



Legal Pointer

For June (Number 12)

▪ **Collective Bargaining Agreement**

Reference:

1. 1997 Labour Law of the Kingdom of Cambodia
2. Prakas 081 dated 29 February 2000 on Working Conditions for Profession that has not had Collective Bargaining Agreement
3. Prakas 287 dated 05 November 2001 on Registration Formality, Dissemination and Control of Collective Bargaining Agreement
4. Prakas 305 dated 22 November 2001 on Representation of Professional Organization of Workers/Employees at the enterprise/establishment level

Collective Bargaining Agreement



The Labour Law stipulates the rights and obligations that govern the labour relations between the employer and workers/employees resulting from an employment contract practiced in the Kingdom of Cambodia. Generally, in an employment contract, the parties determine obligations, rights and some benefits to be fulfilled and to receive during the length of this employment contract. In addition, the law also allows the employer and professional organization of the workers/employees or shop steward to negotiate and create a collective bargaining agreement, aimed at further determining conditions, occupation and labour relations. In particular, the parties can also include other benefits as long as the benefits are not against the public order and make better protection of workers/employees against social risk.

Collective Bargaining Agreement aims to determine working conditions and occupation of workers/employees and govern relations between the employer and workers/employees as well as professional organization of the employer and professional organization of workers/employees.

1. Condition of Creation of Collective Bargaining Agreement (CBA)

A CBA is considered an agreement that creates obligations between the professional organization which is the signatory and workers/employees who are members of the professional organization. The creation of the CBA needs to follow the conditions of the law. For the CBA to be valid, two elements: formality condition and fundamental condition must be respected:

A. Formality Condition

CBA is an agreement that requires the parties to make it in writing and Cambodian language. This CBA can also be translated into foreign language but in any case of dispute on the interpretation of the content of the CBA, the Cambodian language must be taken for official use before the law. In short, the form of the CBA must be made in writing.

B. Fundamental Condition:

CBA has judicial power which means that it is legally valid and recognized as a rule to govern the relations between the two parties as long as the formality condition and fundamental condition above have been fulfilled. There are three important fundamental conditions: **1) will of the parties to negotiate and create a CBA, 2) capacity of the parties and 3) subject of the agreement.**

1. **Will of the parties:** According to Article 96, Paragraph 2 of the Labour Law, a CBA must be made by an agreement between the two parties. Based on the Article above, the term “**agreement**” needs a general principle of contract stipulated in the Civil Code to help clarify and give further explanation.

Based on the principle of the Civil Code, the agreement of the parties must be made by the will of the parties in creating this Collective Bargaining Agreement and the will of this agreement must not have defect which means confusion, fraud, or threat by any party (Article 345 of the Civil Code). **In conclusion, in the first condition of this fundamental condition, the agreement in creating a CBA must be based on the real will of the parties.**

2. **Capacity of the parties:** The parties who are capable of creating a CBA **are the employer party which can be one person or a group of people or an organization or multiple organizations representing the employer and the workers/employees.** In this point, the employer’s capacity of creation may not be complicated, as mentioned the above already, so the following paragraphs will

give an explanation only on the worker party's capacity of creation which is the other party to the creation of the CBA.

The worker/employee party who is capable of negotiating and creating a CBA includes:

- One union or more unions representing the workers/employees: In this point, it is classified into two: 1) one union that is capable of negotiating and creating a CBA and 2) multiple unions that are capable of negotiating and creating a CBA. 1) one union that is capable of negotiating and creating a CBA refers to a union that has most representative status (*Article 9 of Prakas 305*). 2) multiple unions that are capable of negotiating and creating a CBA refers to an enterprise or establishment that does not have a union with the most representative status and all the unions or multiple unions that have members in the enterprise/establishment jointly propose a draft in negotiating a CBA and in this condition if there is an objection to any representation, a secret vote must be held in order to elect one most representative status union with participation from workers/employees or all types of workers/employees that the union represents (*Article 9 and Article 6 of Prakas 305*)
- If there is no union to represent workers/employees in the enterprise/establishment, the party that is capable is shop steward who has been duly elected.

The Arbitration Council of Case 29/09 found that the most representative status of the union provides a legal qualification in negotiating and creating CBA in a company.

3. **Subject of the agreement:** Besides the real will of the parties and the capacity of the parties, the last condition of the fundamental condition is to ensure that a CBA is created with judicial power which means it is legally valid and it must consider the subject of the agreement of the parties.

Negotiation and discussion on creating a CBA cannot be contrary to the regulation on public order, the law and existing regulations. Any agreement of the parties that is contrary to the public order which is the main fundamental principle in Article 13 of the Labour Law will make the CBA have no judicial power.

Case 22/04 of the Arbitration Council dated 07 June 2004, the Arbitration Council ordered the cancellation of the CBA that the employer made with shop steward and ruled that it would be effective and applicable only in the case that the union with most representative status of the Raffle Le Royal agreed and recognized this document.

The Arbitration Council stated that the union of the Raffle Le Royal Hotel has most representative status and the hotel must discuss and consult with the union before electing a new shop steward. In the hearing, the president of the hotel's union provided evidence that the employer did not carry out this obligation. So the election to elect the shop steward was considered illegal. On the other hand, on 17 May 2004, the Cambodia Daily reported that the hotel elected a shop steward and the hotel made a new CBA with the committee of this new shop steward without participation of the old union.

In this case, only the union of the Raffle Le Royal that was registered since 23 May 2003 and has most representative status could sign this CBA. But the employer party did not implement the procedure properly: he signed it with a new shop steward that has illegally been elected.

2. Content of Collective Bargaining Agreement

The creation of CBA aims to further determine the working conditions and occupation of the workers/employees and govern the relations between the employer and workers/employees as well as between the organization of the employer and the organization of the workers/employees. Pursuant to the principle of public order stipulated in Article 13 of the Labour Law, all the regulations of the CBA cannot be contrary to the regulations of the law and other regulations which are of the nature of public order, otherwise it will be legally considered null and void. So the CBA can state any regulations that provide more benefits for workers/employees than those in other regulations and it must not violate this public order.

Similar to this, if the regulation of the employment contract between the employer and workers/employees who are engaged in the CBA provide less benefit than those stipulated in the CBA, the regulations stipulated in the employment contract must be null and void and must be replaced with the regulations in the CBA automatically.

The parties must try their best to include in the CBA all procedures related to dispute conciliation and dispute resolution through Arbitration Council and interpretation of the CBA.

A. Points to be included: Generally, not all points are allowed to be included in the negotiation of creating a CBA. Some points stipulated in the Labour Law are pointed out clearly by the law, giving rights to the parties to include them in the CBA. Those points are as follows:

- Article 13, Paragraph 2: except all the regulations of this law that cannot be deregulated, the CBA can provide benefits determined in this law.
- Article 73: CBA must determine severance pay of the Fixed Duration Contract and in case there is no determination of severance pay, it is at least equal to 5% of the wages that the workers/employees received during the length of the contract.
- Article 23: Internal Regulation and CBA are implemented the same as general provisions of the Labour Law.
- Article 166: CBA can provide more annual leave than that in the Labour Law.
- Article 301: CBA can provide a procedure for conciliating an individual dispute.
- Article 303: CBA can provide a procedure for conciliating a collective dispute.
- Article 309: CBA can provide a procedure for resolution through the Arbitration Council in case the dispute cannot be conciliated.

Generally, the parties can include other points in the CBA as long as the points are not contrary to the regulation of the public order and it does not mean the parties can include only the points mentioned above.

B. Points that must not be included: The following points are prohibited and are absolutely not allowed to be included in the CBA:

- Article 129: in the CBA, it is not allowed for any deduction of wages more than those determined in the Labour Law.
- Article 167: in the CBA, it is not allowed to make the workers/employees waive their rights to annual leave or not allow the employer to make payment instead of annual leave.
- Article 183: In the CBA, it is not allowed to make the women workers/employees waive their rights to paid maternal leave or other benefits.

3. Type and End of Collective Bargaining Agreement:

It is not different from employment contract. CBA is classified into 2 categories. Fixed Duration CBA and Undetermined Duration CBA, according to point 3, Article 96 of the Labour Law

A. Fixed Duration CBA: a CBA made between the employer and the professional organization of workers/employees has its fixed duration of not more than 3 (three) years. If the CBA is made by the employer with shop steward, the CBA must have its duration not more than 1 (one) year.

Upon the expiration of the CBA, if either party does not give notice to object 3 months in advance before the expiry date, the CBA must be considered renewed with its effect, meaning that the parties (employer, professional organization of workers or shop steward) must give notice 3 months in advance if they want to end the CBA. If any party does not implement this right, the implementation of the CBA remains effective, except that the two parties have a particular agreement.

B. Undetermined Duration CBA: CBA with undetermined duration can be objected but the CBA that is objected remains effective for one year. However, the objection to this CBA is not an obstacle to the implementation of the other party that does not object. In principle, the parties have the rights to end the CBA but must continue to implement it for another year for the party initiating the end, so it means that it requires one year's notice in advance for the party initiating the end of this CBA.

4. Obligation of the parties to CBA

When the professional organization of workers/employees or shop steward request the employer to negotiate a CBA, the employer has an obligation to negotiate and during the negotiation, the wages, bonus, and other benefits of the representatives of the parties participating in the negotiation must not be deducted. All the parties to the negotiation of the CBA have the following obligations:

- Obligations to coordinate procedures of negotiation that is acceptable
- Obligation to give concession and objection by considering a proper reason
- Obligation of the employer to provide the representative of the union or unions with a means to make ease so that the negotiation can be made smoothly.
- Obligations of the employer to provide all information related to the negotiation proposed by the union participating in the negotiation process.

After registering the CBA, the employer must give the shop steward a copy of the CBA, Annex and additional contract of the CBA that has already been registered for each of them and another copy to the personnel office of the enterprise/establishment. The employer must post notice of the CBA in the workplace of the workers/employees and the information place of the workers/employees.

Case of Arbitration Council No. 29/09 dated 21 July 2009 found that the parties have a major role in determining each condition that they want to be included in the CBA and each party also has the right to accept or not accept the request of the other party but the Arbitration Council finds that the obligation of the employer is to give concession and object with a valid reason in order to reach a CBA.

5. Scope of Implementation and Expansion of Extent

To achieve the purpose of the CBA, the parties must state clearly their scope which can be an enterprise, a group of enterprises, one industrial workshop or a partial industrial workshop or one economic activity or multiple economic activities. When a CBA exists in accordance with the law, it will have power for implementation on the employer and all types of relevant workers/employees in the enterprise or establishment that have been stated in the CBA.

At the request of the union or employers' association or initiative of the Minister of Labour and Vocational Training, an expansion of some regulations or all regulations of the CBA can be declared to have a broader scope for workers/employees. In this case, the CBA of the enterprise or establishment can

be adapted to the regulations of the CBA that has a broader scope and broader implementation. The benefit of expansion of implementation of this CBA is because the regulations of the CBA that have been expanded provide better benefits for the workers/employees than the previous CBA.

6. Registration and implementation

For the CBA to be effective, the employer must take the CBA to be certified at the provincial department if the CBA is made in the provincial geography or at the Department of Labour Inspection of the Ministry of Labour and Vocational Training if the CBA is made in Phnom Penh. The implementation will take effect one day after the registration. The documents for application for registration are as follows:

- Application Form for registration 01 copy
- CBA, Annex and Additional Contract of CBA, “if any”05 copies each

After the registration, the Provincial Department of Labour or Department of Labour Inspection must send the CBA, Annex and additional contract of CBA 01 copy each to be filed at the Office of the Court Clerk of Municipal/Provincial Court.

The parties that have signed or members of the signatory have an obligation to implement the CBA. The implementation of the CBA is broad although the employer withdraws from membership of the signatory organization after the CBA takes effect, the employer still has an obligation to implement this CBA.

A labour inspector may conduct a visit to inspect the CBA by asking for information from the shop steward, director of enterprise/establishment or from workers/employees directly.

7. Importance of CBA

CBA is made by the worker/employee party or professional organization of workers/employees and employer party or professional organization of employers in engaging in a new obligation. There are also some reasons that need to be found out and noted in creating a CBA whether what benefits the creation of the CBA have for the parties. According to its content it is to create obligation for the parties.

Although the creation of the CBA is tied to a new obligation, we can also in principle show that it has some remarkable benefits such as:

1. **Benefits for workers/employees in the enterprise/establishment:** Generally, we can say that workers/employees will get better benefits than the law during the validity of the CBA because the points set out in the CBA is better than those set out in the law. *For example: the employer and workers/employees can set out in the CBA an agreement to provide lunch allowance of 2000 Riels or free lunch during the validity of the CBA for 2 years while this is the benefit that the workers/employees get better than the law and it is an obligation of the employer.*
2. **Benefits for the employer:** In principle, the employer also gets some benefits: sustainability of industrial relations and production of the enterprise/establishment. The reason why we can dare to claim this is because during the length of the CBA, the workers/employees cannot demand more benefits than those set out in this CBA. On the other hand, the employer can determine a CBA stipulating the procedure of resolving a dispute, negotiation and some procedures. *For example: the employer can set out an agreement stating that during the validity of the CBA, the workers/employees cannot demand more benefits than those already set out.*

Consequence: Although, in principle, we have observed that the creation of CBA in the enterprise/establishment can have a positive impact for both parties, we have also observed that there are not many factories/enterprises making a negotiation to create CBA because **(1) union with the most representative status cannot prevent unregistered unions or minority unions from**

demanding more benefits, (2) unions cannot reach a consensus: popularity remain the major topic for the parties; (3) law enforcement is still limited when the union violates the CBA.

Precedent of the Arbitration Council

1. Both parties can review or amend the regulations in the CBA by an agreement. (Arbitral Award 14/04)
2. The Arbitration Council will respect all the regulations of the CBA, so will not issue an arbitral award to overhaul or amend the CBA that has been properly made. (Arbitral Award 14/04)

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