GETTING THE DEAL THROUGH

gar
The international journal of commercial and treaty arbitration

Arbitration

in 55 jurisdictions worldwide

2011

Contributing editors: Gerhard Wegen and Stephan Wilske

Published by
GLOBAL ARBITRATION REVIEW
in association with:

Anderson Mōri & Tomotsune
Appleby
AZB & Partners
Badri and Salim El Meouchi Law Firm LLP
Bell Dewar Inc
Bonn Schmitt Steichen
Bredin Prat
Brodermann & Jahn Rechtsanwaltsgesellschaft mbH
Carlos Aguiar, Ferreira de Lima & Associados,RL
Cavelier Abogados
Clifford Chance
Conway & Partners, Advocaten & Attorneys-at-law
Dittmar & Indrenius
Drakopoulos Law Firm
Dr Colin Ong Legal Services, Advocates & Solicitors
Esin Law Firm
Freshfields Bruckhaus Deringer
George Etomi & Partners
Gleiss Lutz
Gregoriou & Associates Law Offices
Habib Al Mulla & Co
Hamilton Abogados
Harris Kyriakides LLC
Hausmaninger Kletter Rechstanwälte
Hedman Partners
Herbert Smith CIS LLP
Heussen Rechtsanwaltsgesellschaft mbH
HM Ooi Associates
Hoet Pelaez Castillo & Duque
Hogan Lovells US LLP
Hughes Hubbard & Reed LLP
Jiménez Cruz Peña
Karanović & Nikolić
Kettani Law Firm
Kim & Chang
Kimathi & Kimathi, Corporate Attorneys
Kosheri, Rashed & Riad
Lalive
Laszczuk & Partners
Law Offices Bělohlávek
Law Office Skrastins un Dzenis
L O Baptista Advogados
Mkono & Co Advocates in association with SNR Denton
Motieka & Audzevicius
Nordia Advokatfirma
Norton Rose (Middle East) LLP
Oscós Abogados
Pestalozzi
Salans LLP
Sandart & Partners
Sherby & Co, Advs
Stikeman Elliott LLP
Tilleke & Gibbins
Tomov & Tomov
Vasil Kisil & Partners

GETTING THE DEAL THROUGH®

Arbitration 2011

Contributing editor: Gerhard Wegen and Stephan Wilske Gleiss Lutz

Business development managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers
Ellie Notley
Sarah Walsh

Marketing assistant
Alice Hazard

Subscriptions manager
Nadine Radcliffe
Subscriptions@GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistant
Nina Nowak

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen

Senior subeditor
Kathryn Smuland

Subeditors
Davet Hyland
Chloe Harries

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Arbitration 2011
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2011
No photocopying: copyright licences do not apply.
ISSN 1750-9947

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of February 2011, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

CONTENTS

Thailand

Sally Veronica Mouhim and Kornkieat Chunhakasikarn

Tilleke & Gibbins

Laws and institutions

1 Multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Thailand acceded to the New York Convention on 21 December 1959, which came into force on 20 March 1960. No declarations or notifications were made under articles I, X and XI of the Convention.

Thailand is also a party to the Geneva Convention on the Enforcement of Foreign Arbitral Awards 1927. It has also ratified agreements supporting programmes of the Overseas Private Investment Corporation (OPIC) and has signed but not ratified the Convention Establishing the Multilateral Investment Guarantee Agency (1985).

Thailand is a signatory to the International Centre for Settlement of Investment Disputes Convention 1965 (ICSID Convention) but has not yet ratified it, and is not likely to do so in the near future.

2 Bilateral treaties

Do bilateral investment treaties exist with other countries?

Thailand has entered into a total of 39 bilateral investment treaties as of 1 June 2010, though not all of these are in force yet. Thailand also entered into the Treaty of Amity and Economic Relations with the US in 1966, which provides that any dispute as to the interpretation or application of the Treaty shall be determined by arbitration.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Thailand's present arbitration law is the Arbitration Act BE 2545 (2002) (the Arbitration Act), which closely follows the UNCITRAL Model Law. This Act applies to both foreign and domestic arbitration proceedings and to the enforcement of both domestic and foreign arbitral awards. The provisions of the Civil Procedure Code relating to evidence may also apply to arbitral proceedings. There is no definition of a foreign proceeding in the Arbitration Act, but generally arbitration proceedings conducted outside Thailand are considered to be foreign proceedings.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Arbitration Act closely follows the UNCITRAL Model Law. While much of the Model Law is adopted verbatim, there are some distinct differences unique to Thailand. For example, while the Model Law allows arbitrators to take interim measures related to the subject of the dispute pending the outcome of the arbitration, the Arbitration Act requires a party seeking a temporary order to file a petition with the Thai court.

In addition, the Arbitration Act exempts arbitrators from liability in performing their duties, except where they intentionally or with gross negligence injure a party. There are also criminal provisions whereby an arbitrator can be fined, imprisoned for up to 10 years or both, for demanding or accepting bribes. These provisions, the purpose of which is to ensure impartiality, are absent from the Model Law, and have been the source of discussions and expressions of concern by local arbitrators who are apprehensive about the potential for abuse of the provisions by disgruntled disputants.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

There are few mandatory provisions, and the Arbitration Act generally allows the parties to agree on the specific rules to govern the arbitration but gives substitute provisions in the event that the parties are unable to agree. The only mandatory provisions are as follows:

- the arbitration agreement must be in writing and signed by the parties;
- the arbitral tribunal shall be composed of an uneven number of arbitrators;
- the arbitrators must be impartial, independent and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration; and
- the arbitral award must be in writing and signed by the members of the arbitral tribunal, or a majority thereof.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties are at liberty to agree on the governing law, but in default of agreement, Thai law will apply.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Some arbitrations in Thailand are conducted under the supervision of the ICC and the LCIA. However, the two main domestic arbitration institutes in Thailand are:

Thai Arbitration Institute (TAI) of the Alternative Dispute Resolution Office
Office of the Judiciary
Criminal Court Building 5th-6th floor
Ratchadapisak Road, Chatuchak
Bangkok 10900, Thailand
Tel: +66 2541 2298 9
Fax: +66 2512 8432

Commercial Arbitration Committee of the Board of Trade (BOT) of Thailand
150 Ratchabophit Road
Wat Ratchabophit, Phranakorn
Bangkok 10200, Thailand
Tel: +66 2622 1860 76
Fax: +66 2225 3372
www.thaiechamber.com

Both of these are well respected, are supervised by a diverse advisory board, have standard arbitration rules and maintain a list of qualified arbitrators. Parties are free to nominate outside professionals as arbitrators, and most often elect to conduct the proceedings in English or Thai. Many more cases are handled by the TAI than the BOT Committee, largely because the former is managed by the Office of the Judiciary.

The TAI does not require any institutional fee. The parties are responsible for the arbitrator's remuneration and actual expenses. Arbitrator fees for arbitrations conducted through the two Thai arbitration institutes are quite reasonable and both have similar fee structures based upon claim amounts. These fees are considerably less than those charged by many international institutes.

The manner of appointment of arbitrators in the TAI's rules is slightly different to that of other international institutes in respect of appointment of a sole arbitrator. Each party may nominate three arbitrators by list. The TAI may add another three names to the list, and the whole list is issued to the parties. Each party may select nine names from the list and arrange in order of preference. The TAI will then contact the most preferred person to be the arbitrator. For appointment of three arbitrators, each party will appoint one arbitrator and the two appointed arbitrators will choose the third arbitrator who will act as chairman of the tribunal.

In addition to the above two main arbitration institutes in Thailand, the Department of Insurance has set up an Office of Arbitration to handle disputes relating to claims under insurance policies; and the Security and Exchange Commission (SEC) and the Department of Intellectual Property also offer arbitration services.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Section 40 of the Arbitration Act gives Thai courts the power to set aside an arbitral award if the award deals with a dispute not capable of settlement by arbitration under the law or where the recognition or enforcement of the award would be contrary to public policy. It is generally accepted and recognised that criminal, family, labour and certain types of IP disputes are not arbitrable on account of being contrary to public policy. IP disputes involving commercial rights may be arbitrated, but it is rare for parties to such disputes to arbitrate, because they do not usually have a binding arbitration clause between them and often they are not able to agree on arbitration after the dispute has already arisen. Disputes in relation to securities are generally considered to be arbitrable and many brokerage firms have unilaterally agreed to participate in SEC arbitral proceedings if their customers elect to arbitrate.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

To be binding, an arbitration agreement must:
- be in writing;
- be signed by the parties; and
- state unequivocally the parties' intent to submit all or certain disputes arising between them in connection with a defined legal relationship.

An arbitration agreement can take the form of an arbitration clause in a contract or a separate arbitration agreement. 'Separate arbitration agreements' can include an exchange between the parties by: letter; facsimile; telegram; telex; data interchange with electronic signatures; or other means that provide a record of the agreement.

Therefore, the arbitration agreement could be contained in general terms and conditions if they are signed by both parties, or each party accepts, in writing, the general terms and conditions as forming part of the contract.

An agreement to arbitrate can also arise if the parties exchange statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. Therefore, this can cure any earlier failure to put the agreement to arbitrate in writing. A further safeguard is provided by the two domestic arbitration institutes, which draw up an agreement to appoint the arbitrators that includes a statement that the parties agree to arbitrate, and the agreement is signed by both parties.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Section 12 of the Arbitration Act provides that the validity of the arbitration agreement and the appointment of arbitrator shall not be prejudiced, even if any party thereto is dead, ceases to be a juristic person, has a final receiving order issued against its property or has been adjudged incompetent or quasi-incompetent.

An arbitration clause forming part of a contract is deemed as a separate agreement independent of the main contract. Therefore the termination of the underlying contract, or a decision by the arbitral tribunal that the underlying contract is null and void, will not affect the validity of the arbitration clause (section 24 of the Arbitration Act).

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Where there is any assignment of a claim or liability, the assignee will be bound by the arbitration agreement concerning such claim or liability (section 13 of the Arbitration Act). A receiver or trustee in bankruptcy will be bound by the arbitration agreement of the insolvent company or bankrupt person if they elect to defend or pursue the relevant claim. Likewise, the administrator of an estate will be bound by an arbitration agreement entered into by the deceased. A principal is bound by an arbitration clause or agreement entered into by its agent.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Act is silent on the issue of third-party participation in arbitration. Therefore, a third party cannot be joined to the arbitration if it is not a party to the arbitration clause, unless all parties agree to the third party joining the arbitration. If so, all of the parties will need to enter into a new arbitration agreement.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Generally, companies in the same group will not be bound by an arbitration agreement entered into by a parent company or subsidiary company, or another company in the same group, in accordance with the principle that each company is a separate legal entity. In Thailand, the requirement for an agreement to arbitrate is strictly applied.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There is no specific provision in the Arbitration Act for multiparty arbitration. The Arbitration Act will apply equally to multiparty arbitration as it does to bilateral arbitration. With respect to the constitution of the arbitral tribunal or the appointment of the arbitrators, the arbitration agreement or the rules of the particular arbitration institute selected by the parties will apply. The ICC rules provide for multiparty arbitration. The rules of Thailand's two domestic arbitration institutes do not have any specific rules for multiparty arbitration, but multiparty arbitration is not precluded. In default of agreement, the parties may apply to the court to appoint the arbitrators.

Constitution of arbitral tribunal

15 Appointment of arbitrators

Are there any restrictions as to who may act as an arbitrator?

The Arbitration Act provides that arbitrators must be impartial, independent and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration. The two domestic arbitration institutes each maintain a list of arbitrators, but the parties are not required to select from the list and may appoint external arbitrators. Present judges may not act as arbitrators, as this is contrary to the rules applicable to judges. However, many Thai arbitrators in the lists of the two domestic arbitration institutes are former judges.

16 Appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

If the parties are unable to agree on the number of arbitrators, a sole arbitrator shall be appointed. Unless otherwise agreed by the parties, the procedure for appointing the tribunal (and the procedure for appointing a chairman if the parties have agreed to an even number of arbitrators) is as follows:

- where the tribunal consists of a sole arbitrator, and the parties are unable to agree on that arbitrator, then either party can apply to the court requesting it to appoint the arbitrator; or
- where the tribunal consists of multiple arbitrators, then each party must appoint an equal number of arbitrators, and those arbitrators will jointly appoint an additional arbitrator (the chairman). If either party fails to appoint its arbitrators within 30 days of notification from the other party, or if the party-appointed arbitrators are unable to agree on a chairman within 30 days from the date of their own appointment, then either party can apply to the court requesting it to appoint the arbitrators or the chairman, as the case may be.

In addition, a party may also apply to the court to appoint arbitrators if:

- a party fails to act as required under the above procedure;
- the parties, or the party-appointed arbitrators, are unable to reach an agreement expected of them under the above procedure; or
- a third party, including an institution, fails to perform any function entrusted to it under such procedure.

The above provisions are contained in sections 17 and 18 of the Arbitration Act.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement and the procedure, including challenge in court.

Sections 19, 20 and 21 of the Arbitration Act deal with the challenge and replacement of arbitrators. Arbitrators can be challenged on the grounds of partiality, lack of independence, and lack of agreed-on qualifications, provided such grounds are justifiable. Prospective arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to independence or impartiality. The standard to be applied closely follows that for challenging a judge in the Thai court, which can only be done in limited circumstances, and a specific relationship must be shown that proves the conflict of interests. A party cannot challenge an arbitrator whom they appointed or if they participated in the appointment, unless they could not have been aware of the grounds for challenge at the time of the appointment.

The procedure for challenging an arbitrator is for the party to file a statement to the arbitral tribunal setting out the grounds for the challenge within 15 days of the appointment of the arbitrator or of becoming aware of the grounds for challenge. This period may be extended by the arbitral tribunal by up to 15 days, where it considers it necessary to do so. Unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal shall determine the challenge.

If there is only one arbitrator, or if the challenge to the arbitral tribunal is unsuccessful, the challenge can be made to the court within 30 days of the appointment of the arbitrator or of becoming aware of the grounds for the challenge, or of the arbitral tribunal's decision rejecting the challenge. The arbitral proceedings may continue, pending the court's decision, unless the court orders otherwise.

In addition, arbitrators must stop holding their office if they refuse to accept the appointment, become subject to an absolute receivership, fail to perform their duties within a reasonable time and in various other circumstances. In such circumstances, if the arbitrator does not withdraw or the parties do not agree to terminate the appointment, either party may apply to the court to do so. In that event, a substitute arbitrator must be appointed according to the rules that were applicable to the appointment of the arbitrator who is being replaced.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses and liability of arbitrators.

An arbitrator is required to be independent and impartial by section 19 of the Arbitration Act, and this applies both to party-appointed arbitrators and to sole arbitrators.

Unless otherwise agreed by the parties, the arbitral tribunal shall stipulate the fees and expenses incidental to the arbitration proceedings and the remuneration of the arbitrator, excluding the attorneys' fees and expenses. The Arbitration Act provides that an arbitration institute may prescribe the fees, expenses and remuneration of the arbitrator (sections 46 and 47).

An arbitrator does not have any civil liability to the parties, unless he or she wilfully or with gross negligence causes damages to either party in the course of his duty as arbitrator. However, an arbitrator may be criminally liable for demanding or accepting bribes, the punishment for which is imprisonment for not more than 10 years, a fine not exceeding 100,000 baht, or both.

Jurisdiction

19 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If proceedings are started in court in breach of an arbitration agreement, the other party may request the court to strike out the case so that the parties can proceed with arbitration. The request must be made no later than the date for filing the statement of defence. If the court considers that there are no grounds for rendering the arbitration agreement void and unenforceable, the court will issue the order striking out the case.

20 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The Arbitration Act provides that the arbitral tribunal is competent to rule on its own jurisdiction, including the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal and the issues of dispute falling within the scope of its authority. For this purpose an arbitration clause is considered to be a separate contract, such that if the main contract is void, the arbitration clause survives.

An objection to the jurisdiction of the arbitral tribunal must be raised no later than the date for submission of the statement of defence. The arbitral tribunal can rule on its jurisdiction as a preliminary question or in the award on the merits. If the arbitral tribunal rules as a preliminary question that it does have jurisdiction, either party may apply to court to decide the matter within 30 days of receipt of the ruling on the preliminary issue. The arbitral tribunal may continue the arbitral proceedings and render an award, pending the court's decision.

Arbitral proceedings

21 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing agreement of the parties, the language and place of arbitration shall be determined by the arbitral tribunal. In determining the place, the tribunal will have regard to the circumstances of the case, including the convenience of the parties. Once the tribunal has determined the language of the proceedings, it shall apply to any statement of claim or defence, any written statement by any party, any hearing, any award, decision or other communication by or to the arbitral tribunal, unless otherwise specified. The tribunal may also order that any documentary evidence shall be accompanied by a translation into the agreed or determined language (sections 27 and 28 of the Arbitration Act).

22 Commencement of arbitration

How are arbitral proceedings initiated?

Arbitral proceedings are deemed to have been commenced in one of the following circumstances (section 27 of the Arbitration Act):

- when a party receives a letter from the other party requesting that the dispute be settled by arbitration;
- when a party requests the other party, in writing, to appoint an arbitrator or to approve the appointment of an arbitrator;
- when a party sends a written notice of the disputed issues to the arbitral tribunal specified in the arbitration agreement; or
- when either party submits the dispute to the agreed arbitration institution.

23 Hearing

Is a hearing required and what rules apply?

In default of agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or oral argument, or whether the proceedings shall be solely conducted on the basis of documents or other evidence. The rules of both of the domestic arbitration institutes require a hearing.

24 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The arbitral tribunal may determine whether to hear live witness testimony or have the witnesses submit written statements. The arbitral tribunal must give the parties sufficient advance notice of any hearing of evidence and of any meeting of the tribunal for the purposes of inspection of materials, places or documents. All statements of claim or defence, statements of request, documents or any other information supplied to the arbitral tribunal by one party must also be communicated to the other party. Any report of expert witness or documentary evidence on which the arbitral tribunal may rely in making its decision shall also be communicated to the parties. There are no set time limits for the giving of advance notice or communications to the other party. However, section 25 of the Arbitration Act requires that the parties shall be given a full opportunity of presenting their cases in accordance with the circumstances of the dispute. Therefore, a reasonable period of advance notice should be given.

Parties and party officers are permitted to testify as witnesses. The parties are free to determine the rules on disclosure, and the most commonly used rules provide for at least some form of pre-trial disclosure as essential to achieving a cost-effective and just outcome. Since Thai civil procedure does not generally provide for pre-trial disclosure, an arbitration tribunal operating in Thailand should understand that a Thai court's willingness to compel disclosure requests may be limited. This also means that the scope of disclosure will usually be much wider in arbitration than litigation in Thailand.

The arbitral tribunal may appoint one or more experts to report on specific issues to be determined by the tribunal. The arbitral tribunal may require a party to give relevant information to the expert or to provide or allow access to documents, materials or places for inspection by the expert. If the tribunal considers it necessary, or if

one party so requests, the expert shall also participate in a hearing in order that the parties may ask questions or present their own expert witnesses, unless the parties agree otherwise (section 32 of the Arbitration Act). There is a tendency towards party-appointed experts in proceedings under the rules of the domestic arbitration institutes.

The IBA rules on the taking of evidence are very similar to rules of evidence in Thailand's Civil Procedure Code, the Thai Arbitration Act and in the rules of the domestic arbitration institutions. Accordingly, there is a tendency to apply the substance of the IBA rules on the taking of evidence.

25 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

A majority of the arbitral tribunal (or a party with the consent of a majority) can request a court to issue a subpoena or an order for submission of any documents or materials. If the court believes that this subpoena or court order could have been issued if the action was being conducted in the courts, then it will proceed in accordance with the application, applying all relevant provisions of the Civil Procedure Code.

For court assistance in the appointment of and challenge of arbitrators or jurisdiction of the arbitral tribunal, see questions 16, 17 and 20.

26 Confidentiality

Is confidentiality ensured?

The Arbitration Act and the rules of the two main domestic arbitration institutes are silent on the issue of confidentiality, but normally the tribunal addresses confidentiality in the terms of reference. Regardless of those restrictions, the law provides that most civil proceedings are open, and final civil court judgments are a matter of public record. Therefore, although the arbitration proceedings and award are normally confidential as far as disclosure by the parties is concerned, the arbitration award or a part of it may become public during or at the end of the enforcement proceedings.

Interim measures

27 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Any party to an arbitration agreement can file an application requesting the court to impose provisional measures to protect its interests either before or during the arbitral proceedings (section 16 of the Arbitration Act). If the court believes that this provisional relief would have been available if the action was being conducted in the courts, then it will proceed as above. If the court orders provisional relief before the arbitral proceedings have begun, then the applicant must begin the arbitration within 30 days of the date of the order (or such other period that is specified by the court), failing which the court order automatically expires. The provisions governing provisional measures under the Civil Procedure Code apply. Such provisional measures include orders for security for costs, freezing orders, attachment of property and restraining injunctions.

28 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Unless the rules agreed on by the parties to apply to the arbitration give the arbitral tribunal the power to award interim remedies, such as security for costs, such interim remedies are not available from the tribunal. A party seeking an interim remedy must apply to the court for such an order.

Awards

29 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The statutory default rule pursuant to section 35 of the Arbitration Act is that a majority vote will suffice for all decisions, orders and awards of the arbitral tribunal. If a majority of votes cannot be obtained, for example, because an arbitrator refuses to take part in a vote or sign the award, the chairman of the arbitral tribunal shall solely issue the award, order or ruling.

30 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

As mentioned above, if there is a dissenting opinion, the decision, order or award will be passed by majority vote or the Chairman of the arbitral tribunal according to section 35 of the Arbitration Act.

31 Form and content requirements

What form and content requirements exist for an award?

The award must be in writing and signed by the members of the arbitral tribunal, or a majority thereof. Reasons must be given for the failure of any member of the tribunal to sign the award. Unless otherwise agreed by the parties, the award must clearly state the reasons for the decisions and must not determine matters outside of the scope of the arbitration agreement or the relief sought by the parties, except for matters relating to costs and fees, or an award rendered in accordance with a settlement. The date and place of the arbitration must be stated in the award and the award is deemed to be made at the place stated. A copy of the award must be sent to all parties.

32 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law?

There is no statutory time limit within which an award must be issued. However, the rules of both domestic institutes provide that the award must be issued within 180 days of the appointment of the last arbitrator (TAI) or of the chairman or sole arbitrator (BOT Committee). The rules of the TAI do not provide for any extension of the time limit for issuing an award, but in practice, the tribunal in a TAI arbitration will allow extensions of time if the parties so agree. Under the BOT Commercial Arbitration rules, an extension of time for issuing the award may be agreed by the parties.

33 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of receipt of the award is decisive for the time limit for motions to correct errors or mistakes, for interpretation or explanation of specific points or parts of the award and for requests for additional awards as to claims presented in the proceedings but omitted from the award. The date of receipt is also decisive for the time limit within which to challenge an award.

The date of the award is decisive for the time limit within which the arbitral tribunal may correct any error or mistake of its own initiative.

The time limit for enforcing the award commences on the day the award becomes enforceable.

34 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may award any final remedy that the court could order, provided the award is within the scope of the arbitration agreement and the relief sought by the parties. If the parties settle the dispute during the arbitral proceedings, the arbitral tribunal shall terminate the proceedings. If the settlement is not contrary to law and the parties request an award, the arbitral tribunal shall render an award in accordance with the settlement.

35 Termination of proceedings

By what other means than an award can proceedings be terminated?

In addition to a final award or a consent award, the tribunal can issue an order to terminate the proceedings if the parties agree to terminate the proceedings, if the claimant withdraws the claim and the respondent does not object, or if the tribunal finds that the continuation of the proceedings has become unnecessary or impossible. The arbitral tribunal can also terminate the proceedings if the claimant does not communicate his or her statement of claim within the time agreed by the parties or determined by the tribunal.

36 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Unless otherwise agreed by the parties, the fees and expenses of the arbitral proceedings, and the arbitrators' compensation, but not the lawyer's fees and expenses, are paid according to the arbitral award.

37 Interest

May interest be awarded for principal claims and for costs and at what rate?

The tribunal can award any remedy that the court could award, including an award of interest, provided this is requested in the claim. Under Thai law compound interest cannot be awarded. The rate of interest is in accordance with the parties' agreement; if not specified, a default rate of 7.5 per cent per annum will apply.

Proceedings subsequent to issuance of award

38 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal may correct minor and insignificant errors, such as typographical errors or an error in computation, on its own initiative within 30 days of the date of the award. Either party may file a motion for the tribunal to correct minor errors, request an interpretation or explanation of a specific point or part of the award, or for an additional award as to claims presented in the arbitral proceedings but omitted from the award within 30 days of receipt of the award, on notice to the other party. If the tribunal considers the motion is justified, it will make the correction or give the interpretation or explanation within 30 days of receipt of the motion, and in the case of an additional award, it will make the additional award within 60 days of receipt of the motion. The tribunal may extend the time periods for making a correction, giving an interpretation or explanation and making an additional award (section 39 of the Arbitration Act).

39 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An arbitral award can be challenged in the courts by making an application to set aside the award. This must be submitted no later than 90 days after receiving a copy of the award (or after a correction, interpretation or the making of an additional award). The court sets aside the award if the applicant proves any of the following:

- a party to the arbitration agreement was under some legal incapacity;
- the arbitration agreement is not binding under the governing law agreed to by the parties, or in the absence of such agreement, the laws of Thailand;
- the applicant was not given proper advance notice of the appointment of the arbitral tribunal, or of the arbitral proceedings, or was otherwise unable to defend the case in the arbitral proceedings;
- the award deals with a dispute outside the scope of the arbitration agreement, or contains a decision on a matter outside the scope of the agreement. If the part of the award outside the scope of the agreement can be separated from the balance of the award, then the court will only set aside that part; or
- the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the arbitration agreement or, unless otherwise agreed by the parties, the Arbitration Act.

The court will also set aside an award if either:

- the award deals with a dispute not capable of settlement by arbitration under the law; or
- the recognition or enforcement of the award would be contrary to public policy or good morals.

40 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There is one level of appeal from the lower court judgment to enforce or set aside the award straight to the Supreme Court, Thailand's highest appeal court. The appeal process can take two to three years before the Supreme Court issues its judgment, depending on the Supreme Court's backlog of cases. As there are no trial hearings at the Supreme Court level, the appeal is made in writing only and therefore the costs are limited to drafting the appeal or answer to appeal and attending the Supreme Court's judgment hearing at which the judgment is handed down. The Supreme Court has discretion to award costs to the prevailing party, up to a maximum of 3 per cent of the amount in dispute. However, large legal fee awards are not common and it is more likely that only a small fraction of legal fees will be recovered.

41 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An arbitral award is recognised as binding on the parties irrespective of the country in which it was made, subject to provisions for enforcing and refusing enforcement of the arbitral award. However, an arbitral award made in a foreign country will only be enforced by the Thai court if it is subject to an international convention, treaty or agreement to which Thailand is a party, and the award is only applicable to the extent that Thailand has acceded to be bound by such international convention, treaty or agreement. Foreign arbitration awards given in countries that are signatories to the New York

Update and trends

Unnecessary administrative delays and underhand delaying tactics employed by opposing parties are the source of much discussion among the Thai arbitration community.

Although these are the exception not the rule, there are instances of cases where it takes many months simply to appoint the arbitrator. Such cases undermine the value of arbitration and colour the perception of those from other jurisdictions towards arbitration in Thailand.

There are also several instances recently of opposing parties using underhand tactics to delay arbitration cases, such as by attacking foreign lawyers who may be involved in the arbitration in respect of immigration matters such as visas and work permits.

Since Thailand has not yet ratified the ICSID Convention, there are no recent or pending ICSID cases in which Thailand is a party.

The arbitral award in the UNCITRAL arbitration brought by the German construction company, Walter Bau AG, against Thailand pursuant to the Bilateral Investment Treaty (BIT) between Germany and Thailand was issued on 1 July 2009, but is not public. It is the only known arbitration against Thailand pursuant to a BIT. In that case, Walter Bau AG had invested in the tollway to the Don Muang International Airport. After the opening of the new international airport, Suvarnabhumi Airport, the revenues from the tollway to the old Don Muang airport decreased substantially. Walter Bau AG therefore pursued an arbitration case against Thailand in Geneva. After obtaining an arbitral award in its favour, Walter Bau AG sought to enforce it against the Thai government's property in the US. The Thai government is presently defending such enforcement proceedings.

Convention or the Geneva Protocol are recognised and enforceable in Thailand.

The party seeking enforcement must file a petition to the Civil Court within three years from the date the award first became enforceable. However, to enforce an award related to an administrative contract, the party seeking enforcement must file a petition to the Administrative Court within one year after receipt of the award. The party also must submit the following documents:

- an original or certified copy of the arbitral award;
- an original or certified copy of the arbitration agreement; and
- a certified Thai translation of the award and the arbitration agreement.

The enforcement proceedings can take about 12 to 18 months to obtain the lower court judgment (which can be appealed directly to the Supreme Court).

When a party applies to the court to enforce an arbitration award, the court can refuse enforcement if the unsuccessful party proves any of the following:

- any of the grounds for the award to be set aside (see question 39);
- that the arbitral award has not yet become binding; or
- that the arbitral award has been set aside or suspended by a competent court, or under the law of the country where it was issued.

Decisions of the court issued under the Arbitration Act cannot be appealed, except in any of the following circumstances:

- recognition or enforcement of the award is contrary to public order;
- the order or judgment is contrary to the laws concerning public order;
- the order or judgment is not in accordance with the arbitral award;
- one of the judges sitting in the case gave a dissenting opinion; or
- the order is an order concerning provisional protective measures under section 16 of the Arbitration Act.

The parties cannot exclude rights of appeal. Although many arbitration agreements purport to exclude the right to appeal, they are not enforceable, and the right to appeal is a statutory right.

42 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

As noted in question 41, the court can (and usually will) refuse enforcement of the arbitral award where the arbitral award has been set aside by a competent court, or under the law of the country where it was issued.

43 Cost of enforcement

What costs are incurred in enforcing awards?

Enforcement of an arbitral award requires an additional set of proceedings, which has the potential to add one to three years to the arbitration process. Therefore, costs will be incurred in respect of attorneys' fees and the court fee for filing the enforcement proceedings. The court filing fee for enforcement of domestic arbitrations is 0.5 per cent of the claim amount up to a maximum of 50,000 baht,

Tilleke & Gibbins

Sally Veronica Mouhim **sally.m@tillekeandgibbins.com**
Kornkieat Chunhakasikarn **kornkieat.c@tillekeandgibbins.com**

Supalai Grand Tower, 26th Floor
1011 Rama 3 Road
Chongnonsi, Yannawa
Bangkok 10120
Thailand

Tel: +66 2653 5555
Fax: +66 2653 5678
www.tillekeandgibbins.com

plus 0.1 per cent of the amount exceeding 50 million baht. The court filing fee for enforcement of international arbitral awards is 1 per cent of the claim amount up to a maximum of 100,000 baht, plus 0.1 per cent of the amount exceeding 50 million baht.

Other

44 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Thai civil procedure does not generally provide for pre-trial disclosure and production of documents is generally limited to those documents that the party will rely on to support its case. The rules of the domestic arbitral institutes provide for some degree of pre-trial disclosure and empower the arbitral tribunal to order production of documents, but the arbitral tribunal's willingness to do so is likely to reflect the attitude taken by the Thai courts, which is that it is only likely to order production of specific documents requested by a party and it will not usually entertain 'fishing expedition'-style requests for production of documents.

Thai courts are increasingly willing to accept witness statements in respect of evidence, mainly to speed up the procedure, and witness statements are common in arbitral proceedings. Traditionally, Thai courts scheduled periodic hearings for taking evidence rather than consecutive hearings. Though the Thai courts now try to schedule consecutive hearings where possible, the TAI in particular continues to adopt the practice of scheduling periodic hearings, which can stretch the proceedings over several weeks or even months. The low fees for arbitrators conducting TAI arbitrations may also have an impact on the lengthy time frame for completing the arbitration, as the arbitrators may be reluctant to alter their schedules and other commitments to accommodate the arbitral proceedings.

45 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign legal advisers may participate as arbitrators. They may also act as legal advisers in arbitration proceedings conducted in Thailand provided the governing law is not Thai law, or that there is no need to apply for enforcement in Thailand. A foreign practitioner will need a non-immigrant 'B' visa and a work permit to act as an arbitrator or legal adviser in arbitration proceedings conducted in Thailand.

VAT in Thailand is currently 7 per cent. Foreign individuals working in Thailand are normally subject to Thai income tax. Foreigners who spend less than 180 days in a calendar year in Thailand are considered 'non-resident' and will be taxed at a flat rate of 15 per cent. Resident foreigners are taxed at a progressive rate varying between 10 to 37 per cent, subject to deductions for allowances. However, there may be an exemption for individuals from countries that have entered into a double taxation agreement with Thailand, depending on the specific provisions of the agreement.

The TAI fees for arbitrators are relatively low, and this is likely to be a disincentive for foreign arbitrators and experienced and highly qualified Thai arbitrators to act in Thai arbitration proceedings.

GETTING THE DEAL THROUGH®

Annual volumes published on:

Air Transport
Anti-Corruption Regulation
Arbitration
Banking Regulation
Cartel Regulation
Construction
Copyright
Corporate Governance
Dispute Resolution
Dominance
e-Commerce
Electricity Regulation
Environment
Franchise
Gas Regulation
Insurance & Reinsurance
Intellectual Property & Antitrust
Labour & Employment
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Patents
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Equity
Product Liability
Product Recall
Project Finance
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Shipping
Tax on Inbound Investment
Telecoms and Media
Trademarks
Vertical Agreements

For more information or to purchase books, please visit:
www.GettingTheDealThrough.com

ABA Section of International Law
Your Gateway to International Practice

Strategic research partners of the ABA International section

THE QUEEN'S AWARDS FOR ENTERPRISE 2006

INTERNATIONAL BAR ASSOCIATION

The Official Research Partner of the International Bar Association

 ISSN 1750-9947