

**[Research Article]**

**A Comparison of Labor Contract Conversion Rules in Cambodia and Japan**

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Abstract

This paper firstly discusses the rules on contract conversion in Cambodia, secondly examines the rules on contract conversion in Japan, thirdly compares Cambodian’s and Japan’s contract conversion rules, and finally recommends proposals for improvement of the rules regarding contract conversion in Cambodia. In Cambodia, the contract conversion rules are compulsory, while the conversion rules in Japan respect the worker’s will to convert the contract. In Cambodia, if a fixed-duration contract fulfills certain conditions for automatic conversion, the contract will be transformed into an undetermined duration labor contract. Any agreement of the parties contrary to these rules is void. In Japan, if the worker has been working longer than five years and requests the employer to conclude the labor contract of an undetermined duration, the employer must accept such a request. In conclusion, this paper suggests that the compulsory conversion rules in Cambodia should be maintained and that Japan’s rule on the guarantee for the continuation of employment (by prohibiting the employer from unjustly rejecting the worker’s request for renewal or concluding new fixed duration upon expiry of the existing contract) should be adopted in Cambodia through an amendment to the Labor Law.

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## I. Introduction

There is a tendency in laws and employment practice in which the labor contract of fixed duration is used for short-term relations while the labor contract of undermined duration is used for a long-term relations. Under the conversion rules, a fixed-duration contract can be converted to an undetermined-duration contract. One of the main purposes behind the rules is to provide workers with employment security and income stability by transforming a fixed-duration contract into an undetermined-duration contract that cannot be unjustly terminated at the employer's initiative.<sup>1</sup> In particular, the conversion rules prohibit the parties from excessively using a fixed-duration contract for continuous or long-term employment. Compared with an undetermined-duration contract, the fixed-duration contract provides workers with limited protection of employment security. In principle, a fixed-duration contract ends at expiry, and premature termination must fulfill strict legal requirements.<sup>2</sup> However, the excessive use of a short-term contract for continuous employment relations may lead to a deprivation of the worker's rights to enjoy the benefits he or she would have received under the rules of an undetermined duration contract of the long-term employment relationship. Based on the consideration above, Cambodia and Japan have adopted the conversion rules.

The currently effective Labor Law of Cambodia (the "Labor Law"), enforced since 1997, adopts the compulsory rules that automatically convert a fixed-duration contract to an undetermined-duration contract if any certain legal condition of the conversion rules has been fulfilled. Unless otherwise stated clearly in the Labor Law, any aspect of the parties' agreement that contrasts with the conversion rules is void.<sup>3</sup> The conversion rules, in particular the rule limiting the total length of the fixed-duration contract, had been long a controversial topic among scholars, practitioners, employers, and employees until the Ministry of Labor and Vocational Training, which is currently the ministry in charge of labor sector, issued an Instruction No. 050/19 dated 17 May 2019 on Determination of the Types of

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<sup>1</sup> Labor Law, Royal Code No. CHORSOR/RORKORMOR/0397/01, (1997) (Cambodia) [herein after called "Labor Law"], art. 74, para. 2. Termination of the undetermined duration contract at the initiative of employer cannot be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirement of the operation of the enterprise, establishment or group. Similar protection has been found in Article 16 of the Labor Contract Act of Japan which stipulates that "If a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as abuse of rights and is invalid." This English translation of Labor Contract Act can be found at website named Japanese Law Translation via <https://www.japaneselawtranslation.go.jp/en/laws/view/3744>, visited on 13 July 2022. The unofficial translation of the Labor Law of Cambodia of 1997 is available at ILO's website (<https://www.ilo.org/dyn/travail/docs/701/labour>).

<sup>2</sup> Article 73 of the Labor Law and Article 17 (1) of the Labor Contract Act of Japan.

<sup>3</sup> Article 13 of the Labor Law provides that "The provisions of this law are of the nature of public order, excepting derogations provided expressly..."

Employment Contract (the “Instruction No. 050/19”).<sup>4</sup> The said Instruction has clarified the maximum duration of a fixed-duration contract and required that a fixed-duration contract whose total length exceeds this maximum duration must be converted to an undetermined duration contract.

In Japan, no legislative text converted the fixed-duration contract to the undetermined duration contract upon the worker's request to the employer for contract conversion.<sup>5</sup> It was until the amendment of the Labor Contract Act in 2012, which took effect on 01 April 2013. Before the amendment, an employee who worked under a fixed-duration contract would never have a chance to convert their contract to an undetermined-duration contract if an employer did not agree with the request for the conversion. The amendment of the Labor Contract Act of Japan in 2012 has adopted contract conversion rules based on the worker's will, under which the contract conversion is made possible upon the request of the worker who has been continuously working with the same employer for more than five years.<sup>6</sup> Since the amendment or adoption of conversion rules became effective on 01 April 2013, the worker who had been continuously working with the same employer under a fixed-duration contract until 01 April 2018 were eligible to apply for the conversion or conclusion of an undetermined-duration contract and the law requires the employer to accept such request. More importantly, the said amendment also incorporates the judicial rules (on the guarantee for continued employment after the expiry of the contract) into the legislative text, and such rules are very related to the conversion rule.

Since Cambodia does not have the rules on the guarantee for continued employment as Japan does, the conversion of contract in Cambodia is avoidable if there is proper management or arrangement on the use of fixed-duration contract, which might affect the job security attached to the undetermined duration contract. In consideration of the facts that the Civil Code of Japan has remarkably influenced the Civil Code of Cambodia and that both countries have adopted the contract conversion rules in employment relation, this paper aims to suggest a proposal for the improvement

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<sup>4</sup> There is an unofficial debate whether or not the Instruction No. 050/019 prevails over the interpretations on the total period of the fixed-duration contract by the Arbitration Council. The details on different rules on contract conversion rule will be discussed in this next section of this paper.

<sup>5</sup> In Japan, tacit renewal of employment relation after the expiry of the contract (Article 629 of the Civil Code) or the continuation of employment relation within the period which exceeds the period limited by the law (Article 14 of the Labor Standard Act) causes the employment relation to be under the contract of indefinite duration. However, if the contract was properly administered or managed to comply with the form and period of the contract, the fixed-duration contract could not be converted to undetermined duration although the contract had been subsequently renewed.

<sup>6</sup> Article 18, paragraph 1 of the Labor Contract Act of Japan.

of the rules regarding the contract conversion in Cambodia through the comparison between the rules relating to contract conversion of Cambodia and the those of Japan. Accordingly, the paper firstly discusses the rules on contract conversion in Cambodia, secondly examines the rules on contract conversion in Japan, thirdly compares Cambodian's and Japan's contract conversion rules, and finally recommends proposals for improvement of the rules regarding contract conversion in Cambodia.

## II. Labor contract conversion rules in Cambodia

In Cambodia, the conversion rules were first found in Article 64 of the Labor Code of Cambodia, which was promulgated in 1972.<sup>7</sup> The first Labor Code required that most labor contracts be concluded in the form of undetermined-duration contracts, except in the case where the type of work to be performed could be fixed. The fixed-duration contract had to be in writing and could not exceed a period of three years. However, for any occupation that did not need to travel far and did not cost much money, the maximum period was 12 months for a single worker without a family and two years for a worker with a family. If the worker needed to travel far and spend much money, the maximum period was two years for a single worker without a family and three years for workers with families. Whenever an employment contract with a fixed term of less than or equal to three years was silently renewed at the end, the contract had to be deemed an indefinite labor contract.

The conversion rules with the same content were again incorporated into the Labor Law of Cambodia, which was adopted in 1992.<sup>8</sup> Article 64 of the Labor Law of 1992 replicates Article 64 of the first Labor Code of 1972. Both required the fixed-duration contract to be written and limited the total duration to three years. The tacit continuation of employment relation after the end of the term would still cause the fixed-duration contract to become an undetermined-duration contract. Although the two laws did not mention clearly whether or not the fixed-duration contract could be renewed once or more times from the commencement date until the three-year term, it is understood from the texts of the two laws that the fixed-duration contract was only concluded when it is necessary while the two

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<sup>7</sup> The Labor Code of Cambodia was firstly promulgated on 14 January 1972 under the Khmer Republic regime which was running the government from 1970 to 1975 before the arrival of Kampuchea Democracy (Pol Pot regime) which came to power in 14 April 1975 until 07 January 1979. Although the Code was no longer valid; there are several provisions of the current Labor Law of Cambodia, which has been promulgated in 1997, have been heavily influenced by those provisions of that Code. The reference to that Code is important to understand the current Labor Law as well.

<sup>8</sup> The Labor Law of Cambodia which was adopted by the National Assembly of the State of Cambodia on 11 August 1992. The Labor Law of 1992 was superseded by the Labor Law of 1997.

laws encouraged the parties to conclude an undetermined-duration contract. Hence, a fixed-duration contract could not be renewed even if the initial contract did not reach the total duration limited by the laws.

The conversion rules continued to be enshrined in the current Labor Law of Cambodia.<sup>9</sup> Until now, the Labor Law has been amended three times; however, the rules on contract conversion therein have remained unchanged. The conversion rules have been stipulated in Article 67 and Article 73 of the Labor Law. Article 67, paragraph 1, reads, “A labor contract signed with consent for a specific duration must contain a precise finishing date.” Paragraph 2 of the same reads, “The labor contract signed with consent 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 becomes a labor contract of undetermined duration.” Paragraph 7 of Article 67 reads, “A contract of a fixed duration must be in writing. If not, it becomes a labor contract of undetermined duration.” Last but not least, Paragraph 8 of the same reads, “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.” Furthermore, Article 73, paragraph 5 of the Labor Law stipulates that “If the contract has a duration of more than six months, the worker must be informed of the contract’s expiration or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a 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 duration exceeds the time limit specified in Article 67.”

According to the above provisions of the Labor Law, labor contract conversion is possible if (i) a contract fails to state the specific expiry date; (ii) the contract is not made in a written form; (iii) the total duration of the contract exceeds the limit period; (iv) the renewal of contract due to employer’s failure to serve notice of the expiration or non-renewal of the fixed-duration contract exceeds the limited period; or (v) the employment relation tacitly continues after the end of the fixed period. Consequently, it can be summarized that contract conversion rules are embedded in the contract

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<sup>9</sup> The Labor Law of Cambodia which has been promulgated on 13 March 1997. The Labor Law of 1997 is the law which has been in force with amendments in 2007, 2018 and 2021. The unofficial translation of the Labor Law of Cambodia of 1997 which is available at ILO’s website (<https://www.ilo.org/dyn/travail/docs/701/labour>) and the original text in Khmer language have discrepancy on numbering the paragraph. This text follows the numbering of paragraph in Khmer text while the content in English is based on the unofficial English translation version.

formation process, total duration of the contract, renewal of the contract, and tacit continuation of employment relations.<sup>10</sup> In the past, the contract conversion rules (i), (ii), and (v) were comparatively less problematic than rules (iii) and (iv). As briefly mentioned in the Introduction herein, the rule on contract conversion based on the total duration of the contract had been controversial interpretation and implementation until the issuance of Instruction No. 050/19.

In the following section, this report explains the different interpretations and practices before issuing the said ministerial rules. The Labor Law, in particular, Article 67, paragraph 2 reads “The labor contract signed with consent 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...” This seems understandable and undisputed; however, it has led to different interpretations and implementations. The first interpretation is that the fixed-duration contract could be renewed one or more times as long as the total period of the contract, which included the initial period and extended period, did not exceed two years. The second interpretation is that the fixed-duration contract could be renewed one or more times, and the total period of the contract, which included the initial and extended periods, can be up to four years. The third interpretation is that the fixed-duration contract could be renewed one or more times as long as each period did not exceed two years, and the fixed-duration contract would not be converted to a labor contract of an undetermined duration.

The Labor Arbitration Council supported the first interpretation.<sup>11</sup> Pursuant to the arbitral award for case No. 10/03 in 2003, the Arbitration Council limited the total period of a fixed-duration contract to two years, and this interpretation of Article 67, paragraph 2 and Article 73, paragraph 5 of the Labor

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<sup>10</sup> See Kanharith Nop, *Employment Contract in Cambodia: A Focus on Rules Transforming Fixed-duration to Undetermined Duration Contract*, Japan Labor Issues, vol. 2, no. 8, August-September 2018 available at <https://www.jil.go.jp/english/jli/documents/2018/008-05.pdf>. That article was written before the issuance of notice of the Ministry of Labor and Vocational Training in 2019 which resolve the issues of the uses of fixed-duration contract in Cambodia. Consequently, certain parts of that article, in particular section III (Renewal of fixed-duration contract) are out-of-date and will be supplemented by this study.

<sup>11</sup> The Labor Arbitration Council was established pursuant to the Labor Law of 1997. See also Prakas No. 099 on Arbitration Council dated 21 April 2004 issued by the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation which was the Ministry in charge of labor sector at the time. The Arbitration Council only had jurisdiction over collective labor dispute until the 3<sup>rd</sup> amendment of the Labor Law in 2021 through which the Arbitration Council has jurisdiction over individual and collective labor disputes. The references to the awards of the Arbitration Council are important for research of the labor laws and employment relations in Cambodia as the Arbitration Council has been consistently and transparently interpreting provisions of labor laws and such practices have formed arbitration-made rules in Cambodia. The awards of the Arbitration Council are accessible via its website: <https://www.arbitrationcouncil.org>.

Law had been an arbitrator-made rule governing the total duration of the fixed-duration contract for years.<sup>12</sup> In that case, the contract was concluded for six months and was subsequently renewed four times. The workers requested to convert the fixed-duration contract to an undetermined-duration contract, while the employer objected. The Arbitration Council viewed that the term “renewal” in Article 67 (paragraph 2) meant the total length of a labor contract of fixed duration, including the initial contract and all subsequent extensions; and the Arbitration Council further viewed that the total length of 2 years was the time limit which was referred by Article 73, paragraph 5. Paragraph 5 of Article 73 reads, “...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.”

Instruction No. 050/19 adopted the second interpretation regarding the total duration of the labor contract of fixed duration. The Ministry has instructed that “Pursuant to Article 67 point 2 of the Labor Law, the labor contract signed with consent 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. If once or more renewals of the contract exceed two years, the fixed-term labor contract will become an indefinite labor contract.”<sup>13</sup> According to this Instruction No. 050/19, the initial duration of a fixed-duration contract cannot be more than two years, and one or subsequent contract renewals cannot be more than two years. Consequently, the maximum period of the fixed-duration contract can be up to four years, depending upon the initial period. If the labor contract’s duration exceeds the time limit, this contract is automatically converted to a labor contract of an undetermined duration. Instruction No. 050/19 provides three examples in order to explain the above interpretation. First, if the first term of the labor contract is six months, then the total duration of the contract is limited to a maximum period of two years and six months. Second, if the first term of the labor contract is one year, then the total duration of the contract is limited to a maximum of three years. Third, if the first term of the labor contract is two years, then the total duration of the labor contract of fixed duration is limited to a maximum of four years.

Instruction No. 050/19 further explains how to calculate the total duration of a labor contract of fixed duration. The duration of the contract is not counted if there is a cut-off relationship or gap

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<sup>12</sup> Arbitration Council, Arbitration Award Case No. 10/03 dated 23 July 2003.

<sup>13</sup> The Instruction No. 050/19 dated 17 May 2019 of the Ministry of Labor and Vocational Training on Determination on Types of Employment Contracts, page 2. The Instruction is written in Khmer language.

between a fixed-duration contract that has just ended and the new fixed-duration contract that the parties will begin. If the duration of the labor contract exceeds the maximum period allowed by law, the employer may re-enter into a fixed-duration contract with the same worker for the same or similar work as long as there is a gap of at least one month between an old fixed-duration contract that has just been terminated and a new fixed-duration contract that has been agreed upon by both parties. If the gap between the old and new labor contract of fixed duration is less than one month, the new labor contract will be considered as a continuation of the previous labor contract, which will be a labor contract of undetermined duration if its total length exceeds the time limit.

Instruction No. 050/19 is in line with the decision of the Arbitration Council that a labor contract of fixed duration will not be converted to a labor contract of an undetermined duration if there is no continuous employment relation due to a gap or break of relationship which cannot cause the total duration of the labor contract to exceed the limit period. However, the gap or break period is not defined but should be reasonable to prove that the employment relation is not continuous. For example, in case No. 177/16, every time the duration of the labor contract reached two years, the employer allowed the worker to take leave for two days and changed the worker's identity number and new staff card when they came to work. The Arbitration Council ruled that employment relation was continuous since there was no break.<sup>14</sup> Instruction No.050/19 has clarified that the gap or break of the employment relationship should be at least one month.

However, to some extent, the conversion rules do not apply to fixed duration with an unspecified date which will be discussed as follow. Pursuant to Article 67, paragraph 3, of the Labor Law, there are cases where a fixed-duration contract may have an unspecified date when it is drawn up for (i) replacing a worker who is temporarily absent; (ii) work carried out during a season; or (iii) occasional periods of extra work or a non-customary activity of the enterprise. This duration is then finished by (a) the return to work of the worker who was temporarily absent or the termination of his labor contract; (b) the end of the season; (c) the end of the occasional period of extra work or the non-customary activity of the enterprise. Moreover, under the Labor law of Cambodia, 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 the fortnight, are considered to be contracts of fixed duration with an unspecified date. Contracts without a precise date can be renewed at will as often as possible without losing their validity. Based

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<sup>14</sup> Arbitration Council, Arbitration Award No. 177/16 dated 18 August 2016.



on these rules, Instruction No. 050/19 instructed that the rule regarding the gap or break of a relationship, as mentioned in the preceding paragraph, does not apply to the conclusion of a new fixed-duration contract for (i) replacing a worker who is temporarily absent; (ii) work carried out during a season; or (iii) occasional periods of extra work or a non-customary activity of the enterprise as stated in Article 66, paragraph 3 of the Labor Law. However, since the labor contract without a specified date is also a labor contract of a fixed duration, it must be made in writing and must not tacitly continue after the termination of such contract. For example, Mr. A is employed to replace Mr. B, who is temporarily sick. After Mr. B returns to work, the employer continues to employ Mr. A tacitly without signing any new contract. Consequently, the labor contract of Mr. A is a contract of undetermined duration.

The conversion rules under the Labor Law of Cambodia have the nature of public order according to which parties' agreement, which is contrary to these rules, is void. Article 13 of the Labor Law reads: “The provisions of the Labor Law are of the nature of public order, excepting derogation provided expressly. Consequently, all rules resulted from a unilateral decision, a contract, or a convention that do not comply with the provisions of this law or any legal text for its enforcement are null and void...Except for the provisions of this law that cannot be derogated in any way, the nature of public order of this law is not obstructive to the granting of benefits or the rights superior to the benefits and the rights defined in this law, granted to the workers by a unilateral decision of an employer or a group of employers, by an employment contract, by a collective convention or agreement, or by an arbitral decision.” In case No. 023/17, when the labor contract reached two years, the employer asked the workers to choose either a fixed or undermined-duration contract. The Arbitration Council ruled that the agreement between the employer and workers to conclude a fixed-duration contract after the duration of the employment relationship exceeded the limit period (2 years) was a violation of Article 67 (2) and Article 73 (5), and such agreement was void according to Article 13 of the Labor law.<sup>15</sup>

Although case No. 023/17 was based on the rule made by the Arbitration Council, which adopted the first interpretation under which the total duration of the fixed-duration contract was limited to two years, this case proves that the conversion rules in Cambodia are compulsorily enforced and prevail over the parties' agreement. However, it is worth noting that the public order nature of Article 13 of

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<sup>15</sup> Arbitration Council, Arbitration Award No. 023/17 dated 07 June 2017.

the Labor Law does not invalidate the private agreement that provides benefits or advantages better than those provided to the workers by the laws. Since the labor contract of undetermined duration is considered a type of labor contract that provides job security and stable income to the worker rather than a labor contract of fixed duration, any agreement between the employer and worker to continue using the labor contract of fixed duration is in contrary to the conversion rules and such agreement is void.

To sum up, Cambodia's labor contract conversion rules can apply to contract formation, total duration of the contract, renewal of the contract, and tacit continuation of employment relations. If the labor contract fulfills any conditions that cause the contract conversion, the fixed-duration contract will automatically be transformed into an undetermined-duration labor contract. The employer must settle all the benefits eligible under the labor contract of a fixed-duration contract to the worker. Therefore, the employer must pay the severance pay, which is provided to the worker at the termination of the fixed-duration contract.<sup>16</sup> Upon conversion, the employment duration under the fixed-duration labor contract will be included with the duration under the undetermined-duration labor contract to calculate the worker's seniority.<sup>17</sup>

### III. Labor contract conversion rules in Japan

The conversion rules in Japan are available in the Civil Code of Japan, the Labor Standard Act, and the Labor Contract Act of Japan. The Civil Code of Japan, in particular, paragraph 1 of Article 629 reads, "If an employee continues to engage in that employee's work after the expiration of a term of employment and the employer knows of this and raises no objection, it is presumed that the further employment is entered into under conditions identical to those of the previous employment. In such cases, each party may give a notice of termination pursuant to the provisions of Article 627."<sup>18</sup> Accordingly, if the fixed-term contract continues after the expiry of the term, it continues with the

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<sup>16</sup> Article 73, paragraph 6 of the Labor Law provides that "At the expiration of the contract, the employer shall 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 set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract." See also Clause 1, paragraph 3, of Prakas No. 443 dated 21 September 2018 on Payment of Seniority Indemnity issued by the Ministry of Labor and Vocational Training.

<sup>17</sup> Article 73, paragraph 7, of the Labor Law reads "If a contract of unspecified duration replaces a contract of specified duration upon the latter's expiration, the employment seniority of the worker is calculated by including periods of the both contracts."

<sup>18</sup> The Civil Code of Japan of Civil Code was adopted on 27 April 1896 pursuant to Act No. 89 of 1896. The English translation of the Civil Code of Japan is available at <https://www.japaneselawtranslation.go.jp/en/laws/view/3494>.

same conditions of the previous contract, except the termination must be made based on the rule of contract of undetermined duration. Article 627, paragraph 1 of the Civil Code reads, “If the parties have not specified a term of employment, either party may give notice of termination at any time. In such cases, employment terminates on the expiration of two weeks from the day of the notice of termination.” Hence, employment through a tacit renewal of employment after the expiry of the term will be under the indefinite term.<sup>19</sup> The above rule is one of the contract conversion rules under the Civil Code.

Another contract conversion rule can be found in the Labor Standard Act concerning continuing employment relations after the period limited by the law. Article 14 of the Labor Standard Act reads:

“(1) Excluding labor contracts without fixed terms and excepting those in which it is provided that the contract period is the period necessary for the completion of a specific undertaking business, it is prohibited to enter into a labor contract for a period exceeding three years (or five years, for a labor contract falling under one of the following items):

(i) a labor contract entered into with a worker who has expert knowledge, skills, or experience (hereinafter referred to as “expertise” in this item and Article 41-2, paragraph (1), item (i)) falling under the standards prescribed by the Minister of Health, Labour and Welfare as being of an advanced level (limited to a worker who is appointed to work activities requiring the specified advanced level of expertise).

(ii) a labor contract entered into with a worker aged 60 years or older (other than a labor contract as outlined in the preceding item).”

“(2) In order to preemptively prevent disputes from arising between workers and employers when they enter into fixed-term labor contracts and when those labor contracts expire, the Minister of Health, Labour, and Welfare may prescribe standards for particulars regarding the notice that employers are to give in connection with the expiration of the period of labor contracts and other necessary details.”

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<sup>19</sup> Hisashi Takeuchi-Okuno, *The Regulation of Fixed-term Employment in Japan*, available at [https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9\\_japan.pdf](https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9_japan.pdf), in foot note 37, visited on 14 July 2022.

“(3) The relevant government agency may give the necessary advice and guidance concerning the standards referred to in the preceding paragraph to employers entering into fixed-term labor contracts.”

Article 14 of the Labor Standard Act limits the period of the fixed-duration contract. The interpretation of this Article 14 by the courts and common views have ruled that if the parties to the contract continue their employment relation beyond the legally limited period, the contract will become one with an indefinite term, in accordance with Article 629, paragraph 1 of the Civil Code.<sup>20</sup>

The contract conversion under the Civil Code (tacit renewal) and the Labor Standard Act (continued relation within the period longer than the legally allowed term) can be avoided through clear management or arrangement of the contract.<sup>21</sup> Hence, the workers having a fixed-duration contract with periods as required by Article 14 of the Labor Standard Act would have little chance of having their fixed-duration contract converted to an undetermined duration contract. Consequently, although the workers had been working under a fixed-duration labor contract with the same employer for years, his or her contract would not be transformed into a labor contract of undetermined duration if the employer did not agree. However, in order to provide job protection to workers under the labor contract of fixed-duration, Japanese judges have applied the “abuse of the right to dismissal” principle in analogy to prohibit an employer from unjustly rejecting the worker’s request for renewal or conclusion of labor contract of fixed-duration upon the expiry date of the existing labor contract.<sup>22</sup>

The Supreme Court, in the Toshiba Yanagi-cho Factory case where the workers, with two-month employment contracts which were renewed from 5 times to 23 times, were denied renewal of the contract, ruled that “where there was a desire for continued employment on the part of both contracting parties, and where the fixed-term contracts were repeatedly renewed so that they were de facto indistinguishable from indefinite-term contracts, the refusal to renew is tantamount to a dismissal.”<sup>23</sup> After this case, even though the employers properly administered the use of the contract to avoid the fixed-term contract being considered indistinguishable from an indefinite-term contract, the Supreme

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<sup>20</sup> *Id.* p. 77.

<sup>21</sup> For example, the parties can manage to have written contract to be signed by the parties for renewed employment relation and to ensure that the period of the contract does not exceed the period limited by Article 14 of the Labor Standard Act.

<sup>22</sup> Hisashi Takeuchi-Okuno, *The Regulation of Fixed-term Employment in Japan*, available at [https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9\\_japan.pdf](https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9_japan.pdf), p. 77-79, visited on 14 July 2022.

<sup>23</sup> Takashi Araki, *Labor and Employment Law in Japan*, 2002, p. 34-35.

Court in the Hitachi Medico case ruled that “even where the fixed-term contract was not indistinguishable from an indefinite-term contract, the theory concerning dismissal shall apply by analogy when there was an expectation of continued employment and the contract was renewed five times.”<sup>24</sup> There was a decision of a lower court that expanded the scope of employment security for a worker under fixed-duration contracts, by ruling that “even if a fixed-term contract was not renewed repeatedly, a justifiable reason is necessary for not renewing it if there was a reasonable expectation of continued employment.”<sup>25</sup>

The labor contract conversion rules in Japan were newly adopted rules when there was an amendment to the Labor Contract Act of Japan in 2012.<sup>26</sup> At the time, the amendment, which was mainly related to the labor contract of fixed-duration, derived from the need to protect workers under fixed-duration contracts by limiting abusive use of fixed-duration contracts by adopting the conversion rules rather than the rules limiting the entering into the fixed-duration contract.<sup>27</sup> In parallel with the conversion rules, there are other rules in relation to the fixed-duration contract. The conversion rules were adopted in Article 18, the rule on guaranteeing continued employment in Article 19, and the rule of equal treatment in working conditions regardless of the type of contract in Article 20 of the Labor Contract Act. The three articles (18, 19, and 20) were very important for promoting labor contract conversion in Japan. Article 19 came into force on 10 August 2012, while Articles 18 and 20 took effect on 1 April 2013.<sup>28</sup> However, Article 20 was deleted when there was an amendment to the Labor Contract Act in 2018. It is worth noticing that rule of Article 20 of the Labor Contract Act was incorporated into Article 8 of the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers.<sup>29</sup>

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<sup>24</sup> *Id.* p. 35

<sup>25</sup> *Id.*

<sup>26</sup> The Labor Contract Act of Japan was firstly adopted in 2007 regulating rights and obligations under the employment contract. The English translation of this law can be found at <https://www.japaneselawtranslation.go.jp/en/laws/view/3744>. The enactment of law in addition to the Labor Standard Act was necessary in consideration to the roles of individual contract, increase of individual labor dispute and absence of civil law dealing with employment contract. Please also read Ryuichi Yamakawa, The Enactment of the Labor Contract Act: Its Significance and Future Issues, Japan Labor Review, vol. 6, no. 2, spring 2009, available at [https://www.jil.go.jp/english/JLR/documents/2009/JLR22\\_yamakawa.pdf](https://www.jil.go.jp/english/JLR/documents/2009/JLR22_yamakawa.pdf), last visited 10 February 2023.

<sup>27</sup> Yuko Watanabe, New Rules of Conversion from Fixed-term to Open-ended Contracts: Companies’ Approaches to Compliance and the Subsequent Policy Developments, Japan Labor Issues, vol.2, no.7, June-July 2018, p. 13-14, available at <https://www.jil.go.jp/english/jli/documents/2018/007-03.pdf>.

<sup>28</sup> *Id.*, p. 13.

<sup>29</sup> Article 8 of the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers (Act No. 71 of 2018) reads: “An employer must not create differences between the base pay, bonuses, and other treatment of the part-time/fixed term workers it employs and its corresponding treatment of its workers with standard employment statuses that are found to be unreasonable in consideration of the circumstances, including the substance of the duties

Article 18 of the Labor Contract Act of Japan reads:

“(1) If a Worker whose total contract term of two or more fixed-term labor contracts (excluding any contract term which has not started yet; the same applies hereinafter in this Article) concluded with the same Employer (referred to as the “total contract term” in the next paragraph) exceeds five years applies for the conclusion of a labor contract without a fixed term before the date of expiration of the currently effective fixed-term labor contract, to begin on the day after the said date of expiration, it is deemed that the said Employer accepts the said application. In this case, the labor conditions that are the contents of said labor contract without a fixed term are to be the same as the labor conditions (excluding the contract term) of the currently effective fixed-term labor contract (excluding parts separately provided for with regard to the said labor conditions (excluding the contract term)).

(2) In between the expiration date of the preceding fixed-term labor contract and the start date of the following one with the same Employer, if there is a period of time outside of these two contract terms (excluding a period outside of either of the said contract terms which falls under the standards provided by Ordinance of the Ministry of Health, Labour and Welfare, provided that these contract terms be regarded as continuous; hereinafter referred to as a “vacant term” in this paragraph) and the said vacant term is six months or longer (if the contract term of one fixed-term labor contract which expired just before the said vacant term (if there is no vacant term between the contract terms of two or more fixed-term labor contracts including the said first one, the aggregate term of the said two or more contracts; the same applies hereinafter in this paragraph) is less than one year, the length of a term given by Ordinance of the Ministry of Health, Labour and Welfare, based on the length of a term determined as being one half of the said first contract term), the contract term of the fixed-term that expired before the said vacant term is not included in the total contract term.”

Pursuant to paragraph 1 of Article 18 above, a worker who has been working under a fixed-duration contract with the same employer for more than five years can request for the conclusion of

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of those part-time/fixed term workers and workers with standard employment statuses and the level of responsibility associated with those duties (hereinafter referred to as the "job description") and the scope of changes in their job descriptions and assignment, that are found to be appropriate in light of the nature of the treatment and the purpose of treating workers in that way.”

the labor contract of an undetermined duration to his or her employer before the expiry date of the currently effective contract of fixed-duration and the employer is obliged to accept the said request and to begin the labor contract of undetermined duration on the day after the expiry date of the current contract. Upon conversion, the labor conditions, which are the contents of the labor contract of undetermined duration, are the same as those (excluding the contract term) of the previous fixed-duration contract. According to paragraph 2 of the same article, the duration of the old contract and new contract will not be aggregated if there is a break or vacant period between the old and new fixed-duration contracts. The said vacant period is six months or longer term.

In Japan, there is an encouragement, but not a compulsory requirement, that fixed-duration contracts must be in writing. A worker and employer must confirm the content of the labor contract (including matters concerning a fixed-duration contract), whenever possible, in writing.<sup>30</sup> Furthermore, except for undetermined-duration contract and contract which is made for a period necessary for the completion of a specific undertaking business, the Labor Standard Act prohibits the parties from entering into a labor contract for a period exceeding three years or five years (for contracts with expertise, 60-year-old or older worker as specified in Article 14 paragraph 1).<sup>31</sup> With regard to the fixed-duration labor contract, the employer must consider not renewing the contract repeatedly as a result of prescribing a term that is shorter than necessary in light of the purpose of employing the worker based on such a labor contract.<sup>32</sup> However, a fixed-duration labor contract will not be converted to undetermined duration contract if the contract violates the rules mentioned in this paragraph.

Regarding renewal of the labor contract of fixed duration, the Labor Contract Act of Japan has protected the worker-whose contract has been repeatedly renewed in the past or who has reasonable ground to expect for renewal-from unjustified rejection by the employer to the worker’s request for renewal or conclusion of labor contract of fixed-duration upon expiry of the existing contract. If the employer’s refusal to accept the worker’s request lacks objectively reasonable ground and is not appropriate in a general social term, it is deemed that the employer accepts the worker’s said request. Article 19 of the Labor Contract Act reads:

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<sup>30</sup> Article 4, paragraph 2, Labor Contract Act of Japan.

<sup>31</sup> Article 14, Labor Standard Act of Japan.

<sup>32</sup> Article 17, paragraph, Labor Contract Act of Japan.

“If, by the expiration date of the contract term of a fixed-term labor contract which falls under any of the following items, a Worker applies for a renewal of the said fixed-term labor contract, or if a Worker applies for the conclusion of another fixed-term labor contract without delay after the said contract term expires, and the Employer’s refusal to accept the said application lacks objectively reasonable grounds and is not found to be appropriate in general societal terms, it is deemed that the Employer accepts the said application with the same labor conditions as the contents of the prior fixed-term labor contract:

(i) the said fixed-term labor contract has been repeatedly renewed in the past, and it is found that terminating the said fixed-term labor contract by not renewing it when the contract term expires is, in general, social terms, equivalent to terminating a labor contract without a fixed term by expressing the intention to fire a Worker who has concluded the said labor contract without a fixed term;

(ii) it is found that there are reasonable grounds upon which the said Worker expects the said fixed-term labor contract to be renewed when the said fixed-term labor contract expires.”

To sum up, the labor contract renewal or conversion in Japan is initiated by the worker who has been qualified to request for contract renewal or conversion to his or her employer.

#### **IV. Comparison between labor contract conversion rules in Cambodia and Japan**

##### **1. Compulsory conversion rules versus at-will conversion rules**

As discussed above, one of the remarkable differences between Cambodia’s and Japan’s labor contract conversion rules rests upon the worker’s will or intention. In Cambodia, as long as the labor contract fulfills certain conditions enabling automatic conversion, the fixed-duration contract will be transformed into a labor contract of an undetermined duration. The conversion rules in Cambodia are compulsory; consequently, any agreement of the parties contrary to these rules is void. The conversion rules of Japan respect the worker’s will to convert the contract and make it compulsory for the employer to accept the worker’s request. After the five-year period of continuous employment relation has passed, if the worker wishes to continue working with the same employer and requests for the conclusion of the labor contract of an undetermined duration, the employer must accept the said request.



## **2. Content of conversion rules**

Comparatively, the conversion rules of the two countries have the same purpose in promoting and protecting the employment security of the workers from the abusive use of a fixed-duration contract for long-term employment relations. However, the contents of the rules of the two legal systems are different in terms of scope and level of protection, to be discussed in this section. The labor contract conversion rules in Cambodia cover the process of contract formation, total duration of the contract, renewal of contract, and tacit renewal, while the contract conversion rules in Japan cover the total duration of the fixed-term contract and tacit renewal of the contract. The guarantee for continued employment in Article 19 is very connected with the contract conversion in Article 18 of the Labor Contract Act of Japan because the continued employment causes the fixed-duration contract to become an undetermined duration contract if the above requirements are fulfilled. However, in Cambodia, there is no rule specifically requiring a justifiable reason for not renewing the fixed-duration contract after the expiry of the previous contract.

In Cambodia, the fixed-duration labor contract must be written in writing and have a specified expiry date. The duration of the initial contract cannot exceed two years, and the total duration of contract renewal cannot be more than two years. Hence, the duration of the fixed duration can be up to 4 years, depending upon the duration of the initial contract of fixed duration. If the parties violate the rules on the formation or those of duration of the contract, the contract is automatically transformed into a labor contract of an undermined duration. Moreover, if the labor contract is made for more than six months, the employer must notify the worker ten days before the expiry or non-renewal of the labor contract. This notice period is 15 days if the labor contract is made for more than one year. Failing to serve such notice, the contract will be automatically renewed for the same period as the previous contract and will become a labor contract of an undetermined duration if the total duration of renewed contracts exceeds two years. The implicit continuation of the employment contract after the end of the fixed-duration contract will convert the contract to the undermined duration contract. Based on the summary of the conversion of Cambodia in the preceding sentences, parties need to carefully administer the formation and implementation of their contracts to avoid contract conversions. Since no rule requires an employer to justify his or her refusal to accept a worker’s request for renewal or conclusion of the fixed-duration contract, the employer can freely terminate the fixed-duration contract upon the expiry date.

In Japan, in addition to the case of tacit renewal of employment relations and of continuing employment relations for a period longer than the period required for the fixed-term, conversion of a contract is also possible when the worker who has been working with the same worker for more than five years requests for the conclusion of the undetermined duration. The worker must make such a request before the expiry date of his or her existing fixed-duration contract, and the labor contract of an undetermined duration will start after the expiry date of the existing contract. Regarding the guarantee for continued employment, to avoid the employer from unjustly rejecting the renewal of the fixed-duration contract, the Labor Contract Act ruled that if the rejection of the employer worker's request for continuation of the fixed-duration or to conclude a new fixed-duration upon the expiry of the existing fixed-duration contract lacks objectively reasonable grounds and is not found to be appropriate in general societal terms, it is deemed that the employer accepts the said request with the same labor conditions as the contents of the prior fixed-term labor contract. This rule applies to the case of repeated renewals of fixed-duration contracts, and non-renewal of fixed-duration is not appropriate in general social terms or where there is reasonable ground on which the worker expects the renewal of his or her existing fixed-duration contract.

Regarding the calculation of the continuous relations, Article 18, paragraph 2 of the Labor Contract Act of Japan has defined continuous relations if there is a break or vacant period between the previous contract and the new contract, which is less than six months. Comparatively, the vacant period is longer than the vacant period defined in Instruction No. 050/19 of Cambodia. The gap between the previous fixed-duration contract and the next fixed-duration in Cambodia is one month.

## **V. Recommendation for conversion rules of Cambodia**

Based on the comparison between Cambodia's and Japan's labor contract conversion rules, the report discusses the similarities, differences, and effectiveness in limiting the abusive use of a fixed-duration contract. This paper suggests that compulsory conversion rules should be maintained considering the social and economic inferiority of workers in Cambodia. Based on the rule on the guarantee of employment in Japan, the report proposes that Cambodia adopts the rule on the guarantee for the continuation of employment by prohibiting the employer from unjustly rejecting the worker's request for renewal or concluding new fixed-duration upon expiry of the existing contract. Based on the current conversion rules of Cambodia, if the employer precisely administers the use of the fixed-

duration contract, the conversion from a fixed-duration contract to an undetermined-duration contract can be avoided. However, if there is a requirement that the employer presents a valid reason for denying the worker’s request for continuing employment, it can cause the continuation of employment under a fixed-duration contract to exceed the period limited by the law for the fixed-duration contract. This suggestion can come into existence if there is an amendment to the Labor law of Cambodia.

