

# The path to 'samarnachan'

Since the coup last September, the new government has been advocating a "reconciliation policy" (known in Thai as *samarnachan*). This policy is generally supported by Thai people as it is consistent with the informal processes for resolving disputes inherent in Thai culture.

Thai people, by nature, love peace and harmony and tend to avoid conflict where possible. Looking back through Thai history it can be seen that Thai people have always sought amicable resolutions to problems that arise in their day-to-day lives.

Approximately 600 to 700 years ago, during the reign of King Ramkhamhaeng, the King took on the role of mediator of disputes among his people. In more recent times, it has been common for parties to a dispute to seek the assistance of an influential member of their community (a *phu yai*) to settle the dispute amicably and maintain harmonious relations.

Thai culture is, therefore, conducive to alternative methods of dispute resolution. Traditionally, however, such methods were informal. It was not until 1987, when Thailand enacted its first Arbitration Act, that a method of alternative dispute resolution was formalised. It was subsequently repealed and replaced by the Arbitration Act 2002.

The present Arbitration Act (2002) defines the Arbitral Tribunal as an arbitrator or a panel of arbitrators. An arbitrator's role is different from that of

a mediator, although they have similar duties. The mediator's role is one of assisted negotiation, helping parties reach a mutually acceptable solution. The mediator's opinion is not binding on the parties.

In contrast, the arbitrator or arbitration panel takes on the role of an adjudicator and the decision is binding on the parties. If the unsuccessful party fails to perform an obligation in accordance with the arbitral award, the other party can submit a petition to the court to enforce the arbitral award.

**What kinds of disputes can be handled by arbitration?** Under the Act, not only can existing disputes be referred to arbitration, by agreement between the parties, but parties can also agree in advance that any dispute arising in the future between them will be determined by arbitration.

Although it is usually contractual disputes that are referred to arbitration, other types of civil claims, such as wrongful act claims, can also be resolved by arbitration. In addition, disputes in relation to civil and administrative contracts can be handled by arbitration if both parties agree. However, disputes in criminal cases cannot be dealt with by arbitration.

Although the Act does not prohibit parties from referring criminal disputes to arbitration, any arbitration agreement in respect of such a dispute will be void on public policy grounds. This is because

of the nature of the punishments for criminal offences, such as imprisonment, which the arbitrator does not have the power to award.

**The arbitration agreement.** An agreement to arbitrate may be in the form of a clause in a contract, or a separate contract independent from the main contract. The arbitration agreement may even be made by exchange of correspondence. The Act simply requires that the arbitration agreement is in writing and signed by the parties. The Act applies the concept of separability to arbitration clauses such that the clause is treated as a separate agreement. The result is that if the main contract is held to be void, the arbitration clause remains valid.

In addition, if there is an assignment of benefit or liability for a claim to a third party, the arbitration agreement in respect of such claim is also binding on the third party.

In cases where there is no arbitration agreement or arbitration clause requiring a given dispute to be arbitrated, before agreeing to arbitrate each party should consider whether arbitration is appropriate for their individual circumstances and should also take into account the cost of the arbitration process as opposed to filing a claim at the court.

**Can Thai courts enforce foreign arbitral awards?** Thai courts can enforce arbitral awards issued in the Thai jurisdiction and also foreign arbitral awards that are subject to an international

convention, treaty or agreement to which Thailand is a party. Thailand is a signatory to the New York Convention and the Geneva Protocol and therefore its courts will enforce arbitral awards rendered in those member countries.

A party seeking enforcement of an arbitral award must file an application to the court within three years from the day that the award is enforceable. The award is enforceable on the day on which the parties receive the award from the tribunal, or the due date for performance of an obligation in the award, if later.

The following courts have jurisdiction to determine an application for enforcement of an arbitral award:

- ◆ The Intellectual Property and International Trade Court;
- ◆ a court where the arbitral proceedings are conducted;
- ◆ a court where either party is domiciled;
- ◆ a court that has jurisdiction over the dispute submitted to arbitration;
- ◆ the Administrative Court (only in relation to arbitrations of disputes concerning administrative contracts).

The same courts have jurisdiction to hear an application to set aside an arbitral award.

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