

## **Arbitrations in Thailand: PART 2 – enforcing contracts outside of Thai courts**

If you are doing business in Thailand you might have already had some experience with the local court system. An all too common complaint of the local business community is that court proceedings in Thailand are agonizingly slow. Furthermore, a non-Thai businessman usually does not understand the proceedings, since the official language in Thai courts is Thai. Finally, a domestic court ruling is generally not enforceable in another country and if one or both of the parties does not live in Thailand and/or has their assets in another country, a domestic court “win” might be a “hollow victory”.

But what’s the alternative? You may have heard of “alternative dispute resolution”. The “alternative” means “other than going to court.” One such longstanding alternative gaining evermore international recognition is arbitration. Arbitration is the most commonly used formal alternative to domestic court proceedings, especially for disputes between parties in different countries. From a legal perspective Thailand was a relative “late comer” to the arbitration scene, enacting its first law governing arbitration in 1987. Then in 2002 Thailand enacted the current Arbitration Act, which replaced the 1987 law. The Arbitration Act governs not only domestic, but also any international arbitrations conducted in Thailand.

In order to submit a dispute to arbitration, it is required that both parties agree to it. Section 11 of the Arbitration Act defines such an arbitration agreement as “*an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement might be in the form of an arbitration clause in a contract or in the form of a separate agreement.*” The arbitration agreement needs to be in writing and signed by both parties. Thus, it is not possible for one party to unilaterally and without the approval of the other party to submit a dispute to arbitration. If the

parties failed to include an arbitration clause to an agreement and a dispute arises, the dispute must be settled by the local courts as long as *both* parties do not agree to arbitration proceedings. Therefore, it is advisable to include a well-drafted arbitration clause in an agreement, preferably in the initial contract document, *before* any dispute that requires a third party adjudicator arises. In our experience, once such a dispute arises, getting the parties to agree on anything, including how to resolve the dispute can be very difficult, if not impossible.

But if you are going to use the arbitration alternative then it is highly advisable to select and include in your arbitration clause a professional arbitration institute that can provide the procedural and administrative support requisite for the conduct of proper arbitration proceeding. Internationally, perhaps the most commonly known such institute is the International Chamber of Commerce's International Court of Arbitration (the "ICC") which is headquartered Paris, France but which conducts arbitrations worldwide. Founded in 1923, the ICC established its own rules of arbitration that govern the proceedings between the parties themselves and between the parties and the ICC. These rules of arbitration are "universal" and govern all ICC proceedings worldwide. Locally, Thailand established its own "Thai Arbitration Institute of the Alternative Dispute Resolution Office, Office of the Judiciary" (the "TAI") to provide arbitration services within Thailand. The TAI also has its own rules that govern its arbitration proceedings. Finally, the Board of Trade of Thailand also offers arbitration services which are provided by its "Thai Commercial Arbitration Institute" and which are conducted under its own rules.

The parties to an arbitration agreement are free to choose what rules should govern the arbitration proceedings by choosing one of the aforementioned service providers. It should be noted that the choice of the service provider not only has an impact on the fees charged for the arbitration service, but could also have an impact on the recourse a winning party has to claim for compensation for legal fees incurred during the arbitration proceedings.

Arbitration proceeding are generally quick, in fact the ICC rules generally require a decision and an award within 8 months of the arbitrator's appointment. In the case of the TAI it is within 6 months of such appointment. Arbitration proceedings can be conducted in any language the parties choose. In general, the parties get to choose the arbitrator, thus they control their competence and may even select someone with particular expertise and experience relevant to the dispute at hand. And an award

issued by any of the above mentioned an arbitration institute is enforceable in any country that is the signatory to the 1958 U.N. Convention on the recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). Thailand is a signatory to the New York Convention and an arbitration award made here will be enforceable outside of Thailand in any other signatory country (currently 145 countries worldwide). And pursuant to the Arbitration Act any such award will also be enforceable inside of Thailand. Accordingly, formal arbitration can be an outstanding alternative to Thai court proceedings and highly advisable to include provision for such dispute resolution in your commercial contracts here in Thailand.

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