Awards of the Arbitration Council

2011 LEGAL AUDIT

COMMISSIONER M A GAY

PREFACE

The 2011 Legal Audit of the selected decisions of the Cambodian Arbitration Council (the Tribunal) not only provides a static consideration of the Tribunal's adjudications in 2009 and 2010 but also permits a broader perspective by forming part, with the 2007 Audit, of a continuum of review.

In preparing the Audit which follows, primary regard has been had for the goals of the *'Support to the Arbitration Council'* sub-component of the Demand for Good Governance Project as described in the Audit's Terms of Reference.

The Terms of Reference

While the Terms of Reference make mention of the basis for selection of the Awards to be reviewed, the Auditor has not been appraised of the individual characteristics mentioned in the Terms of Reference which may attach to various decisions. So, for example, the Auditor is unaware of such aspects as, primary authorship of Awards (whether Arbitral Panel or LSD), or whether the composition of Panels (either as to gender balance or dominant/recurring chairmanship) is representative of the body of Arbitration Council decisions over the period in question. The Auditor's task is to apply the review criteria to the 12 Awards and this is what has been done - without reference to other potentially relevant considerations.

The Cambodian Peak Councils' Conferral

There may however be some general contextual comments ventured by virtue of the Auditor's continuous involvement with, and observations of, the Arbitration Council from its very inception. If, like most new organisations, the Arbitration Council had an initial, formative phase followed by a period of consolidation during which the

confidence of the industrial participants was to be gained, it is likely that now the Arbitration Council, as a busy quasi-judicial arbitral tribunal, has achieved full institutional maturity. Appreciated in this way, its potential for influencing the form and direction of Cambodia's industrial development will be pronounced and potentially very significant. It will be in the Cambodian national interest to maximise this potential.

The peak employee and employer councils' recent conferral of authority upon the Arbitration Council (that arbitral decisions will form part of dispute procedures within collective agreements, will bind members and will be given effect) reflects the expertise and effectiveness which has merited such confidence. The institution which emerges is one of integrity, accessibility to employers and employees and which is not accompanied by legal costs, jargon or technicality. These consequences must be directly advantageous to the users of the system, the country's industrial parties, but also in the Cambodian national interest as industrial stability inevitably attracts increasing foreign investment.

It is not overly optimistic to postulate that, over time, the peak councils' recent conferral of the power of binding arbitration can, by the elimination of ad hoc industrial action, assure certainty of delivery cost and contract date. Such industrial stability in turn will encourage more highly skilled, capital-intensive employers to invest, increasing employment and broadening Cambodia's skill base to include higher tech industries in manufacture and fabrication.

Arbitration Council Decision Making in 2009 – Overall Assessment – 79%

In the previous review a number of positive descriptions as to the curial achievements of so young a determinative body were merited. Without hesitation after considering these Awards overall one can record that the earlier descriptions continue to be warranted by virtue of a clarity of reasoning and absence of superfluity by which the Labour Law is applied to the problems of each case with a clever simplicity. The decisions under review are short and to the point. None embellish the issues with the views of the arbitrators. All remain detached expositions of the law in relation to the matters in dispute. The decisions decide issues without taking a judgemental air.

Such an approach makes, generally, for most effective industrial relations decision-making, because bringing along winner and loser in a way which does not emphasise individual opprobrium, tends to blur the dividing lines between adversaries, meaning that by the Arbitration Council's decision the parties' mutual problem has been overcome.

A narrative commentary on each Award ensues. This commentary is supplemented by my handwritten notes assessing each Award with a score on each criterion in a

document named *Scores and comments on AAs 2009* and another document, named *Legal Audit of Arbitral Awards 2009_Final spreadsheet*.

Professional Development

The Auditor is also asked to consider the various areas where professional development might be considered for Arbitrators and/or the Legal Services Department Staff.

Decision Writing

In the earlier audit several observations of a general nature were made. The aspects of decision writing to which these referred have in the Auditor's view, been reflected in the contemporary decision writing now observed at the Arbitration Council. For example, it was said of a 2003 case that the statement summarising the submissions of the parties had been overly abbreviated. It was observed that *"when reasons for decision do not refer to aspects of a party's case upon which particular reliance has been placed, a sense of grievance may arise in the unsuccessful party. Accordingly, it is often useful to detail the principal arguments advanced. One compelling virtue in this approach is that belligerents are gratified to see their arguments repeated".*

There would be no place for this observation today.

The list of Arbitral Awards covers employment over a range of issues and disparate industries and calls for interpretation of the Labour Law as applied over the years of consistent Arbitration Council jurisprudence. In all instances the decisions give a full explanation of the issues, clear accounts of the law and precedent and, where relevant, acknowledge the human facts, the actual narrative of events that gave cause for disputation and ultimately, for decision.

Privacy of Conciliation

In most industrial systems the efforts of disputants to reach agreement in conciliation are not detailed before a subsequent Arbitrator. Conciliation conferences are generally regarded as private and parties are encouraged to put various 'without prejudice' positions in search of agreement which, if not accepted, are withdrawn. The public positions of parties in arbitration are often different than those disclosed in conciliation. Some consideration might be given to limiting the detailing of parties' positions which have been put in conciliation before the Ministry conciliator when the matter comes to the Arbitration Council. The industrial parties may be less open to consider possible settlements at the early stage of Labour Inspector/Specialist conciliation if they are

conscious that their concessions at conciliation are to be revealed to the Arbitrators hearing their case at the Arbitration Council.

In making these observations I am aware of the Arbitrators frequently successful conciliation efforts prior to arbitration.

Case Reporting/Citations

As the Decisions of the Arbitration Council are now widely read and relied upon in Cambodia, and internationally, it may be appropriate to consider adopting a method of decision presentation which permits easy citation of specific passages.

By numbering every paragraph in an Arbitral Award a person wishing to cite the decision can make precise reference to a key element of a decision. As the Arbitration Council is regarded as a Tribunal of Record, such an approach will make it easier for other Courts and Tribunals to adopt or refer to Arbitration Council jurisprudence.

Legality of the Arbitral Awards

In completing the 'spread sheets' the Auditor has been asked to comment, in terms of 'legality' upon the status of each Arbitral Award having been published with the fifteen working day timeline from the date of submissions at the Arbitration Council by the Ministry Conciliator/Regional Office.

Clearly one observes there are divergences from the 15 working day stipulation. The Auditor has been reluctant to draw a negative conclusion from these divergences for several reasons.

First, one is unaware of the impact of Cambodian public holidays and whether an extension has application. There are also occasions when more than one hearing was necessary for reasons peculiar to the case. As a general rule cases beyond the 15 day stipulation have not been regarded as failing the 'legality' criterion.

The Auditor would appreciate it being noted that the requirement for a percentage 'score' to be given under the various headings is arbitrary and unpalatable

Award/Decision Drafting - Professional Development

The Auditor is unaware of the extent to which the LSD members prepare draft Awards. The appropriate outer limits of decision writing or drafting by support

staff/interns/legal researchers is not easily declared. It is also an internal matter for the Arbitration Council/Arbitration Council Foundation (ACF). At the same time it must be said that the Awards bearing the names of Arbitration Council Arbitrators, or Judges and Commissioners in other systems, must truly be the opinion and represent the view of the Tribunal member. This is not to deny that particularly helpful preparatory work might be done by those providing legal/technical assistance. Again, these are matters for the Arbitrators and the ACF.

While Associates to Judges and Commissioners regularly prepare a 'first cut' early draft - many do so only as an outline of contentions and commentary on the relevance of the authorities sought to be relied upon by the parties. A remark often heard in decision-writing workshops is that in the more difficult cases, when the arguments are finely balanced, it is only during the writing of the decision that the answer to the case becomes apparent to the decision-maker. To provide for a system of pre-prepared draft decisions, prepared other than by the decision maker, (whatever else may be said about such an approach) is to deny the Arbitrator the opportunity to refine and deliberate upon the contentions as the arguments are considered within the developing decision. It is the Auditor's view that writing the decision is fundamental to the discipline of reaching the decision.

If the Arbitration Council Professional Development Committee and others believe it to be beneficial, the significant literature available on decision-writing could be the subject of a future AC in-house colloquium. It is likely to also be of benefit for the more experienced members of the LSD to have ongoing access to the broader industrial dispute resolution community through travel and international affiliation. This is really to acknowledge the status quo.

Case 1 78%

06/09 - Sang Woo

Date of Award: 11 February 2009

Sang Woo is concerned with entitlements/rights under the Labour Law as to management prerogative, the extent and manner of an employer's involvement/interference in union matters and, subject to the necessary findings, the role of the Arbitration Council in resolving such a dispute. As to these issues the decision deals with how the parties must conduct themselves in giving effect to their obligations under the Labour Law.

This dispute concerned the collection and remittance of union membership fees deducted from employee's pay by the employer following authorisation by employees, members of the NIFTUC.

Where in this case the Panel was required to declare the meaning of the Labour Law it was necessary to adroitly deal with the tension evident between Articles 129(2) and clause 5(5) of Prakas 305/2001 on the one hand and Article 281 on the other.

Ultimately, at hearing there was no dispute as to the first question sought to be determined by the union - that union fees be deducted - and it was necessary then only to deal with the matter of verification of authorities to deduct. The finalisation of this issue threw up the key element requiring decision - whether, and in what way, an employer might be constrained in its individual dealings with an employee relating to union membership. Although the employer will normally be considered to have a broad capacity to speak with their employees, the Bench in this case acknowledge the existence of important constraints deriving from Freedom of Association considerations contained within Article 271.

In resolving the dispute as to the second or residual issue the Panel relied upon Arbitration Council jurisprudence which outlined the various capacities available to the employer to exercise its authority over employees, but subject to the fetters arising from the Labour Law and decided Arbitration Council cases. Relying upon Article 271 it was the Panel's task to then determine the basis, given the competing considerations in this case, for the employer to verify in a timely way the individual deduction authorities of employees where there existed some lack of clarity on the face of the deduction form, but with a union delegate or employee 'support person' present.

In clarifying the application of article 271 the Panel set out examples, relevant to the dispute before it, of employer actions which infringed or would infringe Article 271.

Evaluative Criteria

In applying the evaluation criteria the decision in *Sang Woo* meets all the statutory requirements in that it is clearly within jurisdiction, and had been the subject of Ministry Conciliation. As to the timeliness the writer is unable to reach a concluded view. The Ministry non-conciliation report of 15 January 2009 was referred to the Arbitration Council Secretariat on 19 January 2009. It may be that the Auditor has misread these dates or an extension was granted. The Award does not on its face reflect the fact of an extension being granted to bring its issuance on 11 February 2009 within the mandatory 15 day period.

Comprehension of Facts and the Law

The Auditor is required to consider the clarity of language and consistency in the use of terminology. In my view the Award is written in the language of the ordinary person and is consistent in its use of terminology. All the decisions avoid complex language. No comprehension difficulties arise because of technical, jargon-filled or legalistic terms. Unless there is a divergent finding in relation to the decisions considered below it is not my intention to repeat these findings as to language.

The decision making involved in this case required the conflation of two issues; the practical implication of the need for union dues to be deducted, when appropriately authorised, and the limit, if any, to be placed on employer dealings with individual employees as to the employee's individual exercise of their Article 271 right to join a union.

The Award demonstrably follows a clear line of reasoning, drawing from cited authorities. As commented upon above the Panel deals with the interaction of Articles 129, 5(5) of Prakas 305/2001 and Article 281. The key sentence in the English translation reads; *"However, in previous Arbitral Awards the Arbitration Council decided that the purpose of Article 281 of the Labour Law is to protect workers' rights and to prevent the employer from interfering in a unions affairs and influencing the union as mentioned in Article 280 of the Law."*.

The Panel navigate through the Article 281/Prakas 305/2001 paradox; clearly differentiating between the various meanings and purposes of these sources of obligation. As the first case dealing with the questioned involvement of an employer in deducting union dues, the determination of the Panel is logically reasoned. Moreover the decision links its declaration of the law's application to these facts by providing real-life questions and answers to explain the law's effect; that relevant to this case, a worker

representative should ensure the employer's involvement with employees in checking 'uncertain' union due-deduction forms is non-coercive.

Case 2 78%

22/09 - Global Apparel

Date of Award: 10 March 2009

In considering *The Legality of the Award; the Comprehension of the Facts and the law and Decision Making based on the facts and legal principles*, as they apply to *Global Apparel* it is necessary to re-state that it is not the role of the Auditor to sit in judgement upon the decision reached.

One can offer a close analysis of the Award applying the above criteria, but stay short of annunciating upon the correctness or otherwise of the Panel's determination.

It is to be remembered that only the Arbitrators had the benefit of seeing and hearing the parties, subjecting them to inquisitive dialogue and testing the arguments advanced by the advocates at hearing. The unique advantage enjoyed by the Arbitrators at first instance is a very significant one which should not be lightly gainsaid.

Legality of the Arbitral Award

The Panel follow the Arbitration Council's established approach and detail all the information for which regard has been had. It is noteworthy that while the employee provided a significant body of material, no material was sought to be placed into evidence by the union party and there was no witness evidence. All the requisite information appears to have been detailed by the Panel.

As to the 15 day time frame for the making of the Award, one notes that the case was submitted on 16 February 2009 and the Award was issued 10 March 2009. The Auditor is unaware whether an extension was granted. On its face the Award is late. There may be a notation indicating the granting of an extension - however, it has escaped the writer's careful attention. It may be that no such notation is made; perhaps it is not recorded in the unofficial English translation supplied to the Auditor. It is sufficient to observe that arguably the Award should explicitly deal with the matter of time. Any aspect going to establish or confirm jurisdiction should, in the Auditor's view, be overtly dealt with.

Comprehension of Facts and Law

There is an uncertainty in comprehension which may derive from the English version. The decision, at *Issues in Dispute,* sets out three distinct issues, two of which (the first

and third), relate to the fact of night shift and a desire to hold to the status quo, while the second relates to the employment contracts of 260 workers.

Under the heading 'Hearing and Summary of Procedure', the Panel set out the narrative of events. It is recorded that the conciliation, conducted by the Panel at the Arbitration Council on 20 February, occurred on the three live issues, *"with the result that 2 out of the 3 issues were conciliated as the worker party required to withdraw the issues"*, (22/09, page 3). The Panel go on to say that as the *remaining* issues, issue 1 and issue 3, are similar they were to be combined and considered together - with the agreement of the worker party.

It is not clear to the writer why it is said that two of the three issues were conciliated and withdrawn. It may be that the meaning sought to be conveyed is that *"...the second of the three issues"* was conciliated unsuccessfully and withdrawn. Should this be so, it would be a matter of some regret if the English version misrenders the Panel's decision or logic. Where there occurs a puzzling or illogical account, as in this case, the reader becomes unsure and the authoritative status of the Tribunal is not enhanced.

Other than in this respect, the Award is written clearly with consistent use of terminology. It must be recorded that there are some 13 instances where in the body of the decision, a word or words appear in brackets. It is likely that these are an editorial device employed by the translator to assist in the logic of a sentence or its grammatical flow. It is unlikely that the continuation of this practice improves the decision or the readers' appreciation of what is being read. There can be varying meanings if one excludes the added word or phrase. In the Auditor's view the reader needs to know what was said by the Arbitrators on the Bench.

As the Arbitration Council's Awards are now scrutinised internationally, as well as read in Cambodia by a readership who may not all have Khmer as their first language, some care needs to be given to the English version. That said, it must be recorded that generally the quality of the English prose is of a first class standard. Since commencing the Audit the LSD have advised of one misrendering into English by the translation.

Decision Making Based on the Facts and Legal Principles

The basis of the Panel's decision making is to affirm the Arbitration Council jurisprudence as to the managerial prerogative inhering in the employer to run the enterprise in the fashion chosen - so long as there is no unreasonable burden placed upon employees in the process. The Panel sets out the positions of the parties, and indeed, how their competing interests have led to the dispute. The Panel rely on Article 20 of the Labour Law to find that direction and transfer of employees is open to the employer, but within the law.

The Panel however depart from a dry distillation of the employer's capacity to legally direct employees to change shift hours - with its consequent affect upon earnings. The Panel refer to the Company having disclosed its Ministry Orders following the GFC. It is stressed that the employees at the Arbitration Council have recognised the employer's trading position. The Auditor observes that Article 312, in conferring upon the Arbitration Council, *"... considerable power to investigate the economic situation of the enterprises ..."* invites the Arbitration Council to draw conclusions as to the genuineness of an employer's claimed economic difficulty.

The decision making in *Global Apparel* is also practical in that the Panel quote the specific provision in the fixed duration contract which acknowledged the potential for future shift charges and the ability for the Company to make such changes *"when necessary"*.

In declining a claim for $30 for the ex-night shift workers, the Panel explain the Arbitration Council's long established dicta as to the Tribunal declining to consider interests dispute questions, unless the union claimant had most representative status. Relying upon clause 43 of Prakas 099 of April 2004, the rationale adopted by the Arbitration Council is given as a function of the Cambodian law - but importantly, also as a matter of logic and fairness - that only a union with most representative status should bind <u>all</u> workers at the enterprise and bar further action for one year.

The final decision is clear and cogent

Like the other Awards presented for audit, *Tack Fat* meticulously follow the Arbitration Council's practice of formal case presentation, in that all the case details, the case number, place of hearing, identification of Arbitrators, parties including all representatives in attendance with their role detailed, detailed exposition of the issues for determination as referred by the Ministries' non conciliation report together with the company's position in response as declared at the conciliation with the company's position in response as declared at the conciliation, the jurisdictional foundation leading to a summary of the case being presented for arbitration and then a detailed identification of the material which in the literal sense constitutes the case - other than for oral argument and viva voce evidence.

Before moving to outline the issues and then give the Panel's reasons in *Tack Fat*, the Panel makes findings of fact and as to agreed matters. The Panel then go on to outline the issues they then proceed to decide.

By any measure this decision details all the requisite information reasonably required. The writer is unsure whether the conciliation proceedings before the Ministry conciliators are said to be confidential. As noted elsewhere there are usually sound reasons to encourage parties at conciliation to float ideas for settlement and explore matters in search of agreement on the basis that *"nothing is agreed until everything is*

agreed". A parties' position in conciliation (with exploratory concessions) is very often not the position adopted at arbitration.

If the positions attributed to the parties at conciliation and contained in the Ministry's Non-Conciliation Report reveal the potential for settlement explored at conciliation it is information the arbitrators ought not hear. This does not apply if it is merely a statement of the issue in dispute and the parties' formal positions.

Case 3 83%

29/09 - Fortune

Date of Award: 21 July 2009

This case presented a complete package of claims in the context of negotiations for the renewal of an existing collective agreement. By long standing Arbitration Council precedent the union in such a case had the capacity to bring the interests dispute which resulted to the Arbitration Council.

Comprehension of Facts and the Law

In carefully chronicling the background to the issues for determination the Panel satisfied not only the technical requirements by explaining that the steps preliminary to arbitration had been taken, but also the history of the dispute in a fashion which assisted the reader in comprehending what flowed, jurisdictionally, from the union's most representative status. This was done in a way which not only established jurisdiction, but which also set out the all-party consequences for the next year, including for non-members (absent a new CBA), when an interests dispute is determined by arbitration.

The Panel was then able to explain its understanding of the grant of equitable relief vested in the Arbitration Council, in appropriate cases, by Article 312. In the Auditor's view these matters, of their nature complex and technical, reflect well on the Panel; not only by virtue of their clear exposition reflecting the arbitrators' analytic approach, but also by their decision being as amenable to understanding by those involved, and by the public, as is reasonably possible.

Decision Making Based on the Facts and Legal Principles

In its application of Arbitration Council authority, particularly 114/08 *Whitex*, and Prakas (clause 43 of 009 and clause 11 of 305) the Panel outlined the approach it intended to adopt, its reasons for doing so and the bargaining obligations resting upon parties making and responding to claims. In many ways the case can be taken as a test case - determining principles which can be adopted to ensure proper consideration of wide-ranging claims going to the establishment of a new CBA. These included

appointing a third party to facilitate the complex negotiations and exercising procedural powers by requiring the employer to provide financial information.

The Panel's heavy responsibility was to apply clause 11 of Prakas 305 of 22 November 2001 to the parties' bargaining behaviour as evinced during the long negotiation period and during the Arbitration Council supervised bargaining period. In a logically reasoned way the Panel comment upon the Cambodian bargaining obligations in relation to this dispute.

Relying on the non-responsive approach of the employer as to provision of data, reaction to concession and providing reasoned positions, the decision arrived at (essentially that the employer had failed to bargain in good faith) was, in the Auditor's respectful opinion, both reasoned, within jurisdiction and entirely in accord with the facts of the case.

Included in the requisite bargaining qualities was said to be, not only participation in discussion but responsive behaviour to claims; which conduct included the reasons why a position was a sound one. Obviously this entailed providing economic and trading information relative to the commercial position of the enterprise and its capacity to pay.

By drawing on these findings the Panel concluded, soundly in my view, that the failure by the employer to bargain in good faith, required an order that the employer participate in negotiations with its participation modified accordingly.

As to the extent to which the decision accords with the facts, reasoning and the law the decision is strong.

It is true of course that a bargaining party cannot be required to agree, or to make concessions, but can be required to participate by responding with information and reasons as to a disputed matter. Any order made further to a finding that there has been a deficit in good faith bargaining must, in the writer's view, be carefully framed to require rational, responsive behaviour and yet fall short of requiring a party to make a concession. The order in *Fortune* is drafted in a way which meets these considerations - other than the stipulation that the negotiations conclude with a CBA *"within three months"* from the decision.

I have interpreted the 'three months' obligation as reflecting an aspirational duty arising from the decision, for the parties to meet intensively in negotiation over that period - rather than an order requiring agreement to have resulted in all respects within that time. The first interpretation refers to an exhortary obligation which is within the Arbitration Council's jurisdiction to require, the second does not.

Case 4 72%

53/09 Tack Fat

Date of Award: 18 May 2009

Unless otherwise specified it can be taken that the decision in *Tack Fat* has meticulously followed the Arbitration Council's practice of formal case presentation in that by outlining all the requisite information it permits a reader, otherwise unacquainted with Cambodian Labour Law to follow the detail of the case. The disputed matters, the narrative of the dispute at the workplace, particularly relevant given the matter of warnings, and the procedural elements which serve as the precursors to the panel's Reasons for Decision, are all set out clearly.

Clarity of Language and Explanation

As it was to be centrally relevant, some detailed attention was given by the Panel to the work rules relating to workers' attendance and for workers absenting themselves. This has assisted in the case being readily comprehended. As to issue 1, it may be that the logic of the decision has suffered in the translation, however there is a slight difficulty in following the Panel's treatment of the argument as to the *"5 January 2004 Agreement"*. It seems that the Panel determine the argument relying upon an earlier late arrival dispute (and a 5 minute discretion period policy) as irrelevant to the question to be determined.

While there is, at least for the Auditor, some lack of clarity resulting, the Panel then develop a logical position in relying upon the internal work rules and the previous decisions of the Tribunal to determine that, unsurprisingly, the attendance bonus relies upon attendance so that absentees without prior permission lose the bonus.

Clarity of Language and the Law

Issue 1 While the language is clear enough, the Panel decide that the 2004 Agreement relevant to the issue in dispute is *"ambiguous"*. The Panel do not indicate what the ambiguity is within the 2004 Agreement. It is likely that the Panel's declaration is that the argument put by the employer relating to the 2004 Agreement is irrelevant. It may be that this is a translation issue.

Decision Making Based on the Facts and Legal Principles

The decision making method applied by the Panel in issue 1 in *Tack Fat* is to distinguish this case from subject matter dealt with in the 2004 Agreement point (which is based upon a 5 minute allowance flexibility, in turn based on reasonable circumstances, such as traffic congestion). The reasoning in the first two paragraphs of the Reasons for Decision, Issue 1 is not as clear in the Auditor's view as it perhaps could be.

Although laborious, I will endeavour to set out the logical uncertainty. The 'Reasons' for Issue 1 include the following five sentences.

> *"In this case, the workers demanded the company provide US$ 5 of attendance bonus to Seng Thea who was absent from 12:000 p.m. to 1:30 p.m. and Pov Chantha who was absent from 12:00 p.m. to 2:53 p.m. on 12 December 2008 without permission. The employer did not agree because Point 3 of the agreement dated 5 January 2004 states, "an allowance of five minute will be given to maintain the bonus based on reasonable circumstances such as traffic congestion." Therefore, the Arbitration Council will consider whether or not the employer has the right to deduct the attendance bonus of the workers who were absent without permission.*
>
> *With regard to the argument of the employer about Point 3 of the agreement dated 5 January 2004, the Arbitration Council finds that the agreement is ambiguous, and cannot be applied in this case since this was an absence from work without permission. Thus, the Arbitration Council will not consider the agreement."*

There are a number of observations. First, it is not clear why the third sentence begins with the word *"Therefore..."*. It may be that this is more a figure of speech, like, 'so' and not reflection of a conclusion necessarily reached. No conclusion follows from sentences one and two in the extract above. It may be that the Panel intended that decision to read *"Accordingly, it is necessary for the Arbitration Council to consider..."*.

As no ambiguity is shown to exist in the 2004 Agreement it is not clear in the English translation why the 2004 Agreement cannot be applied. If, as seems likely, the 2004 Agreement is irrelevant to the issue in the case (despite the employee's argument that it is somehow relevant) the decision might have said so.

The Panel's reasoning beyond this point is easily followed, with the jurisprudence of the Arbitration Council traced to reflect the broader meaning of attendance bonus to include, not only employees' timely arrival, but also working for a whole month according to company work rules, and performing assigned duties without unauthorised absence.

In coming to what appears to be an entirely justified and logical conclusion it is not clear to the Auditor why a quotation from *Fortune* (159/08) is included which appears to

stand for a contradictory position. The penultimate paragraph of Issue 1 is, however, logical and appears to accord with the facts and the law.

Issue 2: The Panel's reasoning is not entirely clear to the Auditor. The Panel sets out the Arbitration Council's decisions applying Article 2 paragraph 2 of the Labour Law to mean that an employer had the right to manage, transfer and assign work to employees as long as the right was exercised lawfully and reasonably. The key passage is:

> *"In this case, the Arbitration Council finds that the employer could not transfer the three workers from the Carpentry Section to the Kiln Section, if the workers did not agree since the employer did not follow the conditions as stated in the Arbitral Award above. However, it does not mean the employer waived its right to transfer the workers, but that the employer should ensure the transfer is lawful and reasonable."*

With great respect to the Panel, it is not easy to follow the logic or rationale of this aspect. The Panel do not set out *"the conditions"* which are referred to in *"the Arbitral Award above"* (presumably this is a reference to *Ho Hing* (17/03 and 18/03) - although one cannot be sure.) If the decision referred to is *Ho Hing*, none of the criteria given as rights of transfer open to an employee (non-deduction of wages, no remote relocation and no change of shifts) were relevant to the transferred workers in this scenario.

The Panel are holding that an employee can, with justification, decline to accept a transfer and not be held to have abandoned their employment. A finding is made that the employer had assigned work *"contrary to Article 2 of the Labour Law and previous Arbitral Awards"*. On the English translation no indication is given as to what this breach of the Labour Law and Arbitration Council Awards was.

The Panel then turn to dispose of the case by noting the poor economic circumstance of the Company, the cause of the closure of the Carpentry Section. This is relevant to the earlier finding of the Panel that the work after the apparently necessary transfer did not use the skills of the employees and involves more physical labour.

If the essential reason that the Panel find the transfer to be *"not appropriate"* is because it does not call on the employees' skills, and is more physical, one might anticipate the Panel making a specific finding about what was unlawful or unreasonable in this case. The earlier finding, *"that generally speaking, in order to make work more effective and productive, the employer should employ the workers matched to their skills and knowledge"* seems to have been applied as being an obligation. In redundancy circumstances there will be many occasions when unions and workers will prefer to have employers obligated at least to offer otherwise redundant employees transfer to other work - particularly if pay rates, location and shifts, can be retained.

In this case the logical reasoning appears to be that the work is too physical for the carpenters. If this is right (and the English translation may be less comprehensible than

the Khmer original) one might have expected a specific finding to that effect. Such a finding would normally be accompanied by a treatment of the degree of physicality of the new work and how it differed from the regular carpentry work - which one assumes is also frequently, but perhaps not constantly, physical.

It appears that the Panel in this case, sympathetic to the three carpenters, have substituted the transfer to the kiln section with a transfer to some other undetermined section more acceptable to the employees, with termination payment the alternative.

In setting out this review the Auditor is conscious that there may have been more evidence as to the physical nature of the work which rendered the transfer unreasonable or that it represented de-skilling and thereby that the employee's refusal was reasonable. If there was such evidence it may have been beneficial to incorporate it into the decision to remove any suggestion that the decision was idiosyncratic or not strictly in accord with the facts and reasoning set out in the decision.

If the employee's transfer was so unreasonable as to constitute a breach of Article 2 it was also surprising why the decision did not deal with the question of the economic loss of the employees over the period that they attended for duty every day, but declined duty in the kiln area.

Where the outcome is not based on an empirical or factual matter and rather, relies upon a discretionary judgment it may have been preferable for the reasoning to be more clearly apparent.

On the factual background detailed, it was open to the Panel to require the parties to confer with a view to finding suitable alternative employment - with ultimate recourse to a termination payment.

Case 5 78%

60/09 Phnom Penh International Airport / Cambodia Airport Management Services (CAMS)

Date of Award: 10 June 2009

On the information available to the Auditor, ie. that the Award was issued on 10 June 2009 and was submitted to the Arbitration Council on 19 May the Award is one day out of time. It may be that an extension of time was granted. The Award made, otherwise establishes the Arbitration Council's jurisdiction and the issues informatively and succinctly.

It is noteworthy that the union has most representative status and that the parties had entered into a collective bargaining agreement, which, at the time of the hearing was valid for a further three years.

Comprehension of Facts and the Law

As a shift-work case where the Labour Law and the CBA were necessarily considered, in my view the contentions of the parties and of the Panel are set out and explained clearly. There is no lack of consistency in the terminology used.

Decision Making Based on the Facts and Legal Principles

The decision in this case as to Issue 1 is a straight forward application of the Labour Law as amended and the CBA's acknowledgment that the employer had the right to schedule employees according to the operational demands of the airline operation. The decision at Issue 1 is, in the Auditor's view, a model of lucidity in that it draws on a consistent line of Arbitration Council precedent. The annunciation of the principle distilled in the Arbitration Council cases cited includes a statement as to the employer's prerogative to manage, subject only to the standard fetters of lawfulness and reasonableness.

At each step Issue 1 is decided by application of the detailed case facts to the law. The decision is one likely to be readily comprehended.

The Panel's approach to Issue 2 similarly sets out the application of the Labour Law to the relevant shifts worked at the airport. The decision, in finding a clause of the CBA

was incompatible with the Labour Law, declared importantly, that agreements must conform with the law - that there can be no contracting out of rights and responsibilities.

In the Auditor's view this decision accords with the facts and applies the law in a logically reasoned way.

It is also of interest that the Panel acknowledge the union's contentions as to occupational health, safety and security (and worthy of further discussion) but of no persuasive effect to the issues in this case.

Case 6 81%

80/09 - Phum Prek Treng

Date of Award: 14 July 2009

It is noteworthy at the outset to note that this case involved an employer and employee group who were, respectively, neither incorporated nor registered with the Ministry of Labour and Vocational Training.

Legality of the Arbitral Award

As to timeliness and technical satisfaction of the facts, documents and participants, the award is published not later than 15 days from the date of submission.

Comprehension of Facts and the Law

In relation to clarity of language and explanation it must be observed that there is uncertainty in this reader's mind as to the Panel's intention when the decision speaks of the employer informing employees within three to seven days *"in accordance with actual requirements"*. Conscious that the Khmer phrase could have a more distinct meaning, it may be preferable, to make the dispute settlement more enduring, for the obligation to be clear. It is noted however that the Panel's final statement, in deciding that the employer should not wait until the conclusion of the work before deciding the piece rate, is unequivocal and clear.

Decision Making Based on the Facts and Legal Principles

In this case the Decision of the Panel, as to the piece-rate notification issue, deals with the dispute in clear terms in only a few lines. The Panel re-frame the employee claim, for timely notice as to a changed piece-rate, in terms of the employee's possession of a legal right for the employer to provide notification concerning their wages.

In determining the undeclared aspect of Article 112(a) of the Labour Law, the time for the employer to determine and advise the employees of the actual piece rate, the Panel distil the principle of 3-7 days for the period, from the cited line of Arbitration Council

authority. In coming to its conclusion the standard emerging from the previously decided cases is considered and then determined, or declared, only after a detailed discussion of the facts of this case. In doing so the Panel reveal that they had regard for the practical needs of the employer. This is likely to encourage acceptance in the minds of the parties and even the losing party.

As to the reasoned nature and consistency of the decision; the Panel's conclusion reflects logical brevity and serves as an example of practical application of statute to facts.

Case 7 81%

95/09 - Tack Fat

Date of Award: 21 August 2009

This decision deals with the difficult question of recognising principles evident in previous Arbitration Council decisions, in this case a doctrine of binding employer 'past practice'.

Legality of the Arbitrated Award

The Decision in 95/09 was given on 21 August 2009, the non-conciliation report having been submitted to the Secretariat on 16 July 2009. The English version of the Arbitral Award does not appear to refer to an extension having been sought. On its face the Award is out of time. In other respects the Award provides all requisite information.

Comprehension of the Facts of Law

The Panel's outline of the facts bearing on the case and of the Arbitration Council's jurisprudence is clear and contains no inconsistencies apparent to the Auditor.

Decision Making Based on the Facts and Legal Principles

As with the other cases, the Arbitration Council in *Tack Fat* has developed a line of reasoning in relation to custom and practice that was said to derive from Article 23 of Decree 38.

The Panel went on to declare that the internal Health and Safety Fund which had been created by the agreement of the union and employer in 2006 and payment to the fund of $US220 per month, made by the employer until October 2008, was such as to constitute a 'past practice'. The question then of the basis for changing such a practice was central to the determinations of the question to be decided. In giving examples from past decisions where past practice was not immutable, the decision goes on to find that past practice does not survive 'economic difficulties', which in the present case, led to the

employer being incapable of continuing the practice. The Panel note, however, that the employer contributed to the National Social Security Fund.

The GFC was said to constitute a convincing argument because of the company's difficult situation. Also relied upon was the possibility of the GFC having a significant bearing on investors in Cambodia and the fact of the company's contribution to the National Social Security Fund.

The Panel, in invoking a 'National Interest' consideration, reflects the Arbitration Council's perspective as a national tribunal.

Consistency in Jurisprudence

The Auditor wishes to make several observations as to the adoption of doctrines such as 'past practice'. Where rules of general application are developed by case law and declared as operating as a factor within the law which conditions the application of the Labour Law, fundamental notions of consistency call for an even-handed application of the rule. Where modifications or exceptions to the general operation of the 'rule' are then brought into existence by subsequent cases, there can come into being an unsatisfactory scheme of things. This is because people may lose confidence in the operation of the Court or Tribunal if there be seen to arise idiosyncratic outcomes, or uncertainty as to whether the 'rule' will prevail, or an exception will apply.

In this case the reasoning is logical in that the extent of the GFC's affects and the lack of any link to the enterprise or either party's actions in fulfilling their contractual obligations leads to the conclusion that such an expense should not be forced upon a party in perpetuity when the consequence could jeopardise the entire enterprise.

While it is true that Article 65 recognises the occasional informality of Cambodian labour contracting, that is, that it can be verbal and in a form agreed upon by the parties, the reference to *"local custom"* is confined to an acknowledgement that it can be drawn up and signed according to local custom. This does not, in terms, provide for 'past practice' or custom and practice to be an enduring part of such a contract.

It is also noted that Article 23 of Decree 238 is relied upon by the Panel in *Tack Fat* in relation to ambiguity. It will be recalled that Article 23 provides:

> *"If the contract is not clear in meaning, that contract shall be interpreted according to common practices or customs of the place where the contract has been made, but the interpretation shall not conflict with the provisions of this laws."*

The decision in *Tack Fat* goes on to make a finding as to the application of such a contract. The Panel say *"... the Arbitration Council finds that a practice which becomes*

customary and can be called "past practice" can be used to interpret and clarify any ambiguous terms in the contract."

Several observations may be made:

- The Decision in *Tack Fat* makes no declarations as to which provision in the previous contract could be said to be an ambiguous term or a term of uncertain meaning;
- Article 23 may be thought of as authority for the proposition that where a contract's meaning is unclear, common local practices or customs shall be an admissible aide to interpretation. No provision in the contract between the parties is identified by the Panel as being ambiguous or of uncertain meaning. The fact that the parties to an industrial contract have different views as to the meaning of a provision in the contract does not mean the contractual term is necessarily ambiguous or of uncertain meaning. Very frequently a court or tribunal will examine a clause over which there is a dispute and, having heard the parties and considered the clause in its context, simply declare its terms to mean a certain thing. The parties will then be obligated, by their original agreement, to give full effect to the contract as interpreted and declared by the tribunal. For a threshold finding of ambiguity to be made one would normally expect a finding that, based on an objective assessment, the provision, term or phrase was susceptible to more than one meaning. A dispute as to a provision's meaning does not of itself render the provision ambiguous or of uncertain meaning. Where the disputing parties have differing views as to the proper application of the Agreement or clause in question the role of the tribunal will be to advise the proper course of action to be undertaken to give proper effect to the clause.
- No acknowledgement is made in the English version of the Decision, of the final sentence of Article 23, that does turn on the fact of an ambiguity; *"If there is, any ambiguity, the contract shall be interpreted in favour of the obligor party"*.
- The existence of a past practice does not always relate to a term in an agreement or contract which is controversial. Practices arise for a multiplicity of reasons - not the least of which is that a practice is likely to result from the power imbalance between the parties. 'Custom and practice' is a concept deriving from the parties' mutual agreement over a lengthy period in applying a certain practice.

In its other legal reasoning, including its application of the principle of *res judicata* to this case, the Panel have adopted a convincing and detailed legal analysis which accords with the facts and law. The logical reasoning throughout this Award is consistently strong, in the Auditor's view, according with the Labour Law as applied to the relevant facts.

Case 8 80%

111/09 - Hoyear

Date of Award: 11 September 2009

Legality of the Arbitral Award

This case is prepared in conformity with the established practices so that all identifying information relative to the exercise of jurisdiction is clearly set out. As to timeliness, the Secretariat received the relevant Ministry referral on 21 August 2009 and the Award issued on 11 September 2009. On the English translation the issue date of the Arbitral Award is out of time. I have assumed that extensions have been issued but not recorded on the English translation.

Comprehension of Facts and the Law

The language used is clear; as is the terminology.

Decision Making Based on the Facts and Legal Principles

In adopting the 'new' jurisprudence established by *Eternity Apparel* (97/08) the Panel state the principle that, on the basis of the service given by the Hoyear workers, they have rights under law equal to those of regular workers. As the periods of service in this case satisfy the condition of continuous service of 21 days per month (Article 166) and employment for an extended period of time, they were entitled to the same rights and benefits as regular workers.

On this reasoning the claim for conversion to regular worker status was not acceded to and such an approach is clearly consistent with the reasoning adopted in *Eternity* (97-08) relying fundamentally on Article 10.

The conclusions reached are strongly reasoned, relying principally upon Article 10. The decision in this, and the antecendent cases is clearly open to the Panel.

The Arbitrator is invited, under the criteria of evaluation, to comment upon *"other criteria as may be appropriate"*.

The Auditor has noted that one of the principle claims for consideration in *Hoyear* is for the status of the employees to be converted to regular workers. It is also noted that under the Arbitration Council's jurisprudence casual employees with the requisite service receive the same benefits as a regular employee.

Although casual employees of the requisite service may have the same benefits as regulars, it will not be a complete answer to a claim for a change in status, which claim is permitted by law, to find that the benefits are the same. It may be that the Hoyear casual employees could be concerned that the Arbitration Council had not exercised its jurisdiction by not ruling conclusively as to the legal right of conversion from casual to regular. Many employees may find comfort in the category of permanence - even if it brings no benefits. (Usually the status of permanence is of some relevance when redundancy is in the air and casuals are to be laid off before permanent employees.) If there is a right of conversion, equality of benefits is not a substitute for conversion - absent a convincing legal rationale.

[See also Arbitration Council reasoning *Jaqsintex* (10/03) as to the bias within Cambodian Labour Law for undetermined duration contracts and its invocation of ILO Recommendation 166 of 1982, paragraph 3 favouring conversion.]

Case 9 82%

126/09 - Emperor Garment

Date of Award: 6 October 2009

Legality of the Arbitral Award

In providing the conditions precedent to establish the case as being properly before the Arbitration Council, there are noteworthy aspects to the background detail of *Emperor Garment*. The chronology of events reveals the need for the local manager to refer the matters in dispute to the employer's foreign head office. It is also telling that the employer did not attend the hearing, but that the Panel, noting that there had been no explanation of the absence and that the employer had been formally notified of the hearing, determined to exercise the jurisdiction and hear the case. The Panel relied upon Article 21 of Prakas 099 of 21/4/2004.

As the Award is dated 6 October and the case was lodged at the Secretariat on 9 September 2009 it is necessary to note that the Award is out of time. No extension is recorded in the English translation of the Decision.

Comprehension of Facts and the Law

The Panel in this case goes to great lengths, given the absence of the employer, to explain the basis of the determination which is to follow. The natural justice consideration, given that the employer had been invited to attend but had absented themselves, is clear from the terms of the Award. In other respects also the Award is expressed clearly, explained lucidly and is not diminished by any inconsistency.

Decision Making Based on the Facts and Legal Principles

This case in relation to issue 1: the matter of paying full wages to workers not required for duty but required to sign on to show availability, strictly follows Arbitration Council precedent as to the application of Article 71. In the Auditor's view its logical reasoning, as is that of the predecessor cases upon which it draws authority, is entirely in accord with the Labour Law; undoubtedly sound black-letter law.

There are many further aspects of labour law that turn on this and related principles such that a workshop or discussion group could profitably consider such questions as:

- entitlement to pay - (conditions surrounding);
- benefits accruing to an employee satisfying the obligation to be ready, willing and available;
- the consequence of work bans - part performance of work;
- no work as directed/no pay;
- the consequence for pay purposes, of employer acceptance of an employee's part performance of work, that is, in the face of work bans, the employer accepting the part of the employee's duty which the employee is willing to perform.

Issue two is a similar application of law, requiring however, an extrapolation of Articles 5 and 6 to declare garment sector production line employees to be labourers (within the meaning of Article 6).

An appreciation of Issue 3 was not assisted in the English translation by the typographical error by which the *"worker party"* was said to have failed to attend.

It is not apparent to the Auditor how the Panel reached its conclusion as to the employer having no plan to close the factory. It is very likely that the translation does not do justice to the Khmer original. In particular the following passage, said to record the Panel's findings, appears internally inconsistent.

> *"At the hearing, the Arbitration Council found that the Emperor Garment Factory does not have a plan to shut down the factory, and the company has been planning to request the relocation of the factory site from Takmao to Angsnoul, Kandal Province."*

In all other respects the decision accords with the facts, reasoning and the Labour Law.

Case 10 80%

143/09 - Sinophea

Date of Award: 6 November 2009

Legality of the Arbitral Awards

The decision in *Sinophea* satisfies the provisions for necessary information to be provided. The Award dated 6 November 2009 appears to be out of time given the lodgement at the Secretariat on 9 October. It is also noted that under the heading 'Jurisdiction of the Arbitration Council', it is said that the non-conciliation report *"...dated 8 October was submitted to the Secretariat of the Arbitration Council on 8 October 2009"*. Under the heading 'Procedural Issues' it is reported that the *"...non-conciliated issues were referred to the Arbitration Council on 9 October 2009..."*.

Comprehension of Facts and the Law

The decision goes to considerable lengths, given the employer's absence, to explain the basis of the determinations which are made by the Panel. The decision is successful in doing so in a concise but particularly detailed way.

Decision Making Based on the Facts and Legal Principles

In considering a broad range of occupational health and safety issues, behavioural issues and industrial standards, the Panel rely upon specific Cambodian Labour Law, upon ILO Conventions, the Cambodian Constitution and the Universal Declaration of Human Rights of the United Nations General Assembly. The decision is strong, logical and, in the Auditor's view, to be applauded.

While these sources of authority appear unassailable, the absence of the employer from the hearing does not imbue one with confidence as to the corrective orders being given effect by the employer.

Optional Criterion

It may be useful in future internal discussion amongst Arbitrators for consideration to be given as to orders which may be made. Because enforcement is difficult, it may be beneficial to consider the varied form Arbitration Council Orders may take to suit the circumstances.

For example, rather than make an order that some form of behaviour stop, for example, the sexual harassment of the Sinophea supervisor, the employer might be required to furnish a witnessed Declaration or Affidavit from the senior Manager appearing as to the date and nature of the active measure (such as the promulgation of a new Company policy forbidding any employee from engaging in sexual harassment or offensive behaviour) taken by the Company in response to the Order requiring that such disapproved behaviour stop. Further, the Order may require a report-back after a review period on whether the action required to be taken, had, been taken and had, or had not, proved effective. Where the Sinophea supervisor may shrug off the Order or even moderate his behaviour for a time, the promulgation of a formal Company policy, binding upon all who come onto the site, employees, supervisors, managers or contractors creates an obligation for all to improve their behaviour or continue to meet minimum standards. Any infraction could see the matter come back on before the Panel.

The possible scope for the Ministry Labour Inspector involved in the conciliation to inspect the factory may also be the subject of discussion.

The failure of a behavioural order which is cast in non-specific terms is not always easy to prove. The Arbitration Council may, for example, order that the employer prepare, file at the Arbitration Council and post on the Company notice-boards, having general application to all staff, contractors, management and supervisors, its policy on Respectful Behaviour, No Sexual Harassment and No Inappropriate Touching. (Toyota, for example, has a strict “Hands Off” Policy). Such an Order, in the right circumstances, may mean the dispute settling function of the Arbitration Council is rendered more effective and enduring. The failure of the employer to take a specific action and report its consequence may even be enforceable. A breach of such an Order, for example, by the employer refusing to post a policy on Sexual Harassment in the Workplace, would reflect poorly on a recalcitrant employer - indicating the employer’s determination to ignore the Arbitration Council and flout Cambodian Labour Law.

The decision as to Issue 8 requiring the reinstatement of dismissed union representatives, is, in the Auditor’s view, a strongly reasoned adjudication representing a full distillation of the relevant facts and law.

Case 11 76%

154/09 - Radio Free Asia

Date of Award: 16 December 2009

Legality of the Arbitral Award

The decision sets out the requisite information and appears to have required an extension.

Comprehension of Facts and the Law

This case particularly required a detailed treatment of the working history of the various workers involved, analysis of the nature of the controversy (collective dispute or otherwise). It is drafted in a readily comprehended way.

Decision Making Based on the Facts and Legal Principles

Dealing with this case is not without its difficulties. The fact of dissension is always problematic on any Bench. It is my intention to avoid commenting upon the rightness or otherwise of the conclusion reached in any case.

The members at first instance are tremendously advantaged by their having heard, and seen, the parties directly and having been able to raise issues for discussion. While the case is cogently considered it seems to be a highly arguable proposition that an employee, found to have absented themselves from duty to burn tyres in the street outside the employer's premises and in a fashion intended to adversely publicly link the tyre-burning with their employer, engaged in serious misconduct. Whether the person was engaging in industrial action does not mean action normally considered objectionable such as burning tyres outside the employer's factory are protected actions.

It should be noted that the sequence of the decision-making meant that the jurisdictional challenge was dealt with at the outset with close application of the Cambodian Labour Law to the Panel's analysis of the contract of service/contract for service dichotomy. In a closely reasoned conclusion the Panel applied the competing arguments from the protagonists to the law.

Optional Criterion

Ultimately decisions must be perceived as just and people will want a fair hearing as they have their day in court. In termination cases, even if there be a technical flaw in a termination which compels a finding favourable to the employee, when it comes to assessing remedy it will generally be a sound approach to have full regard for an employee's degree of misconduct, if there is any, when arriving at remedy or calculating compensation.

In my view it would have been preferable for the majority to have dealt with the reasoned points made by the dissenting arbitrator. Where there is a nexus between the workplace and a striking worker's misconduct, such as engaging in anti-social behaviour or aggressive and intimidating behaviour, at or near the workplace it will not generally be a persuasive argument that there can be no retaliatory action taken against such a person because this employee was on strike. It is likely to be assumed that the law, in protecting a striking worker against sanction at the conclusion of the strike, was protecting a worker who had taken strike action but who had not also misconducted themselves.

Case 12 81%

180/09 - Prek Treng Trading

Date of Award: 10 February 2010

Legality of Arbitral Awards

The decision in question provides suitable information as to the basis of jurisdiction and as to the timeliness of the Award's publication, given that the hearing occurred on 12 January 2010 and the Award was published on 10 February. The English translation does not indicate on its face that an Extension was granted.

Comprehension of the Facts and the Law

Other than for the comments below (as to the translation) the decision is consistent in its use of terminology and clear in its language and in explanation.

Decision Making Based on the Facts and Legal Principles

This case deals with the application of contractual principle. Importantly, the Panel determined that the primacy of an agreement was not susceptible to change or variation on the basis of the employer's economic hardship or incapacity. An exception would be upon the finding by the tribunal of an ambiguity or uncertainty in the agreement and the application of strict principles in relation to the finding that an ambiguity or uncertainty exists. Whether there should then be a variation as a consequence of such a finding and what considerations should guide the Tribunals exercise of such a discretion would be the consequential questions for a particular case.

In deciding to rely on the Agreement's strict terms, the Panel invokes the public policy interest in ensuring industrial agreements, when entered into, are carried out and clearly there are wide ramifications if employers and employee unions are not bound to provide strict compliance during the term of an agreement. *Prek Treng* stands for the principle that obligation and responsibility under an agreement must be met and given effect - despite the employee's complaint of poor trading.

The corollary of these findings is that CBAs cannot readily be altered or brought to an early conclusion other than by the genuine consent of the parties.

Although the English translation is stilted and not without its difficulties, the Panel's logical reasoning as to the contract's binding application in light of Article 22 is carefully recorded as to the unilateral contract variation.

It may be the translated copy has affected the flow of the Panel's reasoning as to Issue 3 in relation to fixed duration workers. For example, the following passage appears: *"In this case, the employment relationship between the company and workers have not ended since the employer party continues with the fixed duration contracts with the workers and the workers are still working at the company. Thus, the employee workers are entitled to receive 5% of wages as a severance bonus for the fixed duration contracts as these contracts have ended and the employer still continues with the employment relationship with fixed duration contracts. (Citations omitted)*

Therefore, the Arbitration Council decides not to deny the demand of the workers who have claimed the company should provide them with 5% of wages as a severance bonus for the fixed duration contract"

As the Auditor is unable to reconcile the earlier passage - the reasoning of which is entirely lucid - with the concluding sentence, which does <u>not</u> deny the workers' 5% claim, I am unable to conclude that there is adequate clarity of language and reasoning. One feels however that there is a miscommunication in this passage as the Panel's analysis does not appear to support the conclusion.

In contrast, the Panel's application of Article 67.2 to the mandatory change of fixed duration contracts to undetermined duration contracts is a model of clarity and consistency in its explanation of the basis for the conclusion reached.

3 May 2011