The International Arbitration Review

Seventh Edition

Editor
James H Carter

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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 by an 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 2016

Chapter 42

THAILAND

Chinnavat Chinsangaram, Warathorn Wongsawangsiri and Chumpicha Vivitasevi[1]

I INTRODUCTION

i Laws governing arbitration

Two forms of arbitration are currently recognised under Thai law: in-court arbitration and out-of-court arbitration.

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. It is governed by the Civil Procedure Code, Sections 210-220 and 222, which provide for the process of setting up an arbitral tribunal (by parties or by the court, or both), the procedural rules to be observed by the tribunal, the making of an arbitral award and the enforcement of the award. Nevertheless, in-court arbitration is rarely used in Thailand. We suspect that this is because the availability of in-court arbitration is under-publicised.

Out-of-court arbitration is the main type of arbitration in Thailand, and therefore the main focus of discussion in this chapter. It is currently governed by the Arbitration Act[2] (Arbitration Act 2002).

Pursuant to Section 11 of the Arbitration Act 2002, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Section 24 of the Act provides that the invalidity of the main contract shall not have an effect on the legality of the arbitration clause.

The Arbitration Act 2002 does not provide comprehensive guidelines on what is arbitrable. It simply provides that courts may dismiss an application for the enforcement of an arbitral award if it finds that the award involves a dispute 'not capable of settlement by arbitration under the law'. Therefore, this is at the discretion of the court on a case-by-case basis. Nevertheless, it is widely understood that only civil and commercial disputes that are

1 Chinnavat Chinsangaram is an executive partner, Warathorn Wongsawangsiri is a partner and Chumpicha Vivitasevi is an associate at Weerawong, Chinnavat & Peangpanor Ltd.

2 BE 2545 (AD 2002).

not contrary to public policy are arbitrable. Disputes relating to administrative contracts between a government agency and a private enterprise are explicitly recognised as arbitrable by Section 15 of the Arbitration Act. Criminal disputes or civil disputes concerning public policy, such as disputes between employers and employees relating to employee rights according to the labour law,[3] disputes relating to trade competition law and disputes relating to mandatory corporate law, are not arbitrable.

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. The provisions relating to such matters in the Act serve as default rules applicable only when the parties fail to agree.

The Arbitration Act 2002 further provides that the arbitral tribunal shall have the power to conduct any proceedings in any manner it deems appropriate. This includes the power to determine the admissibility and weight of the evidence. The Act stipulates that the arbitral tribunal must apply the laws of evidence of the Code of Civil Procedure to proceedings *mutatis mutandis*,[4] and that the parties shall be treated with equality and shall be given a full opportunity to present their case.[5]

Thai courts are required to enforce an arbitral award, irrespective of the country in which it was made, provided, however, that if an arbitral award was made in a foreign country, the award shall be enforced only if it is subject to an international convention treaty or agreement to which Thailand is a party, and such award shall be applicable only to the extent that Thailand accedes to be bound.[6] In this regard, Thailand is a party to the Geneva Convention on the Execution of Foreign Awards 1927 (Geneva Convention 1927) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention 1958). Therefore, arbitral awards issued in countries that are also parties to the Geneva Convention 1927 or the New York Convention 1958 will be enforceable in Thailand.

According to the Abitration Act 2002, arbitral awards can be challenged only in very limited circumstances, for example:

a when the arbitration agreement is not valid;

b when the composition of the arbitral tribunal or the arbitral proceeding was not consistent with the agreement;

c when the arbitral award is beyond the agreement; and

d when the recognition or enforcement of the award would be contrary to public order or good morals.[7]

The Arbitration Act 2002 favours arbitration by bypassing the court of appeal when it comes to decisions rendered by a court under the Act. Typically, the Thai court system is a three-tiered judicial system composed of the courts of first instance, which in turn comprise district courts, provincial courts and specialist courts; the courts of appeal; and the Supreme Court,

3 Supreme Court judgments No. 3530/2549 (AD 2006) and No. 4038-4039/2542 (AD 2002).

4 This part of the provision deviates from the UNCITRAL Model Law.

5 Arbitration Act 2002, Section 25.

6 Arbitration Act 2002, Section 41.

7 Arbitration Act 2002, Sections 40 and 43.

the highest court in Thailand. Nevertheless, in the context of arbitration, the Arbitration Act 2002 provides that an appeal against a court's order of judgment under the Act shall be filed with the Supreme Court directly.[8]

It is worth noting that the Arbitration Act 2002 adopts most of the provisions in the UNCITRAL Model Law on International Commercial Arbitration. Nevertheless, there are a few provisions in the Arbitration Act 2002 that deviate from the UNCITRAL Model Law. For example:

a 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;

b the Arbitration Act 2002 exempts arbitrators from civil liabilities except in cases where they wilfully or through gross negligence cause damage to either party;[9] and

c the Arbitration Act 2002 empowers the presiding arbitrator to solely issue an award, an order or a ruling in the event that a majority vote cannot be obtained.[10]

ii 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 (TAI)[11]

The TAI was established in 1990 under the authority of the Ministry of Justice. It is now under the supervision of the Arbitration Office of the Office of the Judiciary, which is an independent organisation from the Ministry of Justice having power and duties to manage the administrative work of the Court of Justice. 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. It is currently the main arbitration body in Thailand that facilitates the arbitration process by assisting with the selection of the arbitrators 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.[12]

The Thai Chamber of Commerce (TCC)[13]

Since 1968, the Office of the Arbitration Tribunal of the 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. The TCC appears to be the preferred institution for arbitration for foreigners that have businesses in Thailand.

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8 Arbitration Act 2002, Section 45.

9 Arbitration Act 2002, Section 23.

10 Arbitration Act 2002, Section 35.

11 Thai Arbitration Institute: www.tai.coj.go.th/ (accessed 20 May 2016).

12 Arbitration Rules, the Arbitration Institute, Office of the Judiciary.

13 ICC Thailand International Chamber of Commerce; iccthailand.or.th/commission/arbitration (accessed 20 May 2016).

Thailand Arbitration Centre (THAC)[14]

The THAC was established under the Arbitration Institution Act 2007 as a non-governmental organisation to ensure the neutrality of the institution. Its objectives are to promote and develop procedures in arbitration, and to provide arbitration services to resolve domestic and international civil and commercial disputes in various areas (e.g., international trade, finance and banking).[15]

iii Arbitration proceedings in special governmental institutions

Throughout the years, 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 (OIC)

In 1998, Department of Insurance Official Decree No. 95/2541[16] provided that all kinds of insurance policies, except for the Marine Hull Policy and Marine Cargo Policy, shall contain a provision that allows 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 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 or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator's discretion.[17] 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 still the same.[18] Each year, over 300 insurance disputes are filed with the OIC.[19] Some of them are settled by mediation and some by arbitration.

14 thac.or.th (accessed 20 May 2016).

15 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 to promote a better understanding of the THAC's rules and services.

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

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

18 Office of Insurance Commission, Arbitration Laws and Regulations: www.oic.or.th/en/consumer/law/arbitration/law (accessed 20 May 2016).

19 Information from informal discussion with an officer of the Office of Insurance Commission.

Department of Intellectual Property (DIP)

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 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 shall not be more than an extra 90 days.[20] However, we have not been able to find recent statistics of the arbitration cases handled by the DIP.

Securities and Exchange Commission (SEC)[21]

Since securities transactions have dramatically increased during the past 10 years, in 2008, the 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 of the Securities and Exchange Commission on Arbitration Proceedings, 14 May 2008 (as amended), 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. In any case, we have been informed that up to 2016, there have been few SEC arbitration cases.

Based on 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.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Since the Arbitration Act 2002 came into effect, no further amendments have been made to it. Nevertheless, we saw developments in relation to the THAC in late 2015. The THAC has adopted a set of comprehensive regulations, including those relating to arbitration proceedings in the THAC, and a code of ethics for arbitrators.[22] The THAC has also adopted a regulation allowing the submission, receipt or delivery of documents and communications between parties to be carried out through an electronic system. However, such regulation is

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

21 www.sec.or.th/th/secinfo/lawsregulation/pages/arbitration1.aspx (accessed 20 May 2016).

22 Regulations of the Thailand Arbitration Centre RE: Arbitration Proceeding BE 2558 (AD 2015); Regulations of the Thailand Arbitration Centre RE: Ethics of Arbitrator BE 2558 (AD 2015): thac.or.th/index.php/th-rules-regulations (accessed 20 May 2016).

now applicable only to the settlement of disputes through negotiation and mediation.[23] We believe that it is possible that the THAC may consider extending this to facilitate arbitration proceedings, especially when the proceedings involve international parties.

ii Arbitration developments in local courts

The issue of whether Thai courts have authority to set aside foreign arbitral awards

Although not regarded as a source of law, Supreme Court judgments have strong persuasive authority. There are not many Supreme Court judgments on the arbitration law in Thailand. This may be because the arbitration law is relatively new (the first Arbitration Act was enacted in 1987), and because arbitration was not the most popular means of dispute settlement until recently. Nevertheless, Supreme Court Judgment No. 13534/2556[24] is noteworthy. The issue in the case was whether Thai courts have the authority to set aside awards made in foreign countries. Previously, in 2009, the Supreme Court, relying on Section 40 of the Arbitration Act, held that Thai courts have the power to set aside an arbitral award notwithstanding the place where the award was made.[25] Such decision was subject to criticism, since it seems to be contrary to the internationally accepted principle that only the courts that have jurisdiction over the place where the award was made can set aside the award, and other courts can determine only whether to 'enforce' such arbitral award within their jurisdiction. Supreme Court Judgment No. 13534/2556, although not explicitly, overruled the decision in 2009, and held that it would be of best interest to follow the comity principle and not exercise jurisdiction to set aside foreign awards according to Section 40 of the Arbitration Act. We believe that this signifies a change of perspective in the legal landscape in relation to arbitration law in Thailand.

Interpretation and enforcement of arbitration clause

During the past couple of years, there have been disputes in the administrative courts about the validity of arbitration clauses that provide for an 'even number of arbitrators'.

The issue arises because there was a transition in 2002 when the Arbitration Act[26] (Arbitration Act 1987) was replaced by the Arbitration Act 2002. Both Acts allow parties to fix the number of arbitrators by themselves. However, while the Arbitration Act 1987 did not explicitly provide that the number of arbitrators must be odd,[27] the Arbitration Act

23 Regulation of Thailand Arbitration Centre Re: Online Dispute Resolution (ODR) for E-Commerce Transactions BE 2558, Thailand Arbitration Centre: thac.or.th/en/wp-content/uploads/ODR-Translation_Final-18Jan.pdf (accessed 20 May 2016).

24 AD 2013.

25 Supreme Court Judgment No. 5511/2552 (AD 2009).

26 BE 2530 (AD 1987).

27 Arbitration Act 1987, Section 11:

> *There may be one or more arbitrators. In the case that there is more than one arbitrator, each party will be entitled to appoint an equal number of arbitrators.*
>
> *In the case that the arbitration agreement did not specify the number of the arbitrators, each party shall appoint one arbitrator, and the appointed arbitrators shall mutually appoint one more person to be another arbitrator.*

2002 does, and further stipulates that if the parties agree to an even number, the arbitrators appointed by the parties shall jointly appoint an arbitrator who shall act as the chair of the arbitral tribunal.[28]

Several disputes heard in the administrative courts during the time that the Arbitration Act 1987 was in force involved an arbitration clause that provided for an even number of arbitrators in disputes between state enterprises and private companies. In 2012 and 2014, the Central Administrative Court held that such an arbitration clause is invalid since it is inconsistent with the mandatory provision of the Arbitration Act 2002, which was applicable at the time the disputes between the parties arose, and the transitional provision in the Arbitration Act 2002, which endorses the validity of arbitration agreements made in accordance with the Arbitration Act 1987 does not apply to the issue about the number of arbitrators.[29] However, in another case in 2015, the Central Administrative Court held that such arbitration clause was still valid because it was made during the time the 1987 Act was in force and the 1987 Act did not require an odd number of arbitrators.[30]

One of the above cases has been appealed to the Supreme Administrative Court. It is expected that the judgment of the Supreme Administrative Court will set the trend for future interpretation of this issue.

Qualifications and challenges to arbitrators

Similar to the 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. 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 or her 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 or her impartiality or independence. Having failed to do so, the arbitrator was disqualified by the Supreme Court.[31] 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.[32]

There has been some discussion among the responsible authorities and practitioners with regard to the need to provide stricter guidance on the ethical conduct of arbitrators and

28 Arbitration Act 2002, Section 17:

The arbitral tribunal shall be composed of an uneven number of arbitrators.

If the parties have agreed on an even number, the arbitrators shall jointly appoint an additional arbitrator who shall act as the chairman of the tribunal. The procedure of appointing the chairman shall be in accordance with Section 18 paragraph one (2).

If the parties fail to reach an agreement on the number of arbitrators, a sole arbitrator shall be appointed.

29 Central Administrative Court Judgment No. Black Khor 3/2553, Red Khor 5/2555 (AD 2012) and Central Administrative Court Judgment No. Black Khor 1/2557, Red Khor 3/2557 (AD 2014).

30 Central Administrative Court Judgment No. Black Khor 1/2558, Red Khor 3/2558 (AD 2015).

31 Supreme Court Judgment No. 2231/2553.

32 Arbitration Act 2002, Section 23.

the prevention of unethical actions. The TAI has its own code of ethics for arbitrators,[33] and in 2015, new arbitration rules adopted by the THAC include rules relating to the conduct of arbitrators.[34]

Recently, the concern over the impartiality of arbitrators has been reflected in disputes between government agencies and the private sector in Thailand. 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 that include an arbitration clause, government agencies often appoint a public prosecutor as both the attorney and the arbitrator for the case. 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, because the public prosecutor plays different roles of the same office. Nevertheless, there has yet to be a case where an arbitrator who was selected from the Office of the Public Prosecutor is removed for this reason.[35]

iii Investor–state disputes

Cabinet resolution against the use of arbitration

The Arbitration Act 2002 explicitly provides for the arbitrability of disputes relating to administrative contracts between government agencies and private enterprises. However, after a series of cases where governmental agencies lost their claims and were required to pay substantial amounts of compensation to the other parties, the Cabinet passed a resolution on 28 July 2009 prohibiting the use of arbitration clauses in contracts between administrative agencies and private parties unless the prior approval of the Cabinet is first obtained. Such provision significantly reduces the chance of arbitration between investors and the state. In any case, the government has recently become more open to arbitration. On 14 July 2015, the Cabinet approved an amendment to a resolution dated 28 July 2009 stating that contracts between administrative agencies and private parties that are subject to prior approval for the use of arbitration clauses are limited only to contracts under the Public-Private Partnership Act[36] and concession agreements.

Recent court decisions

Recent court judgments show that courts incline towards the enforcement of arbitral awards even in the event that the state is a losing party. Notably, on 10 October 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. The Cabinet approved the payment according to the Court's judgment on 17 November 2015. However, it has been publicly reported that the government is considering making another petition to a court for reconsideration of the case.

33 Code of Ethics for Arbitrators, the Arbitration Institute, Office of the Judiciary.

34 Rules of the THAC relating to Regulations of the Thailand Arbitration Centre RE: Ethics of Arbitrator BE 2558 (AD 2015): thac.or.th/index.php/th-rules-regulations (accessed 20 May 2016).

35 Administrative court order Case No. Black Khor 1/2554, Red Khor 5/2554.

36 BE 2556 (AD 2013).

III OUTLOOK AND CONCLUSIONS

The past couple years have seen reasonable development in arbitration in Thailand, not only regarding aspects of arbitral institutions and their regulatory frameworks, but also the interpretation of relevant laws and regulations by the courts. Government sections have implemented initiatives to actively promote arbitration, which can be seen from the enactment of the law and regulations for the THAC and the attempts of several government agencies to establish arbitration departments within their organisations. Although there are some limitations, especially in relation to the government's policy for entering into arbitration agreements with private entities, and some inconsistencies in the interpretation of the arbitration law, we believe that looking forward, arbitration in Thailand will be subject to further improvement.

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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