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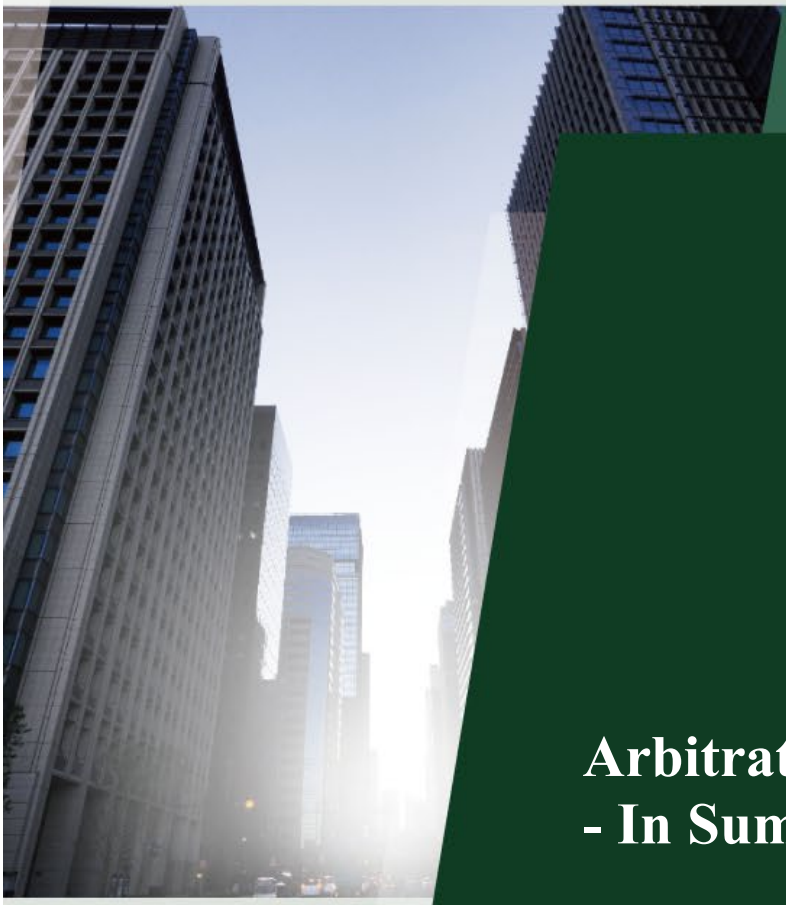

Arbitration in Thailand (1)
- In Summary

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Commercial arbitration is a unique method of dispute resolution where the parties voluntarily submit their disputes to a neutral third party, called the arbitrator(s) or the arbitral tribunal, selected by the parties themselves, for a decision or an "award" based on the evidence and arguments presented. The award rendered by the tribunal is considered as final and binding.

In a typical commercial arbitration, before the arbitral proceeding commences, the parties have the opportunity to agree upon most procedural aspects of the proceeding, such as the language of the proceeding (including the language of the evidence to be submitted), the disclosure and production of evidence, the seat of arbitration and the venue for the hearing, among others. Additionally, unless the parties wish for a public proceeding, the process of arbitration is normally confidential. Coupled with the fact that the parties can select arbitrators based on the latter's expertise and experience regarding the disputed subject matter, arbitration is generally considered a dispute resolution method with greater confidentiality and flexibility than traditional litigation. This customizability, along with arbitration's final and binding internationally enforceable decisions, sees it continuing to grow in popularity.

With the constant development of arbitration worldwide, the United Nations Commission on International Trade Law (UNCITRAL) has published the UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (the "**Model Law**"), to assist States in reforming and modernizing their national laws on arbitral procedure. The Model Law accounts for the particular features and needs of international commercial arbitration and covers all stages of the arbitral process, from the arbitration agreement to the recognition and enforcement of arbitral awards. Accordingly, the Model Law reflects the worldwide consensus on the key aspects of international arbitration practice. Specifically in Thailand, the modernization of commercial arbitration comes in the form of the enactment of the Arbitration Act B.E. 2545 (2002) (the "**Arbitration Act**"). The Arbitration Act was drafted based on the Model Law[1] and governs the entire process of arbitration from the creation of the arbitration agreement, through the constitution of the arbitral tribunal and carrying out of the arbitral proceedings, all the way to the setting-aside or recognition and enforcement of the award.[2]

1. Arbitration Agreement

Before the parties can initiate an arbitral proceeding, there must be an arbitration agreement in which the parties clearly indicate the intention to submit their dispute to an arbitral tribunal. Under the Arbitration Act, the arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. However, the agreement shall be in writing and signed by the parties. An arbitration clause constitutes an arbitration agreement if it is contained in an exchange between the parties by means of, among others, letters, facsimiles, data interchange with electronic signatures, other means which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.[3]

In this regard, the model clauses for an arbitration agreement as published by the institutes in Thailand are as follows:

"Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or validity thereof, shall be settled by arbitration in accordance with the [Arbitration Rules] applicable at

[1] Annotation annexes to the Arbitration Act

[2] Prior to the enactment of the Arbitration Act, commercial arbitration in Thailand was governed by the Arbitration Act B.E. 2530 (1987); however, it was not suited for international commercial arbitration nor in line with commercial arbitration practices of other countries. As such, the Arbitration Act was enacted as one of the tools to modernize commercial arbitration in Thailand.

[3] Section 11 of the Arbitration Act

the time of submission of dispute to arbitration, and the conduct of arbitration thereof shall be under the auspices of [Arbitration Institute]."[4]

"Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be referred to and finally resolved by arbitration in accordance with the [Arbitration Rules] for the time being in force and the conduct of the arbitration thereof shall be under the administration of [Arbitration Institute]."[5]

The parties are free to adopt an arbitration clause with wording and content that differ from what is provided by the institutions. For example, apart from the arbitration rules and institution, the seat of arbitration, hearing venue, language, and number and qualification of the arbitrator(s) may also be stipulated in the arbitration agreement. Additionally, it is worth noting that in the case where a party to an arbitration agreement initiates a legal proceeding in the court against the other party, in respect of any dispute which is the subject of the arbitration agreement, such other party may file a motion requesting the court to issue an order striking the case so that the parties may proceed with the arbitral proceeding, provided that there are no grounds for rendering the underlying arbitration agreement void, unenforceable or impossible to perform.[6]

2. Arbitration Rules and Institutions

During the process of drafting an arbitration agreement or before the submission of the dispute to the arbitral tribunal, as the case may be, the parties are well advised to select the arbitration rules that will be applied to their case as well as an arbitration institution that will oversee the proceedings. The arbitration rules are default procedural rules that will be applied to the parties during the process of the proceeding, such as the necessary content of the notice of arbitration and the response to it, the statements of claims and defense, the default number of arbitrator(s) and their method of appointment, the grounds for challenging the impartiality or independence of the arbitrator, the principles governing the rendering of an award, including the time period within which the arbitral tribunal shall render the award, as well as the method for deciding the relevant costs, expenses and fees.

While the arbitration rules provide the procedural rules for the parties, the arbitration institution acts as an administrative body that monitors the arbitration process and assists the tribunal and the parties during the entirety of the proceeding. Apart from the arbitration rules, the arbitration institution normally also provides venues for the hearing, administrative staff, a list of arbitrators for the parties to select as well as scrutinization of the award to avoid possible mistakes. In Thailand, there are two prominent arbitral institutions, namely, the Thai Arbitration Institute (TAI), an arbitration institution operated under the Office of the Judiciary, and the Thailand Arbitration Center (THAC), an arbitration institution independently operated under the Ministry of Justice to promote international commercial arbitration in Thailand. Apart from the abovementioned, there are also the Thai Commercial Arbitration Office, operated under the Board of Trade of Thailand; the Thai - Chinese International Arbitration and Mediation Center, specializing in commercial and investment disputes between Thailand and China; and the Office of Insurance Commission, which oversees insurance related disputes.

An arbitral proceeding which is administered by an institution is called an "institutional arbitration". Alternatively, the parties may also opt for so-called "*ad hoc* arbitration", i.e. a proceeding not administered by any arbitral institution. For *ad hoc* arbitrations, the parties have to determine all procedural aspects of the arbitration which normally would be governed in detail by the rules of an arbitral institution. As such, the parties have control over most aspects of the proceeding, but also have the challenge of agreeing on them, despite being in a dispute. It is worth noting that, in general, *ad hoc* arbitration requires that the parties have a certain knowledge and understanding of how arbitral proceedings should be conducted.

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[4] TAI Arbitration Model Clause

[5] THAC Arbitration Model Clause

[6] Section 14 of the Arbitration Act

Normally, the only fallback to this approach is the (potentially) rudimentary framework of a national arbitration act, at least once the seat of arbitration has been determined. Parties therefore tend to adopt the arbitration rules they deem most appropriate (e.g. ICC or SIAC Arbitration Rules, or the rules of other arbitral institutions).

3. Seat of Arbitration (Place of Arbitration)

The seat of arbitration is an important aspect the parties have to decide on. Basically, the seat of arbitration is a location selected as the legal place of arbitration. The seat of arbitration determines the governing national procedural law of the arbitration and in turn, the intervention of the courts and the national enforceability of the award. For example, if Thailand is chosen as the seat, the Thai Arbitration Act would be applied to the procedural aspects of the arbitration and if Singapore is chosen, the Singapore International Arbitration Act (IAA) would be applied – as least insofar as procedural issues are not already governed by the chosen arbitration rules. The choice of seat of arbitration may affect the enforceability of the award as different countries have different grounds for the award to be challenged. Some countries allow the challenge of the award based on errors of procedure or public policy, which differ depending on the jurisdiction, while some only allow challenges based on general grounds such as the lack of jurisdiction or impartiality of the arbitrators. Additionally, the courts of certain countries, when chosen as the seat, may only intervene in support of arbitration (e.g. in order to grant interim relief) while others interfere in the arbitration process and decline to respect the arbitration agreement. In general, it is advisable to choose a seat of arbitration in a state that is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (the "**New York Convention**"), or a state whose laws favor arbitration and whose courts support, rather than interfere with, the arbitral process.

It is important to note that the seat of arbitration is not necessarily the place of the hearing or the hearing venue for such arbitration. While the seat of arbitration determines the governing procedural law of the arbitration, as mentioned above, the place of the hearing is the physical location where the hearing is held, which may be anywhere chosen by the parties. However, where no agreement on a separate place for the hearing is reached, it is not uncommon that the hearing is conducted at the seat of arbitration. It is important to note that the procedural law of the seat of arbitration is independent of the governing substantive law chosen by the parties to be applied to the subject matter of their dispute (e.g. the applicable law to the agreement in dispute).

4. Arbitral Tribunal

The arbitral tribunal is the panel of arbitrators chosen by the parties to resolve their disputes. While the parties are free to select any person as their arbitrator, different arbitration institutes have different default methods for the parties to select their arbitrators.

Under the TAI Arbitration Rules, the parties may jointly nominate a person to be appointed as a sole arbitrator. Otherwise, a so-called "list procedure" applies under which each party shall nominate three candidates and the TAI may nominate an additional three candidates. Afterwards, each party shall rank the nominees, from the nominated list, in order of their preference and the institute may contact the five most preferred nominees to inquire about their availability to act as arbitrator.[7] If three arbitrators are to be appointed, each party shall nominate one arbitrator and the arbitrators nominated shall jointly designate an arbitrator to be the chairperson of the tribunal. In the rare case that more than three arbitrators are to be appointed, the same procedure shall be applied.[8] For example, in the case where 5 arbitrators are to be appointed, each party shall nominate 2 arbitrators (i.e. the same number of arbitrators) and the arbitrators nominated shall designate an arbitrator to be the chairperson.

[7] Article 15 of the TAI Arbitration Rules
[8] Article 16 of the TAI Arbitration Rules

Under the THAC Arbitration Rules, if a sole arbitrator is to be appointed, each party shall propose the name of one or several candidates for the other party to consider. If both parties can agree, such candidate shall be appointed as the sole arbitrator. However, if both parties are unable to reach an agreement, the president of the institute shall appoint the sole arbitrator.[9] If three arbitrators shall be appointed, each party shall nominate one arbitrator and the president of the institute shall appoint the third arbitrator as the presiding arbitrator, unless the parties agree on the procedure for appointing the presiding arbitrator.[10] It is worth noting that under the THAC Arbitration Rules, where the parties agree to have more than three arbitrators, there only shall be three arbitrators, unless the arbitral proceeding will be conducted in Thai.[11]

In general, the doctrine of *kompetenz-kompetenz* (competence-competence) applies to the arbitral tribunal. In other words, either an applicable arbitration act or the arbitration rules prescribe that the arbitral tribunal has the competence to rule on its own jurisdiction, with respect to the issue presented, including any objections with respect to the existence or validity of the arbitration agreement. However, this does not bar the parties from challenging such jurisdiction of the tribunal or the validity of the arbitration agreement.

5. Recognition and Enforcement of Awards

After an award has been rendered by the arbitral tribunal, the parties may apply to the courts at the seat of the arbitration to have the award set aside. The grounds for setting aside an award somewhat differ in each jurisdiction, depending on the relevant arbitration act of each country. Specifically in Thailand, an award may be set aside if, among others, one of the parties to the arbitration agreement lacked capacity under the law applicable to them, the arbitration agreement was not enforceable under the law of the seat of arbitration, the composition of the arbitral tribunal was not in accordance with the agreement of the parties, the subject matter of the dispute was not capable to be settled by arbitration or the recognition and enforcement of the award would be contrary to public order or good morals.[12] When an award is set aside, as a general matter it would not be recognized or enforced by other jurisdictions.

A party wishing to enforce an award is required to submit such award to be recognized and enforced by a court with jurisdiction over the subject assets. This will be the courts at the seat of arbitration if the assets are located there. If the assets are located elsewhere, the New York Convention provides the general grounds for the courts of contracting states to refuse the recognition and enforcement of the arbitral award. For example, the recognition and enforcement of an award may be refused if the arbitration agreement was not valid under the governing law of the agreement or the law of the country where the award was made, the composition of the arbitral tribunal was not in accordance with the agreement of the parties or was not in accordance with the law of the country where the arbitration took place (i.e. the seat of arbitration), the award has not yet become binding or has been set aside or suspended under the law of where such award was made, the subject matter of the dispute was not capable of settlement by arbitration under the law of the jurisdiction where enforcement was sought, or the recognition or enforcement of the award would be contrary to the public policy of such country.[13]

In Thailand, the court with jurisdiction may refuse the recognition and enforcement of a particular award based on the same grounds that are stipulated by the New York Convention.[14] In addition, the order or judgment of the court refusing the recognition and enforcement of an arbitral award may not be appealed, unless, among others, such recognition and enforcement is contrary to public order and good morals, such order or judgment is contrary to the law regarding public order, or such order or judgment is not in line with the contents of the award.[15]

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[9] Article 20 of the THAC Arbitration Rules
[10] Article 21 and Article 22 of the THAC Arbitration Rules
[11] Article 17 and Article 17/1 of the THAC Arbitration Rules
[12] Section 40 of the Arbitration Act
[13] Article V of the New York Convention
[14] Section 43 and Section 44 of the Arbitration Act
[15] Section 45 of the Arbitration Act

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