

Enforcement of Foreign Arbitral Awards and Foreign Judgments in Thailand

Is an Arbitral Award Rendered Outside Thailand Enforceable in Thailand?

Arbitrations involving Thai parties often have their seat outside of Thailand. In case a Thai party is the award debtor and does not comply with the directions given in the award, the issue of enforcement comes up inevitably.

Chapter 7 of the Thai Arbitration Act B.E. 2545 (2002)¹ addresses the issues linked with the recognition and enforcement of arbitral awards in Thailand. Section 41 of the Thai Arbitration Act provides that an arbitral award made in a foreign country will only be enforced in Thailand if it is subject to an international convention, treaty, or agreement to which Thailand is a party, and then only to the extent that Thailand agrees to be bound.

Since Thailand is a party to both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention”)² and the Geneva Convention 1927 (“Geneva Convention”), foreign arbitration awards rendered in countries that are signatories to the New York Convention or the Geneva Convention are recognised and enforceable in Thailand, subject to certain conditions set out in the Thai Arbitration Act that shall be dealt with below.

What are the Procedural Requirements for a Foreign Award to be Enforceable in Thailand?

At present, for enforcement purposes of arbitral awards, there is no distinction between domestic and foreign awards in Thailand. So enforcing an arbitral award rendered in Thailand and an award made in an overseas jurisdiction are subject to the same legal provisions, although foreign awards must meet certain basic threshold qualifications (s 41 Arbitration Act).³

The first condition is that the award must be made in writing and signed by the arbitral tribunal and stating the reasons for the decision. The date and the place of arbitration must also be stated in the award if the arbitral tribunal consists of more than one arbitrator. The signature of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature shall also be stated

in the award. And finally, copies of the arbitral award must have been served on the parties of the arbitration (s 37 Arbitration Act).

What is the Process and Procedural Steps for Enforcing an Arbitral Award in Thailand?

There is sometimes a misconception among foreign investors and their counsel that enforcement proceedings of arbitral awards in Thailand are merely a purely “administrational matter” and something like an “automatic” process. This is however not the case. The procedure for enforcing arbitral awards in Thailand follows normal Thai Court practice.

The process of enforcement is initiated by the filing of an application with the competent Court for a judgment recognising and enforcing the award. The Court must then, without delay, promptly examine and inspect the application to ensure that it fulfills all necessary requirements for its enforcement. After filing the petition for enforcement of the award, the defendant has a right to file an objection to the petition. Thereafter the hearing for presentation of witnesses/evidence in support of the petition or objection is then scheduled and conducted. Needless to say that these proceedings require usually some time and don’t have any guaranteed outcome.

The Court shall then render judgment on the award’s enforceability provided the opposing party has requested an opportunity to challenge the application.

After the enforcement judgment has been obtained from the Thai Court, the award may be enforced in the same way like any other Thai judgment with the assistance of the Thai Legal Execution Department.

When filing the petition for enforcement of the award, the application must also be submitted with the following documents:

- An original or certified copy of the arbitral award;
- An original or certified copy of the arbitration agreement;

- A certified Thai translation of the award and the arbitration agreement.⁴

What is the Grounds For Refusing Enforcement of a Foreign Arbitral Award?

Grounds Relating to a Time Bar

The first item to observe with regard to the enforcement of the award is a time bar: According to s 42 Arbitration Act, a party seeking enforcement of an arbitral award must file a petition to the Thai Court holding jurisdiction no later than three years from the date the award first became enforceable.

Grounds Relating to the Arbitration Agreement (Section 43(1) Arbitration Act)

According to s 43(1) Arbitration Act, a ground for refusal is present if the party to the arbitration agreement is under some incapacity under the laws that are applicable to such party and therefor the arbitration agreement becomes voidable.

The second ground that may be invoked to prevent enforcement of the award under s 43(2) Arbitration Act is present, when the arbitration agreement is not binding under the law of the country agreed to by the parties. Absent such specification by the parties, the issue whether the arbitration agreement is binding will be determined by Thai laws according to s 43(2) Arbitration Act.

Grounds Relating to the Arbitration Proceedings (Section. 43(3), (5) Arbitration Act)

If a party has not been properly notified of the appointment of arbitrators, it is impossible for such party to adequately protect their own interests in the proceedings. Therefore, s 43(3) Arbitration Act provides the Thai Court the opportunity to examine whether the parties have been notified of the appointment of the arbitrators and the arbitration proceedings and if this is not the case, to refuse enforcement.

Likewise, s 43(5) Arbitration Act constitutes a ground for refusal of the enforcement, if the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties, or, if not otherwise agreed by the parties, in accordance with the Thai Arbitration Act.

Grounds Relating to the Arbitral Award (Section 43(4), (6) Arbitration Act)

Section 43(4) provides a ground for enforcement refusal if

the Thai Court has concluded that the matter that the arbitral tribunal decided was beyond the scope of the arbitration agreement.

In addition, if a Court of the country where the award was rendered has set the award aside or suspended it, then according to s 43(6) Arbitration Act enforcement may be refused by a Thai Court.

Grounds Established by the Court's Own Initiative (Section 44 Arbitration Act)

Section 44 may come as a surprise to a common law trained counsel. Because s 44 establishes two additional grounds that give the Thai Court the right to refuse the enforcement of an award, even though the parties may not even have pleaded these grounds. The first ground relates to the lack of arbitrability of the underlying dispute; the second ground refers to a violation of Thailand's "public policy". Obviously, neither is there a clear cut definition of what exactly constitutes "Thai Public Policy" nor is it entirely predictable when a violation of such public policy will occur.

It is not easy to make reliable predictions regarding the length of time required for the enforcement proceedings, but normally enforcement proceedings can take anywhere between 8 to 18 months (in some exceptional cases longer) to obtain the lower Court's judgement, depending on the complexity of the case (eg number of witnesses introduced etc), which can then be – under certain conditions – further appealed directly to the Supreme Court, which may lead to further delays.

Appeal proceedings

According to s 45 of the Arbitration Act, an order or judgment of a Court under the Arbitration Act concerning the recognition and enforcement of the award shall not be appealed, except where:

1. The recognition or judgment of the award is contrary to public order or good moral;
2. The order or judgment is contrary to the provisions of law relating to public order or moral;
3. The order or judgment is not in accordance with the arbitral award;
4. One of the Judge who has tried the case gave a dissenting opinion in the judgment; or

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5. It is an order on provisional measures under s 16 Arbitration Act.

An appeal against an order or judgment under the Arbitration Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be. Appeals can also take up to two years to be completed.

Costs

The Thai Arbitration Act does not contain any specific provisions concerning recovery of costs when applying for enforcement of a foreign arbitral award. Section 46 of the Thai Arbitration Act only states that any fees and expenses pertaining to arbitral proceedings shall be included in the final award by the arbitral tribunal. In the absence of a specific agreement on costs of the enforcement between the parties, a party may file a motion to the competent Thai Court requesting allocation of costs, as permitted under the Thai Civil and Commercial Code.

How Can Foreign Court Judgments Be Enforced in Thailand?

Before parties start to commence legal proceedings against a Thai party abroad, they often wonder what is more advantageous for them in terms of enforcement, ie proceedings in a foreign Court or arbitration proceedings?

The answer is very straightforward.

Currently, Thailand doesn't have any specific legislation addressing the recognition and enforcement of foreign judgments by domestic Courts. Thailand is also not a party to any bilateral or multilateral conventions of enforcement of foreign judgments, by which a foreign Court judgment may be entitled to recognition and enforcement in Thailand.

Consequently, foreign judgments cannot be enforced in Thailand. A new trial based on the merits must be initiated in Thailand in which the foreign judgment may only be submitted as evidence. Therefore, dispute resolution clauses with Thai legal entities should either stipulate that Thai Courts are in charge or that the dispute is to be decided by arbitration, but never through any courts outside of Thailand to avoid incurring unnecessary legal costs and a repetition of the trial in Thailand.

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Notes

- 1 An English version of the Thai Arbitration Act is available online at: <http://www.thailawforum.com/laws/Arbitration%20Act.pdf>.
- 2 No reservations were entered at Thailand's time of accession to the Convention.
- 3 There is also no longer any requirement for stamp duty to be paid on an award in order for it to be enforceable in Thailand.
- 4 The translation of the arbitral award and the arbitration agreement in Thai language must be made by a translator who was sworn under oath before the Court or the official or the person having power to accept the oath, or who has made an oath to, or represented by, the official authorised to certify the translation or by a diplomatic delegate or the Thai consul in the country in which the award or the arbitration agreement was made.