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Challenges Made against Arbitrators in Thailand: New Trends

The arbitrator plays a key role in protecting due process in arbitral proceedings and in granting an enforceable arbitral award. Unlike in a traditional court, parties who agree to solve their dispute through arbitration can separately or solely appoint an arbitrator or arbitrators—subject to the arbitration agreement and the rules of each arbitration institution—in the event that both parties cannot agree to appoint a sole arbitrator or presiding arbitrator. Challenges against the arbitrator must meet the requirements stipulated by the rules of the institute under which the arbitration is conducted. Under UNCITRAL rules, arbitrators may be challenged if circumstances give rise to "justifiable doubts" about their impartiality or independence, or if they do not possess qualifications agreed upon by the parties.[1]

The UNCITRAL rules do not detail what circumstances give rise to these "justifiable doubts," as they simply transfer the relevant provision of the UNCITRAL Model Law on International Commercial Arbitration without providing any further guidance on the circumstances that could affect the arbitrator's impartiality or independence.

Challenging the arbitrator could interrupt the arbitration process and would be an essential factor in causing an award to ultimately be unenforceable. Differing interpretations of the broad provisions of the UNCITRAL Model Law and rules have thus led to challenges against arbitrators being made as a delay tactic.

IBA Guidelines on Conflict of Interest

In several countries, arbitral institutions and tribunals apply the International Bar Association's (IBA) 2004 Guidelines on Conflict of Interest in International Arbitration as a "soft law" that provides two basic parts: a set of "general standards" and a set of "practical applications" consisting of three lists of specific potential conflicts that could subject an arbitrator to challenges. The lists cover three categories—non-waivable red, waivable red, and orange—providing specific situations likely to take place in current arbitration practice, and specific guidance to arbitrators, parties, institution and courts as to which circumstances do or do not establish conflicts.[2] The non-waivable red list details situations in which the arbitrator must not act because they show clear evidence of a conflict of interest. The waivable red list covers situations that are serious potential conflicts that can be waived by the parties.

However, in Thailand, the IBA guidelines have not been recognized, are rarely applied in international proceedings, and have not been mentioned or considered in any court judgments. Thus, examining the grounds to challenge the arbitrator in Thailand requires consideration of the Arbitration Act B.E. 2545 (2002), and the rules that administer the arbitration proceedings.

Common Grounds for Challenging an Arbitrator in Thailand

The Arbitration Act also requires that the arbitrator be impartial and independent and have the qualifications required by the arbitration agreement (or by the mutually agreed-upon arbitration institution).[3] The arbitrator is obligated to disclose any fact that would cause a reasonable doubt of his or her impartiality or independence from the date of their appointment until the end of the arbitral proceedings (that is, until the date the arbitral award is granted).[4]

When it comes to the permissible grounds for challenging an arbitrator, Thai law refers to the UNCITRAL Model law—that is, an arbitrator may be challenged if the facts give any cause for justifiable doubt about the impartiality or independence, or in the case of a lack of quality agreed upon by the parties.

In practice, the grounds most commonly cited for challenges against arbitrators in Thailand are (1) conflict of interest; (2) failure to disclose facts that could affect the arbitrator's impartiality or independence; and (3) irregularity—the arbitrator's violation of due process rights of the parties, or the conduct of arbitration procedures not according to the arbitration law and the applicable procedural rules.

Timing of Challenges against the Arbitrator

To challenge an arbitrator, the party has to consider the rules of the institution administering the dispute. The key national institutions for arbitration in Thailand—the Thai Arbitration Institute (TAI) and Thailand Arbitration Center (THAC)—provide similar approaches for challenging the arbitrator. The challenging party must submit a challenge application to either the tribunal or the institution within 15 days of the fact or cause becoming known.

The TAI and THAC appoint a committee to consider the challenge on the case-by-case basis. Either the tribunal's or the committee's order on the challenge is nominally final, but a party who is not satisfied with the order can also continue to file a challenge against the arbitrator with the court.

Two levels of Thai court consider challenges against arbitrators: the courts of first instance and the Supreme Court. If an arbitration case is related to a state enterprise or government official, it would instead go into Thailand's Administrative Court system (as opposed to the general courts). For these cases, the appropriate court of first instance is the Administrative Court. In case of an appeal, the final judgment will be made by the Supreme Administrative Court.

Recent Thai Court Judgment on Challenging the Arbitrator

In 2019, the TAI heard 103 new cases but unfortunately did not record the number of challenges against arbitrators. Our research into Thai judgments found that most recent challenges were against arbitrators from the Office of the Attorney General. When state enterprises or government offices have a contractual dispute with a private party, they may request legal assistance from the Office of the Attorney General, which is the state counsel for both civil and

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[1] Article 12 (2) of the UNCITRAL Model Law.
[2] IBA Guidelines on Conflict of Interest p. 17.
[3] Section 19 Paragraph 1 of Arbitration Act 2545 (2002).
[4] Section 19 Paragraph 2 of Arbitration Act 2545 (2002).

and criminal matters. If the office agrees to represent the state enterprise, it will appoint a public prosecutor who specializes in civil actions and arbitration to act as the state enterprise's counsel. In turn, this counsel has always nominated a senior public prosecutor in the Office of the Attorney General to be either the claimant's or the respondent's arbitrator. Challenging the public prosecutor's appointment as arbitrator seems to be very common in Thailand's Administrative Court, although the Supreme Administrative Court has never upheld any such challenge.

Where one of the parties to Thai arbitration is a state enterprise or government unit, it is very likely that they would nominate the public prosecutor. In two such cases (No. Kor. 1/2560 and Kor. 3/2560), the Supreme Administrative Court dismissed challenges against the arbitrators, which were made on the following grounds:

1. The arbitrator is not independent because he could be influenced by his supervisor at the Office of the Attorney General;
2. The arbitrator receives his monthly salary from the Office of the Attorney General, which is required by law to protect the best interests of the nation. The business of the state enterprise is the national interest. Thus, the arbitrator appointed by the Office of Attorney General could not be impartial and independent;
3. The salary of the public prosecutor is paid by the Ministry of Finance, which is the majority shareholder of the state enterprise; and
4. The chief of the Office of the Attorney General is also a director in the state enterprise.

The Supreme Administrative Court dismissed the challenge, reasoning that the arbitrators were appointed by the parties and had to comply with the Arbitration Act, not the Act of the Office of Attorney General and the Public Prosecutor. Although the arbitrators were public prosecutors, they were not under the supervision of the Office of the Attorney General. In addition, the arbitrators in these cases had no direct or indirect casual or business relationship with the party that nominated them.

On the other hand, Thailand's Supreme Court seems to apply a very strict interpretation of the arbitrator's obligation to disclose facts that could put their impartiality and independence into doubt. In a recent insurance case (case no. 3542/2561), the Supreme Court set aside an arbitral award due to the presiding arbitrator's failure to disclose his defense of a different client in a prior insurance case stemming from the same cause of the insured loss (a single incidence of civil unrest). Neither party in that previous case was part of the arbitration in question. However, the claimant petitioner who challenged the presiding arbitrator was not pleased that, in that prior case, the defense presented by the current presiding arbitrator (who had been the defense lawyer) led to his client not being held liable, and therefore not having to compensate for the loss caused by the riots. The claimant therefore challenged the presiding arbitrator for failure to disclose his involvement in the prior insurance case.

The Supreme Court reasoned that the arbitrator who had been challenged should have disclosed this involvement, and that the failure to do so caused justifiable doubts about his impartiality and independence under section 19 of the Arbitration Act. The arbitration proceedings were therefore held to be unlawful, and recognizing and enforcing the arbitral award granted by the tribunal would be contrary to the law and the public order.

Potential Solutions

In summary, challenges against arbitrators can protect due process by preventing misconduct by the arbitrator. On the other hand, challenges can be used as a tactic to interrupt and delay arbitral proceedings, as the UNCITRAL Model Law and Thailand's Arbitration Act provide very broad and vague provisions concerning challenges against the arbitrator. Moreover, in a civil law country where a higher court's judgment does not create binding precedent over the lower court, the different interpretations of the law lead to different standards and approaches to the same situation. These inconsistent judgments concerning challenges against arbitrators in Thailand could cause alarm and concern. One potential amelioration of this situation is for arbitration institutions and practitioners to apply the IBA Guidelines on Conflict of Interest in International Arbitration as a soft law to more clearly define these challenges. While not perfect, the guidelines could assist in determining whether situations warrant an arbitrator's removal or responses to challenges according to consistent standards of international arbitration practice.