile, it is essential for users of the system and the government to have a realistic view that the Council will not remain sustainable to deliver its important service without the support from the users and the national budget. Pending the judicial independence, it seems that to sustain the work of the Council is the most useful mission to be accomplished.

²⁰¹ The Arbitration Council, 'The AC: A Model Institution for Labour Dispute Resolution: American Professor' (online), 6 March 2013 < <http://www.arbitrationcouncil.org/en/post/1/The-AC-A-model-institution-for-labour-dispute-resolution-American-professor>>.

BIBLIOGRAPHY

A Articles/Books/Reports

- Austermiller, M. Steven, Esq, *Alternative Dispute Resolution: Cambodia: A Textbook of Essential Concepts* (American Bar Association's Rule of Law Initiative, 2010)
- Adler, Daniel, and Hans Hwang, 'From Law on the Books to Law in Action: A Note on the Role of Regulation in the Production of Good Jobs in Cambodia's Garment Sector' (Report, The World Development, 2013)
- Adler, Daniel, Susie Brown, Lee U Meng and Hugo van Noord, 'The Arbitration Council and the Process for Labour Dispute Resolution in Cambodia' (Community Legal Education Centre, 2004)
- Arnold, Dennis, and Toh Han Shih, 'A Fair Model of Globalisation? Labour and Global Production in Cambodia' (2010) 40 (3) *Journal of Contemporary in Asia* 401
- Brown, Scott, Christine Cervenak and David Fairman, 'Alternative Dispute Resolution Practitioners Guide' (Report, 1900)
- Berik, Gunseli, and Yana Van Der Meulen Rodgers, 'Options for Enforcing Labour Standards: Lessons from Bangladesh and Cambodia' [2010] 22 *Journal of International Development* 56
- Bronstein, Arturo, 'The Role of the International Labour Office in the Framing of National Labour Law' (2005) 26 *Comparative Labour Law & Policy Journal* 339
- Cambodia's Leading Independent Development Policy Research Institute, 'Study on the Contribution of AC Services to Improving Industrial Relations in Cambodia: The Case of Garment Factories' (Report, 2013)
- CDRI-PARD Team, 'Study on the Contribution of AC Services to Improving Industrial Relations in Cambodia: The Case of Garment Factories' (Cambodia's Leading Independent development policy research institute, 2013)
- Chhair, Sokty, and Luyna Ung, 'Economic History of Industrialization in Cambodia' (Working Paper, United Nations University, 2013)
- Deuster, Paul, Barry MacDonald and Don Zimmerman, 'Labour/Industrial Productivity: Activity Evaluations' (Report, The United States Agency for International Development, 2009)
- Ear, Sophal, *Aid How Foreign Assistance Dependence Undermines Democracy in Cambodia*, (Columbia University Press, 2013)
- Hill Hall and Jayant Menon, 'Cambodia: Rapid Growth with Weak Institutions' (Working paper, Asian Development Bank, 2013)
- Hall, A. John, 'Human Rights and the Garment Industry in Contemporary Cambodia' (2000) 36 (1) *Stanford Journal of International law* 119
- Henderson, Alastair, 'Enforcement of Arbitral Awards in Indochina' (2006) 26 (6) *Journal of International Arbitration* 841
- Hepple, Bob, *Right at Work: Global, European and British Perspective* (London Sweet & Maxwell, 2005)
- Heron, Robert, and Hugo van Noord, 'National Strategy on Labour Dispute Prevention and Settlement in Cambodia' (Report, International Labour Office, 2004)
- Huang, Shir-Shing, 'The Reconciliation System of the Republic of China' in Fred E. Jandt and Paul B. Pedersen (eds), *Constructive Conflict Management: Asia Pacific Cases* (Sage Publication, 1996)
- International Human Rights and Conflict Resolution Clinic Stanford Law School & Worker Rights Consortium, 'Monitoring in the Dark: An Evaluation of the International Labour Organization's Better Factories Cambodia Monitoring and Reporting Program' (Report, 2013)

- Kolben, Kevin, 'Note From the Field: Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories' [2004] 7 *Yale Human Rights and Development Law Journal* 79
- Lew, Julian, Loukas Mistelis, and Stefan Kroli, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003)
- Noord van Hugo, Hans Hwang and Kate Bugeja, 'Cambodia's Arbitration Council: Institution-Buidling in Developing Country' (Working Paper, International Labour Organisation, 2011)
- Ojendal Joakim and Mona Lilja, 'Beyond Democracy in Cambodia: Political Reconstruction in a Post-Conflict Society?' in Joakim Ojendal and Mona Lilja (eds), *Beyond Democracy In Cambodia* (Nordic Institute of Asian Studies, 2009)
- Phallack, Kong, 'Labour Arbitration in Cambodia: Law And Practice' in Kuong Teilee et al (eds), *Cambodian Yearbook of Comparative Legal Studies* (Cambodian Society of Comparative Law, 2010)
- Phallack, Kong, 'Cambodian Labour And Employment Law' in Hor Peng, Kong Phallack, Jorg Menzel (eds), *Introduction to Cambodian Law* (Konrad Adenauer Stiftung, 2012)
- Sok, Lor, and Samborana Mar, 'Regional Conference for Judges and Arbitrators on Employment Dispute Resolution Systems in Asia and the Pacific' (Country Paper, 2012)
- Sibbel, Lejo, and Petra Bormann, 'Linking Trade with Labour Rights: The ILO Better Factories Cambodia Project' (2007) 24 (1) *Arizona Journal Of International and Comparative Law* 235
- The Arbitration Council, 'Annual Report 2009' (Report, 2009)
- The Arbitration Council, 'Annual Report 2010: Labour Disputes Resolved Industry Benefits' (Report, 2010)
- The Arbitration Council, 'The Arbitration Council Alternative to Strike in the Garment Sector' (Annual report, 2011)
- The Arbitration Council, 'The Arbitration Council 2012: Moving Towards a Sustainable Future' (Annual Report, 2012)
- The Arbitration Council, 'Arbitration Council Sustainability Strategy 2014-2017' (Report, 2012)
- Tajgman, David, 'Extending Labour Law to All Workers: Promoting Decent Work in the Informal Economy in Cambodia, Thailand and Mongolia' (Report, International Labour Office, 2006)
- The International Labour Organization, 'International Labour Organization Programme of Technical Cooperation Project Document: Labour Dispute Resolution in Cambodia' (Project Document, 2000)
- Un, Kheang, 'The Judicial System and Democratisation in Post-Conflict Cambodia' in Joakim Ojendal and Mona Lilja (eds), *Beyond Democracy In Cambodia* (Nordic Institute of Asian Studies, 2009)
- Wells, Don, 'Best Practice in the Regulation of International Labour Standards: Lessons of the U.S.-Cambodia Textile Agreement' (2005) 27 *Comparative Labour Law and Policy Journal* 357
- Zack, M. Arnold, 'How Labour Arbitration Has Changed the Workplace Landscape in Cambodia' [2009] *Dispute Resolution Journal* 77

B *Legislation*

- *Labour Law* (Cambodia) adopted by the Parliament on 13 March 1997
- *Prakas* (Ministerial regulation) *on the Arbitration Council* No. 99 (21 April 2004)
- *The Commercial Arbitration Law of the Kingdom of Cambodia* (Cambodia) adopted by the Parliament on 06 March 2006

C Others

- Cambodian Genocide Program, *The CGP, 1994-2013* (2010) < <http://www.yale.edu/cgp/>>
- Global Public Forum, *Do Donors and NGOs: Donors and Their Changing Paradigms* (April-June 2005) <<http://www.globalpolicy.org/component/content/article/176/31490.html>>
- Henderson, Simon, 'At 10th Anniversary, Arbitration Council Faces Funding Shortage' *The Cambodia Daily* (22 May 2013) <<http://www.cambodiadaily.com/archives/at-10th-anniversary-arbitration-council-faces-funding-shortage-25887/>>
- International Labour Organisation, 'Prakas on the Arbitration Council (No.99 MoSALVY)' <http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=KHM&p_classification=02&p_origin=SUBJECT>
- Preston, Joel, *Female Garment Workers in Cambodia Fighting for the Right Not to Die at Work* (24 May 2013) < <http://www.tmponline.org/2013/05/24/garment-workers-cambodia/>>
- Reaksmey, Heng, 'In Survey, Many Cambodians Report Corrupt Public Officials' *Voice of America* (online), 10 July 2013 < <http://www.voacambodia.com/content/in-survey-many-cambodians-report-corrupt-public-officials/1698269.html>>
- Rao, M., Jaganadha, *Concepts of Conciliation and Mediation and Their Differences* (2002) <http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf>
- Sean Teehan, 'Brands Call for Trade Union Law' *The Phnom Penh Post* (online), 20 January 2014 <<http://www.phnompenhpost.com/national/brands-call-trade-union-law>>
- Transparency International, *Corruption Perception Index 2013* <<http://cpi.transparency.org/cpi2013/results/>>
- The NGO Forum on Cambodia, *Budget Law Series* <http://cambodianbudget.org/budget_law_series.php>
- The National Alternative Dispute Resolution Advisory Council (NADRAC), *NADRAC Publications* <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>
- The NGO Forum on Cambodia, *Budget Law: Promulgated by King on 28 November 2013* <<http://cambodianbudget.org/userfiles/file/Left%20Menu/Budget%20Government%20Documents/Budget%20Law%20Series/The%20Law%20on%20Financial%20Management%202014.pdf>>
- Taum, Yapi, Yoseph 'Collective Cambodian Memories of The Pol Pot Khmer Rouge Regime' (Paper presented at the Fifth Annual Conference, Bangkok, 25-26 July, 2005)
- The Arbitration Council, 'The AC: A Model Institution for Labour Dispute Resolution: American Professor' (online), 6 March 2013 < <http://www.arbitrationcouncil.org/en/post/1/The-AC-A-model-institution-for-labour-dispute-resolution-American-professor>>
- United States Department of State, *2010 Human Right: Cambodia*, (8 April 2011) <<http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154381.htm>>