
THE
INTERNATIONAL
ARBITRATION
REVIEW

SIXTH EDITION

EDITOR
JAMES H CARTER

LAW BUSINESS RESEARCH

THE INTERNATIONAL ARBITRATION REVIEW

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2015

Chapter 41

THAILAND

Chinnavat Chinsangaram, Warathorn Wongsawangsi, Teerasak Petchpaibool and Rawin Herabat¹

I INTRODUCTION

i Structure of the law

Under Thai law, two forms of arbitration are currently recognised: out-of-court arbitration and in-court arbitration. While out-of-court arbitration is regulated under the provisions of the Arbitration Act 2002, in-court arbitration refers to a process in the court of first instance where the parties agree to submit issues in dispute before the court to arbitration and is governed by the Civil Procedure Code (CPC). As in-court arbitration is rarely used in Thailand, this chapter will focus on out-of-court arbitration, which has gradually been gaining popularity in recent years.

The Arbitration Act 2002 was enacted to replace the Arbitration Act 1987. Having realised the need to improve the standard of arbitration in Thailand to meet international standards, the drafters of the Arbitration Act 2002 adopted most of the provisions in the UNCITRAL Model Law on International Commercial Arbitration.²

In line with UNCITRAL Model Law, the Arbitration Act 2002 addresses both the procedural aspects of arbitration and the enforcement of awards.

ii Distinctions between international and domestic arbitration law

The Arbitration Act 2002 governs both domestic and international arbitration. Thus, currently there is no distinction between international and domestic arbitration under Thai law.

1 Chinnavat Chinsangaram is an executive partner, Warathorn Wongsawangsi is a senior associate and Teerasak Petchpaibool and Rawin Herabat are associates at Weerawong, Chinnavat & Peangpanor Ltd.

2 The Thai Arbitration Institute, 'The New Arbitration Era in Thailand', (2002).

iii Structure of the courts, including specialist courts

Typically, the Thai court system is a three-tiered judicial system comprised of: (1) the courts of first instance, which in turn comprise district courts, provincial courts and specialist courts; (2) the courts of appeal; (3) the Supreme Court, the highest court in Thailand. Pursuant to Section 9 of the Arbitration Act 2002, the Intellectual Property and International Trade Court is the specialist court that has jurisdiction over arbitration-related cases.³

iv Local institutions

Currently, there are several institutions providing arbitration services under their own arbitration rules to facilitate domestic and cross-border disputes that arise in Thailand and other countries.

Thai Arbitration Institute

In 1990, the Thai Arbitration Institute (TAI) was established as the ‘Arbitration Office’ under the authority of the Ministry of Justice. However, in 1997, the Office of the Judiciary took over the supervision of the Arbitration Office from the Ministry of Justice and the name was then changed to the TAI. The TAI continually promotes arbitration in both public and private sectors and contributes greatly to the development of Thai arbitration, including the drafting of the Arbitration Act 2002. The TAI is currently the main arbitration body in Thailand that facilitates the arbitration process by assisting with the selection of the arbitrator and providing the resources required for arbitration proceedings. With qualified and experienced experts in various fields in 17 categories, the TAI provides arbitration services to disputing parties under its own set of rules.⁴

The Thai Chamber of Commerce

Since 1968, the Office of the Arbitration Tribunal of The Thai Chamber of Commerce (TCC) has offered arbitration services provided by its Thai Commercial Arbitration Committee. The arbitration proceedings are conducted under its own rules, which were adopted from the ICC Rules of Arbitration and the Economic Commission for Asia and the Far East (ECAFE) Rules of International Commercial Arbitration and the ECAFE Standard for Conciliation.⁵

Thailand Arbitration Center

The Thailand Arbitration Center (THAC) was established under the Arbitration Institution Act 2007 as a non-governmental organisation to ensure the neutrality of the

3 Arbitration Act 2002 Section 9.

4 Alternative Dispute Resolution Office Thailand, Office of the Judiciary, ‘Thai Arbitration Institute’, www.adro.coj.go.th/info.php?info=sub_menu&cid=12&pm=3&co=en (accessed 25 April 2015).

5 Office of the Arbitration Tribunal of The Thai Chamber of Commerce, ‘What is Thai Commercial Arbitration?’, <http://rss.thaichamber.org/rss/view.asp?nid=1169> (accessed 25 April 2015).

institution. Currently, the THAC is drafting the rules and regulations that will govern the organisation when operations are commenced in late 2015. The THAC's objectives are to promote and develop procedures in arbitration and to provide arbitration services to resolve civil and commercial disputes in Thailand and abroad in various areas; for example, finance, banking, engineering and cross-border disputes. The THAC is planning to set out its own rules and services in accordance with international standards, with modern facilities and experienced arbitrators as well as mediation services through its THAC Mediation Center.⁶

v Trends and statistics

Arbitration proceedings in special governmental institutions

Throughout the years, ADR, especially arbitration, has been promoted by various Thai governmental institutions to solve commercial claims governed by special laws. Under this approach, claims are solved by professional officials or arbitrators who are specialised in specific areas to facilitate fair and expedited dispute-resolution proceedings. This approach not only benefits the disputing parties but also helps to reduce claims in arbitration institutions or other arbitration venues.

Office of Insurance Commission

In 1998, the Department of Insurance Official Decree No. 95/2541⁷ provided that all kinds of insurance policies, except for the Marine Hull Policy and Marine Cargo Policy, shall contain a provision that allows the parties to policies to settle disputes by arbitration. This rule also applies to all insurance policies issued before the date of the Official Decree. Therefore, in the same year, the Department of Insurance, Ministry of Commerce (which turned over its authority to the Office of the Insurance Commission (OIC) in 2008) set out rules on arbitration for claims arising from insurance agreements to be resolved by the Arbitration Committee. Any person who wishes to claim his or her rights under an insurance agreement by arbitration proceedings may submit a claim to the Department of Insurance, and the claim will be resolved within 90 days from the date the arbitrator(s) is appointed. Any extension to the 90-day period is subject to the arbitrator's discretion.⁸ In 2008, some details of the rules were slightly amended by the OIC to be in line with the current insurance business; however, the general principles are

6 As the TAI was established first (more than 20 years ago), many contracts that contain arbitration clauses and are governed by Thai law usually specify the TAI as an arbitration venue in the event of a dispute. However, the THAC is a new institution which sometimes causes confusion for contracting parties. Therefore, the THAC is currently being promoted in various dispute resolution seminars and other academic meetings for a better understanding of THAC's rules and services.

7 Department of Insurance Official Decree, 19 November 1998, No.95/2541.

8 Regulation of Insurance Department on Arbitration Proceedings, 1 September 1998 (as amended).

still the same.⁹ In 2014, over 300 insurance disputes were filed with the OIC. Some of them were settled by mediation and some were resolved by arbitration.

Department of Intellectual Property

Intellectual property is an important part of global business and the infringement of intellectual property rights has often been of serious concern in Thailand. In 2002, the Department of Intellectual Property (DIP) announced its rules on intellectual property arbitration proceedings to facilitate intellectual property claims. Any person who wishes to claim his or her right under intellectual property laws by arbitration proceedings may submit a claim to the DIP and the claim will be resolved within 90 days from the date the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator's discretion but it shall not be more than an extra 90 days.¹⁰ However, based on public records, most intellectual property disputes were settled by mediation. There were only four arbitration cases resolved by the DIP between 2002 and 2010.¹¹

Securities and Exchange Commission

Since securities transactions have dramatically increased throughout the past 10 years, in 2008, the Securities and Exchange Commission (SEC) set out rules on arbitration to allow disputes that arise from securities and exchange laws, provident fund laws, derivative laws or related rules to be overseen by arbitrators. For a petition for arbitration to be submitted to the SEC, the value of the claim of each investor must not exceed 1 million baht and, if it is a service claim, it must meet certain other conditions. If the claim falls under the conditions set out in the Notification,¹² the SEC will allow such claim to be resolved by the SEC's arbitrators. The claim will be resolved within 90 days from the date the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator's discretion but it must not be more than an extra 180 days unless the parties agree otherwise. However, since 2008, only nine cases have been referred to the SEC for arbitration.

From the above-mentioned trends, in the near future, arbitration may be adopted in other governmental institutions to provide out-of-court dispute resolution between parties and especially to protect individual consumers and contractors who cannot afford the time and expense of complicated, lengthy court proceedings.

9 Regulation of the Office of Insurance Commission on Arbitration Proceedings, 25 July 2008 (as amended).

10 Regulation of the Ministry of Commerce on Intellectual Property Arbitration Proceedings, 11 July 2002.

11 Department of Intellectual Property, 'Statistics of Intellectual Property Disputes', www.ipthailand.go.th (accessed 30 April 2015).

12 Notification of the Securities and Exchange Commission on Arbitration Proceedings, 14 May 2008 (as amended).

Enforcement of arbitration clauses in contracts with Thai administrative agencies

Before 2009, there were cases where arbitration clauses in contracts with Thai administrative agencies were enforceable and the disputes were resolved by arbitrators; however Thai governmental agencies often lost the claims and were required to pay substantial amounts of compensation to the other parties. Therefore, on 28 July 2009, a Cabinet resolution was announced to prohibit the use of arbitration clauses in contracts between administrative agencies and private parties, unless prior approval from the Cabinet was first obtained. This resolution set the benchmark for many of such disputes to proceed through court litigation rather than arbitration proceedings as approval is considered by the Cabinet on a case-by-case basis.

Statistics

Based on the available public records, the report of the Department of Civil Dispute Settlement and Arbitration of the Office of the Attorney General shows that the number of arbitration claims resolved by the TAI was 62 in 2013 and 66 in 2014.¹³

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Legislation

As stated above, the Arbitration Act 2002 closely follows the UNCITRAL Model Law. The Arbitration Act 2002 enshrines the freedom of parties to contract as they may decide on the place of arbitration, the language to be used in the arbitral proceedings, the procedures regarding the appointment of the arbitrators and other practical matters. In such matters, the Arbitration Act 2002 will only be applicable when the parties fail to agree.

On the other hand, there are a few provisions that deviate from the UNCITRAL Model Law, for example:

- the Arbitration Act 2002 has not been amended to include the provisions on interim measures and preliminary orders, which were adopted by UNCITRAL in 2006;
- the Arbitration Act 2002 exempts arbitrators from civil liabilities except in cases where they willfully or through gross negligence cause damage to either party;¹⁴
- the Arbitration Act 2002 provides that arbitrators may apply the provisions of the law of evidence under the CPC to the proceedings *mutatis mutandis*; and
- the Arbitration Act 2002 empowers the presiding arbitrator to solely issue an award, an order or a ruling in the case that a majority vote cannot be obtained.¹⁵

13 Department of Civil Dispute Settlement and Arbitration, 'Statistics of cases', www.dispute.go.th/index.php/sn (accessed 25 April 2015).

14 Arbitration Act 2002 section 23.

15 Arbitration Act 2002 section 35.

While the Arbitration Act 2002 has no provisions regarding arbitrability, it is widely understood that only civil and commercial disputes that are not contrary to public policy are arbitrable. This is because under Section 40 of the Arbitration Act 2002, it is at the discretion of the competent Thai courts to set aside an arbitral award in a case where the recognition or enforcement of the award would be contrary to public policy.¹⁶ This is in line with the Arbitration Act 1987. Thus, criminal disputes or civil disputes that are contrary to public policy – such as contracts involving murder, prostitution or gambling – are not arbitrable under current Thai law.¹⁷

With respect to the recognition and the enforcement of awards, Thailand is a party to the Geneva Convention on the Execution of Foreign Awards 1927 (the ‘Geneva Convention 1927’) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the ‘New York Convention 1958’). Therefore, arbitral awards issued in countries that are also parties to the Geneva Convention 1927 and the New York Convention 1958 may be recognised and enforced in Thailand.

Since the Arbitration Act 2002 came into effect, no further amendments have been made to the law.

Court judgments

As Thailand is a civil law country, court rulings are not regarded as sources of law. Rather, they are read as convincing examples in the interpretation of current laws.

New THAC rules

As mentioned above, the THAC is a newly established arbitration institution. In 2014, THAC announced its Rules on Mediation,¹⁸ the Registry of Mediators¹⁹ and Ethics of Mediators²⁰ to facilitate mediation services for domestic and international disputes through its THAC Mediation Center. This framework was created to promote amicable dispute resolution between parties through mediations that will be faster than arbitration proceedings. THAC operations are scheduled to begin within 2015.

ii Arbitration developments in local courts

Interpretation and enforcement of arbitration clauses

In Thailand, arbitration clauses are recognised in the Arbitration Act 2002. Pursuant to Section 11, ‘An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.’²¹ This Section can be taken to mean that arbitration clauses shall be considered for the form of arbitration, the appointment of the arbitrator, and the powers and duties of the arbitrator. Arbitration under the

16 Arbitration Act 2002 Section 40.

17 S Asawaroj, *Explanation on Settlement of Commercial Disputes through Arbitration* (Third Edition, Thammasat University Press, Bangkok, 2011).

18 THAC Rule on Mediation, 29 August 2014.

19 THAC Rule on Registry of the Mediators, 20 June 2014.

20 THAC Rule on Ethics of Mediators, 29 August 2014.

21 Arbitration Act 2002 Section 11.

Arbitration Act 2002 shall be *de facto* brought about only by contractual relationships. To put it another way, dispute settlement by means of arbitration is a result of contractual relationships separable from the main objective of the agreement to which the arbitration clauses adhere. Hence, under the doctrine of separability of Section 24 in the Arbitration Act 2002, the invalidity of the main agreement shall not have an effect on the legality of the arbitration as the adhesive clause.²²

Under the Arbitration Act 2002 and the Commercial and Civil Code, there are two factors in the validity of arbitration clauses: the capacity of the parties and the form of the arbitration agreement.

With regard to capacity, the Arbitration Act 2002 states that ‘in any contract made between a government agency and a private enterprise, regardless of whether it is an administrative contract or not, the parties may agree to settle any dispute by arbitration.’²³ This enables a government agency to enter into an arbitration agreement with a private party, however, the Cabinet Resolution of 28 July 2009 has prohibited arbitration in contractual disputes between administrative agencies and private parties unless prior approval from the Cabinet is obtained. Unless this Cabinet Resolution is reversed, it will be difficult for an administrative agency to proceed with arbitration in a dispute arising out of a contract.

The enforcement of arbitration agreements is contemplated in Section 14 of the Arbitration Act 2002. In the event where any party to an arbitration agreement initiates a claim in court against the other party thereto with regard to any dispute within the scope of the arbitration agreement, the defendant may request the court to dismiss such case in order for the parties to resume arbitral proceedings. If the court finds that there are no grounds to find such arbitration agreement to be void, unenforceable or impossible to perform, the court may dispose of the case.

Qualifications and challenges to arbitrators

Similar to UNCITRAL Model Law, Section 19 of the Arbitration Act 2002 stipulates that an arbitrator may be challenged in circumstances that give rise to ‘justifiable doubts’ as to his or her impartiality or independence. For instance, in one case an arbitrator who received a subscription form for new shares of a party before the arbitration and subsequently granted the right to buy such shares to an employee under his supervision was deemed to have an obligation to disclose such fact because this circumstance was likely to give rise to justifiable doubts as to his impartiality or independence. Having failed to do so, the arbitrator was disqualified by the Supreme Court.²⁴ Furthermore, the Act imposes liability on the arbitrator for his or her civil actions conducted as arbitrator, with intent or gross negligence that cause damage to any party.²⁵ There is some discussion among the responsible authorities and practitioners with regard to the need to provide

22 T Suwanpanich, *Explanation on Thai Arbitration Act B.E. 2545* (Nititham, 2002).

23 Arbitration Act 2002 Section 15.

24 Thai Supreme Court Decision No. 2231/2553.

25 Arbitration Act 2002 Section 23.

stricter guidance on the ethical conduct of arbitrators and the prevention of unethical actions.

Last but not least, in disputes between government agencies and the private sector, the impartiality and fairness of the arbitrators may become an important focus in arbitration. In Thailand, government agencies are represented by public prosecutors before the court or arbitrator. The administrative contracts between the government agencies and the private parties in question are reviewed or sometimes drafted by the Public Prosecutor. When a dispute arises from such contracts which include an arbitration clause, government agencies often appoint a public prosecutor to be the arbitrator. Thus, it is critical that a fair and impartial Public Prosecutor be appointed in such cases. In the past, there have been many cases where a party from the private sector has alleged that the Public Prosecutor appointed as arbitrator to the court of justice or the administrative court lacked the necessary qualifications of being fair and impartial. In these cases, evidence is required to prove that the appointed arbitrator lacks fairness and impartiality, otherwise, the arbitrator is deemed to have such qualifications.²⁶

Judicial assistance in evidence gathering in arbitration proceedings

Evidentiary and witness proceedings are based on the doctrine of equality set out in Section 25 of the Arbitration Act 2002. The Section provides that, under the consideration of the arbitrators, the parties shall receive equal treatment and have an opportunity to present witnesses and evidence as appropriate in the circumstances of each case.²⁷

An arbitral tribunal ordinarily has no direct power to either summon witnesses or grant interim measures for protection. Such power is held by the national court. The arbitral tribunal or parties can therefore request judicial assistance in evidence gathering and in granting interim measures for protection before or during the arbitral proceeding.

Enforcement or annulment of awards

A foreign arbitral award will have a binding effect in Thailand on the condition that the award was issued in a jurisdiction that is a party to the New York Convention on the Recognition of Foreign Arbitral Awards, to which Thailand is a signatory. A party seeking enforcement of an arbitral award must file an application with a court of jurisdiction.

A stay of enforcement may be granted by a court only if the opposing party is able to present witnesses and evidence to satisfy the court that: (1) a contractual party was not legally fit to execute the arbitration agreement; (2) the arbitration agreement cannot be enforced; (3) a notice of arbitration was not duly served to a party or a party was not granted the lawful right to defend itself before the law; (4) the arbitral award involves the enforcement of conditions extending beyond the scope of the arbitration agreement; (5) the members that formed the arbitral tribunal or arbitral proceedings undertaken were not in compliance with the law or the provisions contemplated in the arbitration agreement; or (6) the arbitral award involves a dispute that cannot be resolved

26 Administrative Court Order Black Case No. Kor.1/2554, Red Case No. Kor.5/2554.

27 Arbitration Act 2002 Section 25.

by means of arbitration.²⁸ Therefore, this legal mechanism allows a party to challenge any arbitration award and international award in a Thai court on certain limited grounds. In such a case, the challenge may cause delays in the enforcement of the award.

iii Investor–state disputes

In the past, the courts rarely recognised or enforced arbitral awards where the government lost the case and was required to pay a considerable amount of compensation for damages. However, recently, a court has enforced an arbitration award related to a contract dispute with an administrative agency. On 21 November 2014, the Supreme Administrative Court ruled that, based on the ruling of an arbitration committee, the Pollution Control Department must pay compensation of more than 9 billion baht to a six-firm joint venture that had won a case related to a contract to construct the Klong Dan wastewater treatment plant.

III OUTLOOK AND CONCLUSIONS

Due to the many advantages of arbitration over court litigation, arbitration will likely become the main dispute resolution method for both domestic and international commercial disputes in Thailand. Arbitral institutes will be able to provide professional and effective arbitral services to the disputing parties and we expect that the arbitral service market will become more competitive after the THAC commences services. At the same time, we are of the view that the issue of impartiality and fairness of the arbitrator will become the main focus in arbitration. Given that the arbitrator is selected by a party to the dispute and without any ethical code of conduct governing the arbitrator, the fairness and impartiality of an award may be questioned. Consequently, the parties to the arbitration may lack confidence in the arbitration procedures. Clear guidelines with regard to the arbitrators' qualifications are required to create confidence in arbitral proceedings.

Nevertheless, it is widely accepted that arbitration is the effective dispute resolution method for public–private investment disputes. Given that foreign investors are often parties to government-sector contracts, to promote foreign investment, arbitration proceedings should be fair, effective and in accordance with international standards. Further, we are of the view that the Cabinet Resolution of 28 July 2009 prohibiting arbitration of a dispute in relation to an administrative contract should be revoked.

28 Arbitration Act 2002 Section 41.

Appendix 1

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Chinnavat Chinsangaram is one of Thailand's most experienced lawyers in mergers and acquisitions, banking and finance, restructuring and insolvency, as well as real estate, aviation and maritime law. He represents Thai and international clients in a wide range of industries and is renowned for his in-depth expertise in deal structuring and complex transactions. Chinnavat has represented some of Thailand's largest banks and corporations in major deals, financing and refinancing transactions, as well as dispute resolution.

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