

Employment Contract in Cambodia: A Focus on Rules Transforming Fixed-duration to Undetermined Duration Contract

Kanharith NOP

- I. Introduction
- II. Formation of fixed duration contract
- III. Renewal of fixed-duration contract
- IV. Tacit continuation of employment relation
- V. Concluding remarks

I. Introduction

Under the Labor Law of Cambodia, there are two main types of employment contracts: fixed-duration and undetermined duration contracts. Undetermined duration contract is used for long-term employment relations and termination of this contract by an employer can be made only if there is valid reason in relation to capacity or misconduct of the worker or operational requirement of the enterprise.¹ In this sense, undetermined duration contract provides workers with job security and stable income under the rule requiring valid reason for dismissal. If compared with undetermined duration contract, fixed-duration contract protects workers from employers' unilateral termination of contract until the expiry date. However, employments and incomes of workers are unsecured and unstable since employers may use short-term contract for the period of two, three or six months or may not renew the contract upon the expiry date.²

The use of fixed-duration contract provides employers with flexibility in managing their workforces; however, the excessive use of short-term or fixed-duration contract for continuous or long-term employment relations need special regulations such as the transformation rules provided under Article 67 and 73 of the Labor Law. In country report for the 1st JILPT Tokyo Comparative Labor Policy Seminar in 2017, I raised three labor legal issues, one of which is unclear employment contract due to unclear transformation rules. Through examination of legal rules and their implementation by labor arbitration council, transformation rules can be articulated through (1) the requirements of contract formation, (2) renewal of contract up to the total length of two years, and (3) tacit continuation of employment relations.

II. Formation of fixed duration contract

One of the transformation rules is embedded in the requirements of contract formation. The Labor Law provides that employment contract establishes employment relations between workers and employers. The contract is governed by the general law and can be made in a form that is agreed upon by the contracting parties.³ It can be written or verbal.⁴ Based on arbitration council, general rule that is mentioned above refers to

1. Law on Labor, Royal Code NS/RKM/0397/001 (1997) (Cambodia) [hereinafter called the Labor Law], art. 74, para. 2; Arbitration Council, Arbitration Award Case Number 07/06, February 17, 2006; Arbitration Award Case Number 09/06, March 09, 2006; Arbitration Award Case Number 24/06, April 11, 2006.

2. When reviewing the cases of collective labor disputes, I observe that at the early stage of the adoption of Labor Law in 1997, the fixed-duration contract for garment and footwear industry is one year. However, since then the length of fixed-duration contract is decreased to six months and currently to three or two months. The awards of the labor arbitration council are publicly available on its website, <https://www.arbitrationcouncil.org/>.

3. Law on Labor, *supra* note 1, art. 65, para. 1.

4. *Id.*, art.65, para. 2.

the Civil Code of Cambodia.⁵ Pursuant to Article 311 of the Civil Code, contract is the matching of intentions held by one or more parties to create, change or extinguish an obligation. Moreover, Article 336(1) of Civil Code provides that contract comes into effect when the offer and the acceptance thereof conform to each other. Therefore, no party can force the other party to accept the form or give consent to the content of the contract if latter party does not agree.⁶

Under the Labor Law, everyone can be hired for a specific work on the basis of time, either for a fixed duration or for an undetermined duration.⁷ The undetermined duration contract can be made in writing or verbal agreement. There is no requirement of valid reason for the conclusion of fixed-duration contract, but the Labor Law requires that the formation and performance of fixed-duration contract strictly follow the requirements stipulated in Article 67 and Article 73 respectively. Article 67 provides three main requirements on formation of fixed-duration contract. Firstly, the employment contract signed with consent for a specific duration cannot be for a period longer than two years. Secondly, the fixed duration contract must be in writing. Thirdly, it must contain a precise finishing date. Failure to abide by any of these rules, the contract will be converted to undetermined duration contract.

The followings are cases in relation to disputes over the use of fixed-duration contract. In case 229/16, the probationary contracts are concluded to examine the workers' fitness to the jobs. However, after the end of probationary period, there are no written contracts executed by employer and workers for their continuing employment relation. The employment contracts of workers in this case are undetermined duration contracts because the formation of the contracts is not in compliance with the requirements that fixed-duration must be concluded in writing and must have specific date of contract termination.⁸

The employer's practice of using employment card without having concluded written contract is under undetermined duration contract.⁹ In case 209/16, employer views that its company practice of the employment relations with workers are under the fixed-duration contracts for the period of three months; however, there are no written contracts. In addition, every time at the expiry of the period of three months, the employer changes the employment identity card of the workers, pays compensation of the unused annual leave and provides 5% severance pay to the workers. In this case, the contracts that are not made in writing are undetermined duration contract because employment identity card is not an employment contract.

The existence of written employment contract shall be proved with evidence. In case 182/16, after probation, employer claims that he concludes fixed-duration contract with the worker for a period of three months. The arbitration council rules that fixed-duration contract has to be made in writing by agreement of the parties and there should be signatures or thumbprints or other means to prove that the parties truly conclude the written contract.¹⁰ The creation of the written contract by a party without the acknowledgment of the other party cannot be assumed that the parties truly conclude the written contract with each other. In this case, the employer makes the written contract alone and the worker does not know about this contract. Hence, there is no written contract between the parties. Consequently, when the employer cannot prove the evidence of the existence of the employment contract, the employment relation in this case is under undetermined duration contract.

5. Arbitration Council, Arbitration Award Case Number 43/17, December 26, 2017; Arbitration Award Case Number 56/06, August 09, 2006; Arbitration Award Case Number 96/13, June 05, 2013; Arbitration Award Case Number 204/13, October 21, 2013; Arbitration Award Case Number 16/14, February 28, 2014; Arbitration Award Case Number 12/16, February 19, 2016.

6. Id.

7. Law on Labor, *supra* note 1, art. 66.

8. Arbitration Council, Arbitration Award Case Number 229/16, November 24, 2016; Arbitration Award Case Number 182/16, August 23, 2016.

9. Arbitration Council, Arbitration Award Case Number 209/16, September 22, 2016.

10. Arbitration Council, Arbitration Award Case Number 182/16, August 23, 2016. In this case, the employer asserts that he/she also pay the severance pay of 5% each time at the expiration of the period of three months and the contract should be fixed-duration contract. The arbitration ruled that the condition of establishment of fixed-duration contract is that the contract must be made in writing and payment of 5% severance cannot be used as condition to determine that a contract is fixed-duration contract. In this case, the contract is undetermined duration contract since there is no written contract after the probation.

While requiring fixed-duration contract to have finishing date, Article 67(3) of the Labor Law also provides that sometimes, fixed-duration contract may have an unspecified date when it is drawn up for (1) replacing a worker who is temporarily absent; (2) work carried out during a season; and (3) occasional periods of extra work or a non-customary activity of the enterprise. This duration is then finished by (1) the return to work of the worker who was temporarily absent or the termination of his/her employment contract; (2) the end of the season; (3) the end of the occasional period of extra work or of the non-customary activity of the enterprise, respectively. Furthermore, contracts of daily or hourly workers who are hired for a short-term job and who are paid at the end of the day, the week or fortnight period, are considered to be contracts of fixed duration with an unspecified date.

III. Renewal of fixed-duration contract

Renewal of contract may cause fixed-duration to undetermined duration contract. The Labor Law allows the possibility of subsequent renewals of fixed-duration contract and limits the period of the fixed-duration contract. However, there is dispute whether the limit of two-year period applies to each renewed contract or the total period of fixed-duration contract including initial and its renewal(s). Article 67(2) of Labor Law reads, “The labor contract signed for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years. Any violation of this rule means that the contract shall be renegotiated as a labor contract of undetermined duration.” Furthermore, Article 73(5) of the same law reads, “If the contract has a duration of more than six months, the employee must be informed of the expiration of the contract or of its non-renewal ten days in advance. This is increased to two weeks for contracts exceeding one year. If this is not done, the contract is extended for a length of time equal to its initial duration or redefined as a contract of unspecified duration if its total length exceeds the limit allowed in article 67.”

In 2003, the arbitral award in case 10/03 which limits the total period of fixed-duration to two years becomes the famous arbitrator-made rule that has been used as the precedent since then until today.¹¹ In case 10/03, employer hires workers under fixed-duration contract for the period of six months and successively renews these short-term contracts. The workers request that these fixed-duration contracts be converted to undetermined duration contracts where the renewal occurs four times, or employment lasts for two years. Arbitration council views that the use of the words “the renewal” in that Article 67(2) is not clear which leads to different interpretations either “the duration of each renewed contract” or “the total length of the employment contract including the initial contract and all subsequent extensions.”

The arbitration council views that the Labor Law promotes the use of undetermined duration contracts because such contracts lead to increased employment security which is important for workers and which is also in the interests of the employer because long-term employment leads to increased workers’ commitment to their work.¹² In addition, Article 73(5) provides that fixed-duration contracts be converted to undetermined duration contracts if there is no notice of termination and their “total length exceeds the time limit specified in Article 67.” Because Article 73(5) refers to the total length of time specified in Article 67(2) the arbitration interprets that the period of two years specified in Article 67(2) is also a maximum total duration and not the duration of an individual renewal. The arbitration council further refers to paragraph 3 of ILO Recommendation 166 of 1982 regarding Termination of Employment which provides that contracts of fixed duration should not be used for long term employment and that fixed duration contracts should be converted to undetermined duration contracts if they are renewed one or more times.¹³ Based on the above grounds, the arbitration council interprets Article 67(2) to mean that fixed duration contract is converted into undetermined duration contract if a renewal causes the total length of the employment contract to exceed two years.

11. Arbitration Council, Arbitration Award Case Number 10/03, July 23, 2003.

12. *Id.*

13. *Id.*

A clause of the internal regulation of the employer that violates the above said arbitrator-made rule is void.¹⁴ In case 91/10, a clause of the employer's internal regulation provides that fixed-duration contract can be renewed once or many times as long as each renewal has maximum duration of two years. The employer pays severance pay 5% every time of termination.¹⁵ Hence, the employer claims that the contract is fixed-duration contract since each time of renewal does not exceed two years. The arbitration council rules that such clause of internal regulation violates Article 67(2) and Article 73(5). Based on Article 13 of the Labor Law, internal rules must comply with Labor Law.¹⁶

Furthermore, the collective agreement that is agreed for the use of only fixed-duration contract in the company is void.¹⁷ In case 133/16, the collective agreement of the company provides that the contract of each worker is fixed-duration contract with the period of three months and it is agreed to provide 5% severance pay at the expiry of each three-month period based on the request of the worker. The arbitration council rules that the collective agreement that regulates the use of only fixed-duration contract violates the Labor Law, particularly Article 67(2) and Article 73 that provides that fixed-duration can be renewed once or more times as long as the total length does not exceed two years.¹⁸ The point violating the Labor Law is that the clause of collective agreement regulates that the contract of each worker is fixed-duration contract for the period of three months forever and employer asserts even though the length of contract exceeds two years the contract is fixed-duration contract. Based on Article 13 of the Labor law, such collective agreement is void because it violates Labor Law.

In 2017, there was an interesting case 022/17 where workers demanded employer to continue using fixed-duration contract for the period of six months even though their contracts had total duration more than two years because they wanted to get severance pay. However, the employer rejected such demand because under the practice of the company and the Labor Law the employer converted fixed-duration contract to undetermined duration contracts for the workers whose total duration of contracts exceeded two years.¹⁹ Based on the arbitrator-made rule that no party can force the other party to accept the form or type of contract and content of the contract they do not agree,²⁰ the fixed-duration contract can only be concluded if employer agrees to change undetermined duration to fixed-duration contract. In this case, the arbitration rejects the demand of the workers because the employer does not agree to use the fixed-duration contract after the total length of employment exceeded two years. It is worth noticing that in addition to case 022/17, there have been several arbitrator decisions allowing the employer and employee to execute the fixed-duration contract even though they have undetermined duration contract if there is free and true agreement of employers and workers.²¹

If agreement of the parties is condition to allow the use of fixed-duration contract when the total length of contract exceeds two years or when the undetermined duration contract is already in place, such rule is in

14. Arbitration Council, Arbitration Award Case Number 91/10, August 30, 2010.

15. Law on Labor, *supra* note 1, art. 73, para. 6 provides that at the end of fixed-duration contract, the employer must provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing is set in such agreement, the severance pay is at least equal to 5% of the wages paid during the length of the contract. Based on arbitration council, this Article means that the provision of 5% severance pay to workers must be made at the termination of contract and employment relation is terminated. See also Arbitration Council, Arbitration Award Case Number 60/06, August 31, 2006; Arbitration Council, Arbitration Award Case Number 99/06, December 12, 2006; Arbitration Council, Arbitration Award Case Number 85/09, August 24, 2009.

16. Law on Labor, *supra* note 1, art. 13 provides that the provisions of the Labor Law are of nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of the Labor Law or any legal text for its enforcement are void.

17. Arbitration Council, Arbitration Award Case Number 133/16, July 23, 2016.

18. Arbitration Council, *supra* note 17.

19. Arbitration Council, Arbitration Award Case Number 022/17, May 09, 2017.

20. Arbitration Council, Arbitration Award Case Number 170/11, January 12, 2011; Arbitration Award Case Number 147/14, January 07, 2014.

21. Arbitration Council, Arbitration Award Case Number 69/04, September 08, 2004; 03/06, February 10, 2006; Arbitration Award Case Number 141/08, December 11, 2008; Arbitration Award Case Number 114/14, June 13, 2014.

contradiction with the rule that limits the total length of fixed-duration contract to two years. For example, in case 023/17, the arbitration council rules that the agreement of the employer and workers to conclude fixed-duration contract even though total period exceeded two years violates Article 67(2) and Article 73(5) and such agreement was void pursuant to Article 13 of the Labor Law.²² In this case, when the total period of contract reaches two years, the employer gives options to the workers to choose fixed-duration or undetermined duration contract. If workers choose fixed-duration contract, the workers are required to affix thumbprint on letter requesting the renewal of fixed-duration contract. The objective of this letter is to request the continuation of the use of fixed-duration contract with the company even though the seniority/length of service with employer exceeds two years. In this case, arbitration council rules that even though the workers request in the letter to continue using fixed-duration contract in order to get 5% severance pay and the employer agrees thereto and such request is in violation to Article 67(2) and Article 73(5) which are interpreted by the arbitration council that fixed-duration contract having the total period more than two years will be converted to undetermined duration contract. Based on Article 13 of the Labor Law, such request letter is not enforceable. Since the total period is more than two years, the workers had undetermined duration contract.

If there is no continuous employment relation due to the break of each time of renewal, the fixed-duration contract will not be converted to undetermined duration contract. The break period is not defined but should be reasonable to prove that the nature of employment is not continuous or permanent relation. In case 177/16, the workers work for more than two years, but the employer asserts that workers do not have undetermined duration contract because every time the total of contract equal to two years, the employer allows the worker to leave 10 days and when the workers come back, the employer changes the identity numbers and new cards for these workers. In this case, the workers leave from work for only two days since they are poor. The employer pays full for the two days leave and kept seniority of the workers. The arbitration council rules that the renewal of contract by the employer above has no break period because the employer still pays the workers and workers are required by employer to take rest for two days every time the total duration of fixed-duration contract equal to two years.²³ In addition, the seniority is maintained even though the employer changes identity numbers and cards. Accordingly, fixed-duration contract becomes undetermined duration contract.

IV. Tacit continuation of employment relation

The tacit continuation of the employment relation is also one of the conditions that transform fixed-duration to undetermined duration contract. Article 67(8) of the Labor Law provides that when a contract is signed for a fixed period of or less than two years, but the work tacitly and quietly continues after the end of the fixed period, the contract becomes a labor contract of undetermined duration. The phrase “tacitly and quietly continues after the end of the fixed period” means that upon the expiry of the initial period of fixed-duration contract, there is no party expressing its intention to renew or terminate the contract and after the expiry of this initial period, the employment relation continues tacitly.²⁴ In other words, the workers still continue working for the employer as normal and the employer continues paying wages and having other same working conditions as those under the initial employment contract. Therefore, Article 67(8) means that when fixed-duration contract for the period less than or equal to two years expires but there is no party expressing the intention to renew or terminate the contract and consequently the employment relation between employer and worker still continues tacitly as normal after the expiry of the contract, the employment relation after the expiry of initial period continues tacitly and must be under undetermined duration contract.²⁵

22. Arbitration Council, Arbitration Award Case Number 023/17, June 07, 2017.

23. Arbitration Council, Arbitration Award Case Number 177/16, August 18, 2016.

24. Arbitration Council, Arbitration Award Case Number 271/13, January 22, 2014. In this case, after passing the two-month probation, the worker worked under fixed-duration contract for two months from 05 April 2013 to 05 June 2013 and then for another two months from 05 June 2013 to 05 August 2013. From 05 August 2013 there was no written contract and the worker continued to work as normal until the employer terminated him on 22 November 2013.

25. Arbitration Council, *supra* note 24.

Article 67(8) and Article 73(5) of the Labor Law seem to overlap with each other since there is no difference between situation of “tacit or quiet continuation of employment after expiry date” and that of “continuation of employment due to employer’s failure of prior notice of non-renewal of fixed-duration contract.” Article 67(8) provides that the work tacitly and quietly continues after the end of the fixed period causes the fixed-duration contract become a labor contract of undetermined duration contract. The tacit renewal of the contract will not extend the contract for the period equal to the period of the initial contract but it converts fixed-duration to undetermined duration contract even though the total length of the contract is less than the period of two years. Article 73(5) provides that if the employer fails to serve prior notice within the required period, the contract will be extended for the period equal to its initial duration or become unspecified duration if its total length exceeds two years.²⁶ Furthermore, the contract can be extended many times as long as the total period does not exceed the maximum limit of two years.

Based on arbitration council’s decision in case 271/13, Article 67(8) and Article 73(5) are not overlapping but they complement each other. The arbitration council views that Article 73(5) is only used for the fixed-duration contract that has the period more than six months. If the employer fails to express his or her intention of non-renewal of the contract within this required period or the employer expresses his or her intention of non-renewal of the contract on the expiry date of the contract, the employment contract will continue for a period equal to the period of the initial contract or become undetermined duration contract if the total period including renewal exceed two years. In this case, the employer has two options. The first option is that the employer must execute new contract for the period at least equal to period of initial contract. The second option is that the employer continues tacitly the employment relation.

For the first option, the employer and worker must sign written contract before the commencement of the new employment relation in order to comply with Article 73. If employer does not conclude the written contract then this contract will become undetermined duration contract based on Article 67(7).²⁷ For the second option (case of continuing the employment relation tacitly), the contract that continues tacitly does not fall under the scope of this Article 73, but it falls under scope of Article 67(8).

The arbitration council rules that the case where the employer does not fulfill the obligation of prior notice as required by Article 73(5) and the case where the employer does not make written contract as required by Article 67(7) are different from the case of tacit renewal of the contract stipulated under Article 67(8) of the Labor Law.²⁸ The tacit renewal of contract happens at the expiry date of the contract and there is no party of the contract expressing the intention of renewal or non-renewal of the contract and the employment relation continues tacitly after the expiration of initial contract. Therefore, for the fixed-duration contract with period more than six months, if the employer fails to give prior notice of renewal or non-renewal and the employment relation continues tacitly after the expiry of the contract, it is viewed that contract is renewed quietly and becomes undetermined duration contract pursuant to Article 67(8) of the Labor Law.²⁹

V. Concluding remarks

The fixed-duration contract can be converted to undetermined duration contract pursuant to Article 67 and

26. Law on Labor, *supra* note 1, art. 73, para. 5 of the Labor Law provides that “if the contract has duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.” Article 67(2) provides that fixed-duration contract can be renewed one or more time as long as the renewal does not exceed two years. See also Arbitration Council, *supra* note 24; Arbitration Award Case Number 277/13, February 20, 2014; Arbitration Award Case Number 064/16, April 19, 2016.

27. Law on Labor, *supra* note 1, art. 67, para. 7 provides that a contract of a fixed duration must be in writing. If not, it becomes a labor contract of undetermined duration.

28. Arbitration Council, *supra* note 24.

29. Arbitration Council, *supra* note 24.

Article 73 of the Labor Law. The lack of clarity of the transformation rules leads to different interpretations and different uses of employment contracts. With an attempt to understand how these transformation rules are applied to resolve the disputes over employment contracts, the paper examines the awards of the labor arbitration council and it finds that there are a lot of rules governing the use of fixed-duration contract. This reflects that the Labor Law does not encourage parties to use fixed-duration contract for long-term or continuous employment relations.

The Labor Law requires that fixed-duration contract be converted to undetermined duration contract if the contract is not made in writing, or it has no specification of finishing date. Furthermore, the renewal of contract can cause the fixed-duration contract to become undetermined duration contract if the total duration of initial and renewal contracts exceeds two years. Last but not least, for the contract having the period for more than six months, if employer fails to provide prior notice of non-renewal with the required period and fails to have written contract before the commencement of the new employment relation, fixed-duration contract will become undetermined duration contract because the employment relation continues tacitly after the expiry date of the initial contract. For the contract having the period less than six months, if the employer fails to make written contract before the commencement of new employment relation and the employment relation tacitly continues after the expiry date of the initial contract, it is ruled that fixed-duration contract become undermined duration contract.



AUTHOR

Kanharith NOP

Attorney-at-Law, CBL Law Group.