Thailand

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GENERAL

1. Which arbitration bodies in your jurisdiction are commonly used to resolve large commercial disputes? Please give details of both arbitral institutions and professional/industry bodies.

Many arbitrations in Thailand are conducted under the supervision of the International Chamber of Commerce (ICC). However, there are also two main domestic arbitration institutes in Thailand:

- The Thai Arbitration Institute of the Alternative Dispute Resolution Office, Office of the Judiciary.
- The Thai Commercial Arbitration Institute of the Board of Trade.

Both of these are well respected, supervised by a diverse advisory board, have standard arbitration rules, and maintain a list of qualified and available arbitrators. Parties can nominate outside professionals as arbitrators, and most often elect to conduct the proceedings in English or Thai. The Thai Arbitration Institute handles many more cases than the Board of Trade's Commercial Arbitration institute, largely due to the fact that the Office of the Judiciary manages it.

Administrative costs and arbitrator fees for arbitrations conducted through the two Thai arbitration institutes are quite reasonable and both have similar fee structures based on claim amounts. These fees are considerably less than those charged by many international institutes.

2. What legislation applies to arbitration in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL model law)?

Thailand's arbitration law is the Arbitration Act B.E. 2545 (2002) (Arbitration Act), which closely follows the UNCITRAL model law. However, there are some distinct differences unique to Thailand. For example, while the model law allows arbitrators to take interim measures relating 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 cause a party damage. There are also criminal provisions where an arbitrator can be fined and/or imprisoned for up to ten years 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 parties.

Foreign legal advisers can participate as arbitrators. They can also act as legal advisers in arbitration proceedings conducted in Thailand if either:

- The governing law is not Thai law.
- It is unnecessary to apply for enforcement in Thailand.

An additional benefit is the fact that in arbitrations involving international contracts, use of English is commonly accepted.

3. Are there any mandatory legislative provisions? If so, please summarise their effect.

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.

However, the following requirements must be met for a valid arbitration:

- The arbitration agreement must be in writing and signed by the parties (*see Question 5*).
- The arbitral tribunal must be composed of an uneven number of arbitrators.
- The arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration.
- The arbitral award must be in writing and signed by all or a majority of the members of the arbitral tribunal.

4. Does the law of limitation apply to arbitration proceedings?

The law of limitation does apply to arbitration proceedings in Thailand. However, the exact limitation period is often uncertain. If an arbitration is filed against a party in Thailand, it is possible that the Thai court enforcing the arbitral award will hold that the arbitration

must have started within Thailand's limitation period, even if foreign substantive law governs the parties' underlying agreement(s). As Thailand does not have any binding case precedent on this issue, the claimant in such a dispute should consider filing its claim within the limitation period applicable in Thailand or under the law governing the agreement(s), whichever is shorter.

ARBITRATION AGREEMENTS

5. For an arbitration agreement to be enforceable:

- **What substantive and/or formal requirements must be satisfied?**
- **Is a separate arbitration agreement required or is a clause in the main contract sufficient?**

Legal requirements and formalities

In order to be binding, an arbitration agreement must:

- Be in writing.
- Be signed by the parties.
- State unequivocally the parties' intent to submit all or certain disputes arising between them in connection with a defined legal relationship.

Form of agreement

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.
- Other means that provide a record of the agreement.

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.

6. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/characteristics or selection of arbitrators?

The Arbitration Act provides that the arbitral tribunal must be comprised of an odd number of arbitrators. If the parties have agreed to an even number, then the arbitrators will jointly appoint an additional arbitrator to act as the chairman of the tribunal.

Arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration (*Arbitration Act*).

PROCEDURE

7. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?

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 (*Arbitration Act*):

- 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.
- Where the tribunal consists of multiple arbitrators, then each party must appoint an equal number of arbitrators, and those arbitrators jointly appoint an additional arbitrator (the chairman). If either party fails to appoint its arbitrator(s) within 30 days after 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 arbitrator(s) or the chairman, as the case may be.

Arbitrators can be challenged on the grounds of partiality, lack of agreed-on qualifications, and so on. 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 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.

Arbitral proceedings are deemed to have started in any of the following circumstances:

- When a party receives a letter from the other party requesting that the dispute be settled by arbitration.
- When a party notifies 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.
- When either party submits the dispute to the agreed arbitration institution.

8. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

Most well-drafted arbitration clauses select the arbitration institute or rules that apply in the event of a dispute. If this is not the case, the parties can determine the procedural rules after the dispute arises, but that rarely happens because one of the parties usually wants to delay the proceedings and the outcome.

If the parties do not select a body of rules, the tribunal can conduct the proceedings in any manner it considers appropriate. In practice, if the parties do not select a body of rules, the tribunal is likely to look to an established set of rules as a model (such as the rules of the ICC or the Thai Arbitration Institute). In all cases, the tribunal must provide the parties with equal, fair and ample opportunity to present their cases, failing which the award may be unenforceable (*see Question 17*).

The statutory default rules governing procedure are as follows:

- The claimant must state the facts supporting its claim, the points at issue and the relief sought, and the respondent must state its defence within the time period determined by the tribunal.
- The parties may submit the relevant documents or list of evidence.
- Either party can amend or supplement its claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it to be inappropriate having regard to the delay in making the amendment.
- The arbitral tribunal decides whether to hear oral testimony and argument or whether the proceedings will be conducted solely on the basis of documents.
- The arbitral tribunal can take evidence at any stage during the course of proceedings as it thinks fit if requested by a party.
- The arbitral tribunal must give sufficient advance notice of any hearing of evidence or meeting of the tribunal for inspecting materials, places or documents.
- All statements of claim, defence, documentary evidence and expert witness reports must be communicated to the other party as well as the tribunal.
- In default of submitting a statement of claim within the time limit determined by the tribunal, the arbitral tribunal must end the proceedings.
- In default of submitting a statement of defence within the time limit, the arbitral tribunal must continue the proceedings without treating the respondent as admitting the claims.
- In the absence of appearance at any hearing, or failure to produce documentary evidence, the tribunal must continue the proceedings and make the award on the evidence before it.
- The arbitral tribunal can appoint one or more experts to rule on any issues it determines necessary.
- The arbitral tribunal can require a party to provide the expert with relevant information or documents or provide access to materials or places for inspection.
- The expert must participate in the hearing after delivery of his report if the tribunal considers it necessary or one of the parties requests his attendance.
- The arbitral tribunal can authorise an arbitrator or a party to request that a court issue a subpoena or order for submission of any documents or evidence.
- In the absence of agreement as to the governing law, the arbitral tribunal must apply Thai laws, save where there is a conflict of laws, in which case the applicable law is determined in accordance with the conflict of laws principle.
- The arbitral award and other orders and rulings must be made by majority of votes. If a majority cannot be obtained, the chairman of the arbitral tribunal must solely issue the award, order or ruling.
- The arbitral award must be in writing and signed by the members of the arbitral tribunal or a majority thereof. The award must clearly state the reasons for the decisions made. The award must state the date and place of the arbitration. The tribunal must send a copy of the award to all parties.

9. What procedural powers does the arbitrator have? In the absence of express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The arbitral tribunal has the power to take evidence at any stage during the course of proceedings as it thinks fit if requested by a party. In the absence of agreement, the arbitrator cannot order disclosure of documents and attendance of witnesses, but may apply to the court for a subpoena or order in respect of the same.

EVIDENCE

10. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?

The parties can 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. As 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 is usually much wider in arbitration than litigation in Thailand (*for subpoena of documents, see Question 9*).

CONFIDENTIALITY

11. Is arbitration confidential?

The Arbitration Act is silent on the issue of confidentiality, but the tribunal usually addresses confidentiality in the terms of reference. Regardless of those restrictions, the law provides that most civil proceedings are open, and all 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 may become public during or at the end of the enforcement proceedings.

COURTS AND ARBITRATION

12. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?

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.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interests either before or during the arbitral proceedings (*section 16, 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 started, 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.

(*For court assistance in the appointment of arbitrators, see Question 6.*)

13. What is the danger of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

The local courts are not likely to actively intervene in arbitration proceedings, but it is common for defendants to delay the proceedings through action or inaction that requires court intervention. For example, a party may refuse to appoint an arbitrator, or challenge the opposing party's arbitrator (or the chairman) on the basis of bias or other grounds, deliberately bringing the court into the proceedings. A party may also apply to the courts for interim measures or interim findings. In most cases, the arbitral tribunal is free to proceed pending the court's decision, but sometimes the parties prefer to stay the proceedings temporarily to minimise the chance that an adverse court decision will jeopardise the enforceability of the award.

If one of the parties to a dispute files an action in the courts, and if the court determines that it has jurisdiction, then the court will not stay the proceedings merely because an arbitral tribunal has determined that it has jurisdiction over the same dispute. If one of the parties to a court case submits a petition objecting to the court's jurisdiction, and if the court agrees that the dispute belongs in arbitration, then the court will dismiss the case.

14. What remedies are available where proceedings are started in the local court in breach of an arbitration agreement?

If proceedings are started in court in breach of an arbitration agreement, the other party may request that the court 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 issues the order striking out the case.

15. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

The Thai courts will not grant an injunction restraining proceedings started abroad, and the objecting party must apply to the overseas court to strike out the proceedings on the basis that they are in breach of the arbitration agreement. This is because Thailand is not a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971, and foreign courts are unlikely to recognise and enforce the Thai court's order granting the injunction.

16. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction accept the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

The arbitral tribunal can rule on its own jurisdiction, including (*Arbitration Act*):

- The existence or validity of the arbitration agreement.
- The validity of the appointment of the arbitral tribunal.
- The issues of dispute falling within the scope of its authority.

For this purpose an arbitration clause is considered to be a separate contract, so that if the main contract is void, the arbitration clause survives.

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 receiving the ruling on the preliminary issue.

APPEALS

17. What rights of appeal or challenge to the local courts exist in relation to arbitration proceedings and awards? Can the parties effectively exclude any rights of appeal?

The parties can challenge an arbitral award in the courts by making an application to set aside the award. This must be submitted to the court 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 that lies outside the scope of the agreement can be separated from the balance of the award, then the court will only set aside that part.
- 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.
- The recognition or enforcement of the award would be contrary to public order.

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 above*).
- That the arbitral award has not yet become binding.
- 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.
- The order is an order concerning provisional protective measures under section 16 of the Arbitration Act (*see Question 11*).

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.

REMEDIES

18. What interim remedies are available from the tribunal? Can the tribunal award:

- **Security for costs?**
- **Security or other interim measures?**

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

19. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?

The arbitral tribunal can award any final remedy that a court can order, provided the award is within the scope of the arbitration agreement and the relief sought by the parties.

COSTS

20. In relation to arbitration costs, arbitrators' and experts' fees, and legal fees:

- **Is arbitration generally less expensive and faster than court litigation in your jurisdiction?**
- **What legal fee structures can be used? For example, hourly rates and task based billing? Are fees fixed by law?**
- **To what extent, if any, is the unsuccessful party liable to pay the successful party's costs?**

Average costs and duration

Traditionally, arbitration is considered to be cheaper than litigation, primarily because arbitral proceedings are more flexible

and limit some of the more costly aspects of litigation (for example, pre-trial disclosure). However, in Thailand, litigation can be cheaper than arbitration. This is because the court filing fee is 2.5% of the claim (or counterclaim) amount and does not exceed THB200,000 (about US$5,906). In addition, litigating parties do not have to pay an arbitration institute or a panel of arbitrators and some Thai Courts (including the IP&IT court) have implemented user-friendly and cost-saving measures, such as affidavits instead of direct examination, and video testimony for overseas witnesses. Finally, a court judgment can be enforced without further recourse to the courts, which is generally not the case when trying to enforce an arbitration award. 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.

While litigation in Thailand has become very cost-competitive against arbitration, parties that prefer arbitration for other reasons can control the costs of arbitration by managing variables within the parties' control, including the choice of arbitration rules and institute, the venue, number of arbitrators, and so on.

Legal fees

Legal fees are not fixed by law and most arbitrations are handled on an hourly basis. Occasionally, law firms work on a fixed-fee or capped-fee basis, or a combination of these. If the fees are fixed or capped, the firms expect a renegotiation in the event of certain contingencies, such as counterclaims, excessive delay tactics by the opposing party, or facts which were unknown to the firm at the time it agreed to the initial fee arrangement. The enforceability of contingency fee arrangements is an open issue in Thailand, as the Supreme Court has issued some decisions enforcing such arrangements, and other decisions voiding such arrangements as unethical under the circumstances.

Payment of successful party's costs

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.

21. Are there any low cost or small claims arbitration schemes?

There are no low cost or small claims arbitration schemes at present in Thailand.

ENFORCEMENT

22. In what circumstances will:

- **An arbitration award made in your jurisdiction be enforceable in the local courts?**
- **An arbitration award made in your jurisdiction be enforceable in other jurisdictions?**
- **A foreign arbitration award be enforceable in your jurisdiction?**

Enforcement of awards

Domestic arbitration awards are expressly recognised as binding on the parties, and enforceable in the domestic courts on application by one of the parties. The party seeking enforcement must file a petition within three years from the date the award first became enforceable. That 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.
- 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).

(For the grounds on which enforcement can be refused, see Question 17.)

Enforcement of awards abroad

Thailand is a signatory to both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Geneva Protocol on Arbitration Clauses 1923 (Geneva Protocol). Thai arbitration awards should be enforceable in all other signatory countries, subject to their individual restrictions.

Enforcement of foreign awards

Foreign arbitration awards given in countries that are signatories to the New York Convention or the Geneva Protocol are recognised and enforceable in Thailand. The procedure for enforcing a foreign award is the same as the procedure for enforcing a domestic award (*see above, Enforcement of awards*).

23. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

Enforcement proceedings can take about 12 to 18 months to obtain the lower court judgment. If this judgment is appealed, this can add a further one to two years to the process. There is no expedited procedure. However, the lower-court judgment may be appealed directly to the Thai Supreme Court without having to be heard by the Appellate Court first.