Arbitration in Thailand: PART 5 – the arbitrators

One of the advantages of arbitration proceedings over domestic court proceedings is the opportunity for the parties to select the person(s) that will decide on the issue in question, the arbitrator(s). In arbitration proceedings the parties are enabled to nominate arbitrators that have a certain specialized and up-to-date know-how that might be required to understand the technical background of the issues in question.

The number of arbitrators forming the tribunal must be an uneven number in accordance with Section 17 of the Arbitration Act of Thailand (2002) (the "Act"). If the parties nominate an even number, the appointed arbitrators will need to choose another arbitrator to create an uneven number. If the parties fail to agree on the number of arbitrators the Section 17 further provides that a sole arbitrator will be appointed. In Thailand, exactly how the arbitrators are appointed is up to the parties and generally the parties will agree that the rules of the institute conducting the arbitration dictate this procedure; failing which, the Act would dictate this procedure. Section 19 of the Act requires that the arbitrator be "independent and impartial" and possess the particular qualifications, if any, agreed by the parties. The interpretations of the terms "independent" and "impartial" are highly controversial and subject to a dispute themselves. In general, it can be said that the absence of close relations between an arbitrator and a party means the arbitrator is independent; whereas "impartiality" refers to the arbitrator's lack of prejudice with respect to a party or the matter in dispute. Such definitions are, however, still very vague.

Some guidance in this area has been provided by the International Bar Association (the "IBA") its *Guidelines on Conflicts of Interest in International Arbitration* (the "Guidelines"). While the Guidelines are not legally binding, the standards they articulate are generally accepted and parties and arbitrators often use and cite them when the assessment of an arbitrator's independence or impartiality is at issue. A potential arbitrator may, for example, turn to the Guidelines to determine what facts

he is required to disclose prior to accepting an appointment to act as an arbitrator. Alternatively, for example, a party may turn to them to determine under what circumstances they can nominate or challenge an arbitrator.

Some of the most common issues that need to be assessed when determining whether or not an arbitrator is adequately independent and impartial are:

1) the relationship between a party and the arbitrator;
2) the relationship between a party and an arbitrator's law firm;
3) the relationship between an arbitrator and a party's counsel;
4) prior appointments as an arbitrator (repeated appointments by one party);
5) ex-parte contacts immediately prior to appointment;
6) non-disclosure of any of the above.

It must be noted that none of the above in itself determines that a potential arbitrator is not independent or not impartial. The determination of such will always depend on the circumstances in each individual case. And even no issue raises sufficient doubt of independence or impartiality at one stage of the arbitration proceedings, the arbitrator is duty bound to disclose the occurrence of any such later in the proceedings for the relevant parties' consideration.

In case a party believes that an appointed arbitrator is not independent or impartial, such party has the right to challenge that arbitrator. The procedure for challenging an appointed arbitrator is dictated by the relevant arbitration institute's rules and the Act. Where it is decided that an arbitrator was not independent or impartial at the time of appointment or was no longer independent or impartial later in the proceedings, that arbitrator will then be removed from the arbitral tribunal and replaced.

With regard to the arbitrator's independence and impartiality it is noteworthy that Section 23 of the Act imposes (somewhat controversially vis-à-vis most other jurisdiction's arbitration legislation) criminal sanctions on any arbitrator for *"[…] wrongfully demanding, accepting, or agreeing to accept an asset or any other benefit for himself or anyone else for doing or omitting to do any act in his duties […]"*

Choosing the right arbitrator with the right skill set who will make the right decisions, is among the most important and sometimes also the most difficult decisions in the arbitration proceedings. Whether the right choice is someone with the right formal

legal training, skills and experience or someone with a specialized or "hands-on" expertise will depend on the dispute that gave rise to the claim. Competent legal counsel with solid arbitration experience will not only be able to help the parties in making the right choice in relation to the proposed arbitrator, but will also be able to identify issues that makes a challenge of an arbitrator advisable if necessary.
