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# Thailand's New Arbitration Regulations

By Dr. Andreas Respondek

## The growing importance of arbitration for foreign investors in Thailand

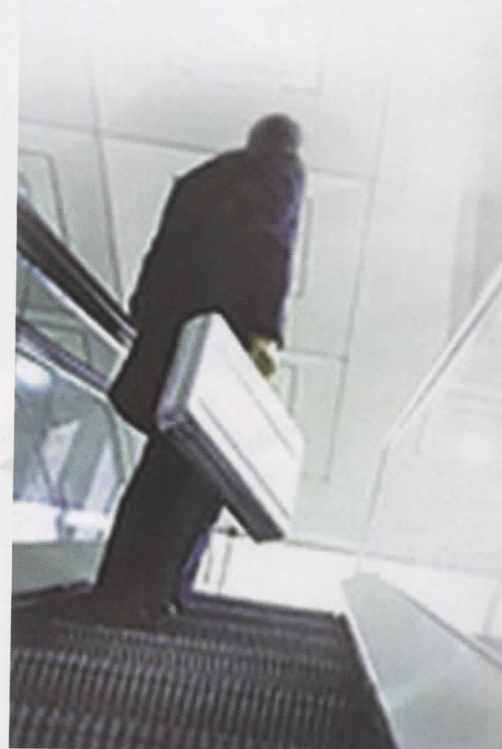
**A**rbitration offers the possibility to have a private (party appointed) tribunal decide on any given business dispute. As a consequence of the ever growing globalisation tendencies, the number of international arbitration proceedings in international business matters is clearly on the increase<sup>1</sup>. There is hardly any international contract like for instance a Joint Venture Agreement, a Technology Transfer Agreement or a Turn-Key Agreement in the construction sector that would not contain an arbitration clause for dispute resolution between the parties. According to various estimates approximately 80 % of all international agreements contain arbitration clauses. This seems also adequate in light of the fact that (state) courts have their roots ultimately in national legal systems and are closely connected with these national laws. In addition, parties tend to assume that if a dispute is litigated in the country of either party that the courts might be biased in favor of the party domiciled in that country. Hence, to agree on an arbitration arrangement for dispute settlement seems appropriate for international business disputes as arbitration enables the parties to freely agree on the venue of the arbitration, the arbitrators as well as the procedural rules they wish to follow.

## Special features and significance of arbitration in Thailand

Arbitration in Thailand carries a special weight with regard to the following facts: A decision of a Thai court is not per se enforceable abroad due to the fact that Thailand has not signed any international treaties for the mutual recognition of decisions from foreign courts<sup>2</sup>. Likewise, judgments from courts outside of Thailand cannot per se be enforced in Thailand due to a lack of mutual recognition of judgments with other countries.

Rather than going through at times difficult enforcement procedures of a Thai judgment abroad, there is a preferable way to proceed: Arbitration. One of the advantages arbitration offers is that foreign arbitration awards are – unlike foreign judgments – relatively easily to be enforced in Thailand and Thai arbitration awards are comparatively easily to be enforced<sup>3</sup> abroad due to Thailand's accession to the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards"<sup>4</sup>. The New York Convention safeguards that Thai arbitration awards can be enforced in more than 120 countries abroad as long as certain procedural minimum requirements have been observed. As a consequence, Thai arbitration awards can for instance be enforced in Singapore, the EU, Japan, China and the USA etc.

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## New Arbitration regulations in Thailand

The laws and regulations pertaining to arbitration in Thailand have been fundamentally revised in 2002 and 2003 respectively. Today, Arbitration in Thailand is governed by the (new) Thai Arbitration Act B.E. 2545 (2002), which was enacted on 29 April 2002 and came into force on 30 April 2002.

Even though the new Thai Arbitration Act has been in force for more than a year now, the promulgation of the new Act seems to have gone largely unnoticed in many publications, especially on the internet. This holds even true for such prominent institutions as the International Chamber of Commerce (ICC)<sup>5</sup>.

In addition to the Arbitration Act B.E. 2545 (2002) other legislation such as the Thai Civil Procedure Code<sup>6</sup> and Conflict of Laws Act (2481) of 1938 can be also relevant<sup>7</sup>. The new Act addresses many issues raised or unresolved by the old Arbitration Act and provides a firmer footing for parties wishing to resolve disputes by arbitration rather than litigation in state courts.

In addition to the new Thai Arbitration Act, also the Thai Arbitration Institute ("TAI") has completely revised its arbitration rules to take into consideration the recent changes under the (new) Thai Arbitration Act. The new TAI Rules came into force on 02 May 2003. At the same time, a new "Code of Ethics for Arbitrators" has also been promulgated.

## Institutional arbitration bodies in Thailand

Thailand's leading arbitration institute is the "Thai Arbitration Office" which was established in 1990<sup>8</sup> by the Thai Ministry of Justice. The Board of Trade had established in 1968 the "Thai Commercial Arbitration Committee", an arbitration department whose caseload involves principally trade cases. In addition to these two bodies, the Insurance Department of the Thai Ministry of Commerce has also its own arbitration rules and established an arbitration body.

## The "old" Arbitration Act

The previous Arbitration Act (1987) provided a reasonable foundation for arbitration proceedings for general acceptance in Thailand. The Thai government encouraged the use of arbitration by establishing the Thai Arbitration Institute under the Ministry of Justice to administer arbitrations locally, and by providing for arbitration in the model procurement contract utilised by state enterprises and other governmental agencies. However,

over the years, a number of problem areas and unresolved issues were identified which pointed to the need for significant modifications of the 1987 Act.

## Relationship between the "old" and the "new" Arbitration Act

Upon the enforcement of the new Arbitration Act on 30. April 2002, the previous Arbitration Act ceased to have effect. However, with respect to any arbitration agreement entered into or proceedings underway prior to the enforcement of the new Act, the old Act will still continue to apply.

## Goals of the new Arbitration Act

The "old" Arbitration Act was often criticised because it was not in tune with the major international guiding codifications, especially the international arbitration law ("Model Law") promulgated by the United Nations Commission on International Trade Law (UNCITRAL). This UNCITRAL Model Law has been widely accepted and recognised as a prototype for international arbitration law in general.

One of the declared goals of the revised Thai Arbitration Act was to model the new law according to the principles laid down under the UNCITRAL law, in order to follow the industrialised countries' arbitration process.

## Structure of the new Arbitration Act

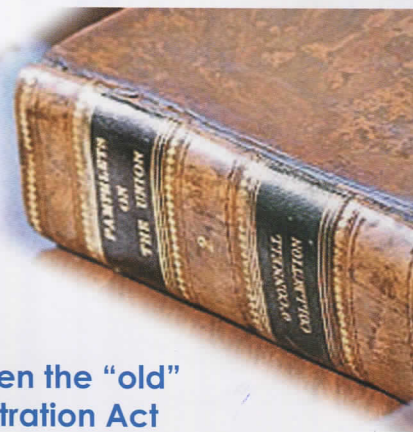
The new Arbitration Act is divided into 8 chapters, namely:

- CHAPTER 1 – Arbitration Agreement (Sec. 11 – 16)
- CHAPTER 2 – Arbitral tribunal (Sec. 17 – 23)
- CHAPTER 3 – Power of Arbitral Tribunal (Sec. 24)
- CHAPTER 4 – Arbitral Proceedings (Sec. 25 – 33)
- CHAPTER 5 – Arbitral Award and Termination of Arbitral Proceedings (Sec. 34 – 39)
- CHAPTER 6 – Setting Aside Arbitral Awards (Sec. 40)
- CHAPTER 7 – Recognition and Enforcement of Arbitral Awards (Sec. 41 – 45)
- CHAPTER 8 – Fees, Expenses and Arbitrator's Remuneration (Sec. 46 – 48)

## Main differences between the old and the new Arbitration Act

### • "Local" versus "foreign" arbitration awards

One of the explicit goals of the new Act was also to encourage the settlement of disputes in international civil





and commercial matters through the arbitration process. In this respect, the old law specified different procedures for the enforcement of local and foreign arbitration awards, and the Act defined terms in such a way that almost all arbitrations were deemed

"local" arbitrations. This made arbitration awards potentially subject to more rigorous scrutiny by Thai courts than would normally be expected. For arbitration awards, the new Arbitration Act sets now the same standards for enforcement of both domestic and international arbitrations, in order to promote investment at both domestic and international levels. Hence, under the new Act, when an award is enforced in Thai courts, parties and judges do not have to apply a double standard in differentiating between domestic and international arbitration awards any more.

#### • Injunctions

Previously only an arbitrator could make an application to court for an injunction. Now the parties to the arbitration can apply for injunctive relief directly to the courts. Besides, it has now been clarified that an injunction may be obtained before and after arbitration proceedings have been formally commenced.

#### • Extension of enforcement period

Under the old Act, if the losing party did not comply with the arbitration awards, the prevailing party was required to seek enforcement of the award through the Thai court within 1 year. This meant that in a practical sense an award requiring a party to make payments or take other action more than 1 year after the award could not be enforced. The new Act allows enforcement actions for up to 3 years of receipt of the award.

#### • Inclusion of "administrative contracts"

In 2001 a specialised court (i.e. the

Administrative Court) was set up to deal with disputes arising out of administrative contracts. "Administrative contracts" under Thai law are contracts to which one party is a government agency and which are either concession contracts or contracts for the provision of public utilities or mining. There was then confusion whether the Administrative Court had exclusive jurisdiction to deal with disputes arising out of administrative contracts, notwithstanding the presence of an arbitration agreement. This question has now been resolved: The new Act makes it clear that Arbitration agreements will apply and be enforced even in the context of administrative contracts, because the new Act also includes "administrative contracts" that can now also be referred to arbitration. Hence, arbitration agreements between a government agency and a private entity are binding and enforceable.

#### • Electronic signatures

An arbitration agreement with an electronic signature (for instance an exchange of emails) is now enforceable under Sec. 11 of the Arbitration Act. Under the previous legislation, the enforceability of such agreements was doubtful.

#### • Appeal to Court Order or Judgment

Unlike the previous Act, the new Act provides that an order or judgment of the court pursuant to the new Act cannot be appealed against except for:

- any recognition or enforcement of an arbitral award which is contrary to public order or good morals, or
- the court order or judgment violates the law related to public order, or
- the court or judge deciding the case has given a dissenting opinion, or
- the order relating to the provisional measures prior to or during the arbitral proceedings. The above appeal must be made before the Supreme Court or the Administrative Court, as the case may be.

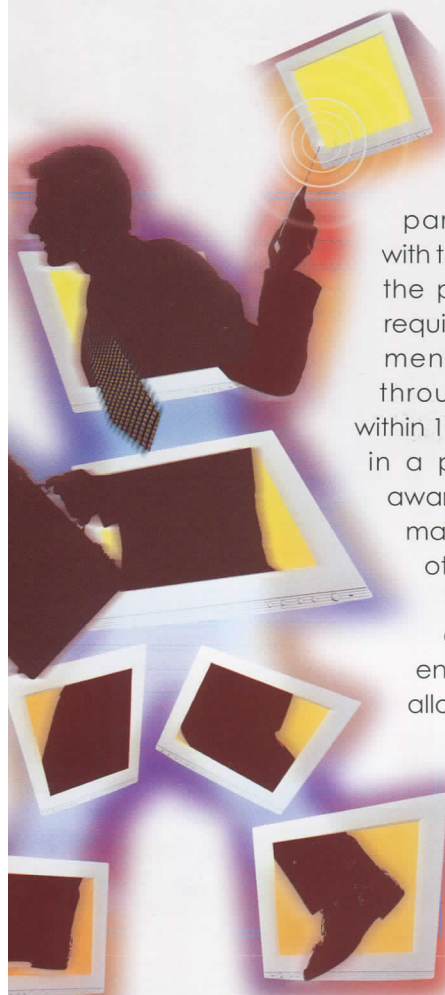
Special regulations under the new Arbitration Act

#### • Temporary relief

The UNCITRAL Model Act authorises the arbitrators to order a party to take protective measures related to the subject of the dispute pending the outcome of the arbitration, but the Thai Act requires a party to go to court if the party seeks a temporary order while the arbitration case is in progress (Sec. 16<sup>9</sup>).

#### • The number of arbitrators

The new Act provides that the number of arbitrators must be an odd number (Sec. 17). If the parties stipulate an even number of arbitrators, the Act provides





that each party's arbitrator shall jointly appoint a third arbitrator as the presiding arbitrator (Sec. 18). In case the parties are unable to agree on the number of arbitrators, there shall be a sole arbitrator.

#### • **Arbitrator's liability**

In Sec. 23 the new Act provides that the arbitrator is not liable in any civil action for any damage occurring as a result of the performance of his duty unless it is caused by his intentional act or gross negligence. The arbitrator will be liable for a criminal offence with penalty or imprisonment not exceeding 10 years or a fine not exceeding THB 100,000 or both, if he dishonestly demands, accepts or agrees to accept assets or any benefit for himself or others to perform or omit to perform any of his duties. Any person who gives or agrees to give or promises to give assets or any benefit to the arbitrator to induce him to perform, not to perform or delay his performance of his duty is also subject to a criminal offence with the same penalty.

#### • **Commencement of arbitral proceedings**

Sec. 27 of the new Act provides for 4 instances upon which the arbitral proceedings are deemed to have commenced:

- a request for settlement of dispute by arbitration is received by one party in the dispute from another party, or
- a party in a dispute notifies in writing the other party for the appointment of an arbitrator, or
- a party in the dispute notifies in writing the arbitral tribunal designated in the contract to settle the dispute, or
- a party in the dispute submits to any organisation designated in the contract to handle the dispute by arbitration.

#### • **Decision of the panel of arbitrators**

Unless otherwise provided by the parties, the decision of the arbitral tribunal shall be by the majority of the members of the tribunal. When a majority cannot be reached, the new Act provides for the decision to be made by the presiding arbitrator.

#### • **Recognition and Enforcement of arbitral awards**

The new Act provides for the recognition and enforcement of a domestic arbitral award to be in the same manner as a foreign arbitral award (i.e. an arbitral award made outside Thailand). Although the foreign arbitral award will be recognised and enforced if it is made in accordance with the treaty or international agreement in which Thailand is a member and to the extent Thailand agrees to be bound.

The new Act requires the enforcing party to submit the following documents:

- the original of the award or its certified copy
- the original of the arbitration agreement or its certified copy, and
- a Thai translation of the award and the arbitration agreement sworn by the translator or the said translator swears before the competent court or officer or a certified true translation by the competent officer or by the Thai consul in the country in which the award is made.

#### • **Fees, expenses and arbitrator's remuneration**

Unless provided otherwise by the parties, the fee, expenses and arbitrator's remuneration other than lawyer's fees and expenses shall be stipulated by the arbitral tribunal in its award. If the award does not so specify, any party may request the competent court for its order. The Act also allows the organisation stipulated in the contract to handle the arbitration proceedings set up the fee, expenses and arbitrator's remuneration for the arbitration proceedings.

### Summary

The revision of the Thai Arbitration Act and also the revision of the TAI Rules are a necessary step for Thailand to make Thailand a more attractive venue for arbitration and also to keep up with international developments in arbitration, notably in view of the UNCITRAL Model Law. How these new regulations will be applied in practice will need to be seen in detail and it is hoped that these new regulations will enhance Thailand's attractiveness as arbitration venue.

### Footnotes

- 1 E.g. the review of the HKIAC at [http://www.hkiac.org/en\\_statistics.html](http://www.hkiac.org/en_statistics.html) as well as the fact and figures "page of the" International Chamber of Commerce (ICC) " under: [http://www.iccwbo.org/court/english/right\\_topics/stat\\_2001.asp](http://www.iccwbo.org/court/english/right_topics/stat_2001.asp)
- 2 However, the decision of a Thai court may be taken as evidence in proceedings brought for the enforcement of any judgment abroad.
- 3 Sec. 41 Thai Arbitration Act: "In the case where an award is made in a foreign country, the competent court shall enforce such award only if it is governed by a treaty, convention or international agreement to which Thailand is a party, and it shall have effect only to the extent that Thailand agrees to be bound.
- 4 Thailand acceded to the New York Convention on 21 December 1959 and the Convention entered into force for Thailand on 20. March 1960.
- 5 [http://www.iccthailand.or.th.news\\_arbitration.htm](http://www.iccthailand.or.th.news_arbitration.htm)
- 6 E.g. Sec. 25 Arbitration Act
- 7 See also the Regulation of the Office of the Prime Minister on Government Procurement B.E. 2535 (1992); Regulations of the Office of the Prime Minister on compliance with arbitration awards B.E. 2544 (2001)
- 8 Formerly know as the "Arbitration Office of the Ministry of Justice"
- 9 All Sec. numbers refer to the (new) Thai Arbitration Act, unless indicated otherwise