

Arbitration in Thailand: PART 4 – the agreement to arbitrate

In our last blog we explained that arbitration can only take place if *both* of the contract parties agree to the use of such a mechanism to resolve any dispute arising from their contract. In fact, in Thailand, Section 11 of the Arbitration Act (2002) (the “Act”) specifically requires that the parties, must enter into a written “Arbitration Agreement” that is signed by both parties. Furthermore, the Arbitration Agreement must state that the parties want arbitration proceedings govern all disputes arising out of a specified legal relationship, like a contract.

The Arbitration Agreement may be in the form of a separate agreement or it may be in the form of a clause within the contract in question itself. It should be noted that if it takes the form of a clause within a contract, the Arbitration Agreement “survives” the termination of the contract it is embedded in. In other words, the “arbitration clause” has its own standing as a separate agreement independent from the main contract that the arbitration covers.

Thus, an Arbitration Agreement, ideally a well drafted Arbitration Agreement, is a pre-requisite for any enforceable alternative dispute resolution. The various arbitration service providers propose sample clauses to be used in contracts between parties who wish to choose arbitration as a method to settle any future dispute under the contract. Locally, the two most well-known arbitration service providers are the International Chamber of Commerce (“ICC”) and the Thai Arbitration Institute (“TAI”).

The ICC recommends the following clause to be included in any contract that the parties wish to have any disputes arising there from resolved by arbitration under auspices of the ICC:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more

arbitrators appointed in accordance with the said Rules.”

Alternatively, where the TAI is the chosen service provider, the following is recommended:

“Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary applicable at the time of submission of the dispute to arbitration and the conduct of the arbitration thereof shall be under the auspices of the Thai Arbitration Institute.”

Both of these model clauses have two essential elements of any Arbitration Agreement: (1) referral of any dispute under the contract to arbitration; and (2) the incorporation of the governing rules of arbitration. However, before actually inserting any such model clause into your contract, it is advisable to further tailor the clause to the parties’ preferences and in order to avoid future disputes regarding the arbitration proceedings. The place of the arbitration hearing, if any, is one essential element that the parties may very well wish to decide on beforehand such that it is mutually convenient and that they will very likely dispute if not agreed prior to any dispute. The language that should govern the proceedings is another element. Especially in cases with a local contract partner, a firm decision as the governing language when entering into a contract with an arbitration clause is generally essential. It is also usually prudent to predetermine the number and qualifications of the arbitrators used for the proceedings. However, note that the more arbitrators the higher the fee payable for the arbitration. Highly skilled arbitrators will generally only work for the institutes that pay them accordingly. On the other hand, the more arbitrators and the more highly skilled they are, generally the better, and therefore, the more certain the enforceability of the final award.

In case of ICC proceedings, the “Seat” of the arbitration is also one of these elements that the parties should agree upon prior to signing the Arbitration Agreement. The choice of Seat will determine what jurisdiction’s procedural arbitration law governs arbitration proceedings itself, e.g. in the case of Thailand being the Seat, the Act will govern the proceedings.

Finally, it should be noted that it is not possible to obtain an enforceable arbitration award for all disputed matters. If the jurisdiction where you are seeking enforcement of an arbitration award has a substantive law that does not allow final resolution of

the said matter by way or arbitration or if that jurisdiction considers that enforcement of arbitration award of said matter would be contrary to “public policy”, that jurisdiction will not enforce any such arbitration award.

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