THE INTERNATIONAL ARBITRATION REVIEW

Eleventh Edition

Editor
James H Carter

THE LAWREVIEWS

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Editor
James H Carter

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2020

Chapter 38

THAILAND

Pathorn Towongchuen, Jedsarit Sahussarungsi, Kavee Lohdumrongrat and Chadamarn Rattanajarungpond[1]

I INTRODUCTION

i Laws governing arbitration

Two forms of arbitration are currently recognised under Thai law: out-of-court arbitration and in-court arbitration.

Out-of-court arbitration is the main type of arbitration used in Thailand, and therefore the main focus of discussion in this chapter. It is currently governed by the Arbitration Act 2002.[2] Pursuant to Section 11 of the Arbitration Act 2002, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Section 24 of the Act confirms the separability of arbitration clauses, and provides that the invalidity of the main contract shall not have an effect on the legality of the arbitration clause.

The Arbitration Act 2002 does not provide comprehensive guidelines on what is arbitrable. It simply provides that courts may dismiss an application for the enforcement of an arbitral award if it finds that the award involves a dispute not capable of settlement by arbitration under the law. Therefore, this is at the discretion of the court on a case-by-case basis. Nevertheless, it is widely understood that only civil and commercial disputes that are not contrary to public policy are arbitrable. Disputes relating to administrative or state contracts between a government agency and a private party are explicitly recognised as arbitrable by Section 15 of the Arbitration Act 2002. Criminal disputes or civil disputes concerning public policy, such as disputes relating to trade competition law and disputes relating to mandatory corporate law, are not arbitrable.

The Arbitration Act 2002 enshrines the freedom of parties to contract, as they may decide on the place of arbitration, the language to be used in the arbitral proceedings, the procedures regarding the appointment of the arbitrators and other practical matters. The provisions relating to such matters in the Act serve as default rules applicable only when the parties fail to agree.

The Arbitration Act 2002 further provides that an arbitral tribunal shall have the power to conduct any proceedings in any manner it deems appropriate. This includes the power to determine the admissibility and weight of the evidence presented by each party. The Act

1 Pathorn Towongchuen is a partner, Jedsarit Sahussarungsi is a senior associate and Kavee Lohdumrongrat and Chadamarn Rattanajarungpond are associates at Weerawong, Chinnavat & Partners Ltd.

2 BE 2545 (AD 2002), as amended by the Arbitration Act (No. 2) BE 2562 (AD 2019).

stipulates that the arbitral tribunal must apply the laws of evidence of the Code of Civil Procedure to proceedings *mutatis mutandis*,[3] and that the parties shall be treated with equality and shall be given a full opportunity to present their case.[4]

A party to an arbitration agreement may request Thai courts to issue an order imposing provisional measures in order to protect parties' interests before or during arbitration proceedings.[5] It is worth noting that Thai courts may provide assistance even in the case where an application requesting interim measures is made before the arbitral proceedings are commenced. However, once the interim measures are granted, the requesting party may be required to submit to the court within 30 days of the date of the court's order (or as otherwise ordered by the court) that the arbitration proceedings have been established.

Thai courts are required to enforce an arbitral award, irrespective of the country in which it was made, provided, however, that if the arbitral award was made in a foreign country, the award shall be enforced only if it is subject to an international convention treaty or agreement to which Thailand is a party, and such award shall be applicable only to the extent that Thailand accedes to be bound.[6] In this regard, Thailand is a party to the Geneva Convention on the Execution of Foreign Awards 1927 (Geneva Convention 1927) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention 1958). Therefore, arbitral awards issued in countries that are also parties to the Geneva Convention 1927 or the New York Convention 1958 will be enforceable in Thailand.

According to the Arbitration Act 2002, arbitral awards can be challenged or revisited only in very limited circumstances, for example:

a when the arbitration agreement is not valid;

b when the composition of the arbitral tribunal or the arbitral proceeding was not consistent with the agreement;

c when the arbitral award is beyond the scope of the agreement; and

d when the recognition or enforcement of the award would be contrary to public order or good morals.[7]

Unlike out-of-court arbitration, in-court-arbitration is rarely used in Thailand. It involves a process at the court of first instance where the parties agree to submit the issues in dispute before the court to arbitration. It is governed by the Civil Procedure Code Sections 210 to 220 and 222, which provide for the process of setting up an arbitral tribunal (by the parties or by the court, or both), the procedural rules to be observed by the tribunal, the making of an arbitral award and the enforcement of the award. We suspect that in-court arbitration is rarely used because the availability of in-court arbitration is under-publicised.

3 This part of the provision deviates from the UNCITRAL Model Law.

4 Arbitration Act 2002, Section 25.

5 Arbitration Act 2002, Section 16.

6 Arbitration Act 2002, Section 41.

7 Arbitration Act 2002, Sections 40 and 43.

ii Distinctions between international and domestic arbitration law

The Arbitration Act 2002 does not provide any distinction between international and domestic arbitration; thus, the Arbitration Act 2002 applies to both international and domestic arbitration. Under the Arbitration Act 2002, parties to arbitration proceedings can be foreign, and the parties are free to choose any substantive law applicable to the agreement.

It is worth noting that the Arbitration Act 2002 adopts most of the provisions in the UNCITRAL Model Law on International Commercial Arbitration. Nevertheless, there are a few provisions in the Arbitration Act 2002 that deviate from the UNCITRAL Model Law. For example:

a the Arbitration Act 2002 has not been amended to include the provisions on interim measures and preliminary orders granted by the arbitral tribunal, which were adopted by UNCITRAL in 2006;

b the Arbitration Act 2002 exempts arbitrators from civil liabilities except in cases where they wilfully or through gross negligence cause damage to either party;[8] and

c the Arbitration Act 2002 empowers the presiding arbitrator to solely issue an award, an order or a ruling in the case that a majority vote cannot be obtained.[9]

iii Structure of the courts

The Thai courts adopt a three-tier court system comprising the courts of first instance, the courts of appeal and the Supreme Court. In civil matters, the courts of first instance consist of general civil courts and specialised courts. Specialised courts hear disputes concerning certain specialised subject matters, such as labour, tax, international trade and intellectual property, whereas general civil courts are divided into district courts (which have jurisdiction to hear small claims not exceeding 300,000 baht) and provincial courts (which have jurisdiction to hear all civil claims, and which are not subject to the jurisdiction of other civil courts).

A party to a civil case may appeal a judgment rendered by a court of first instance to a court of appeal (as the second tier of the system), subject to certain conditions as prescribed by law. Similar to the courts of first instance, the courts of appeal comprise general courts of appeal (including regional courts of appeal) and the court of appeal for specialised cases, which have jurisdiction to hear appeals from the specialised courts. An appeal against a judgment of a court of appeal can only be submitted with the permission of the Supreme Court. As the highest court of the land, the Supreme Court will grant permission to appeal when it is satisfied that the issues contained in the appeal are significant and should be considered by the Supreme Court.

The Arbitration Act 2002 favours arbitration by bypassing the courts of appeal when it comes to decisions rendered by a competent court under the Arbitration Act 2002. The Act provides that, in certain circumstances, an appeal against a court's order or judgment under the Act may be filed with the Supreme Court directly.[10]

8 Arbitration Act 2002, Section 23.

9 Arbitration Act 2002, Section 35.

10 Arbitration Act 2002, Section 45. However, for arbitrations concerning administrative contracts or other matters that fall within the jurisdiction of the administrative courts, an appeal against an administrative court's order or judgment under the Act may be filed with the Supreme Administrative Court directly.

iv Local institutions

There are several institutions providing arbitration services under their own arbitration rules to facilitate domestic and cross-border disputes that arise in Thailand and other countries.

Thai Arbitration Institute[11]

The Thai Arbitration Institute (TAI) was established in 1990 under the authority of the Ministry of Justice. It is now under the supervision of the Office of the Judiciary, an organisation independent of the Ministry of Justice. The TAI continually promotes arbitration in both the public and private sectors and has contributed greatly to the development of Thai arbitration, including the drafting of the Arbitration Act 2002. It is currently the main arbitration body in Thailand that facilitates the arbitration process by assisting with the selection of arbitrators and providing the resources required for arbitration proceedings. With qualified and experienced experts in various fields in 20 categories, the TAI provides arbitration services to disputing parties under its own set of rules, which were revised in 2017.[12] In 2019, the TAI received 105 new requests for arbitration and resolved 204 arbitration cases. In the first two months of 2020, as a consequence of the coronavirus outbreak, the TAI received only 10 new requests for arbitration and resolved 35 arbitration cases.

The Thai Chamber of Commerce[13]

Since 1968, the Office of the Arbitration Tribunal of The Thai Chamber of Commerce (TCC) has offered arbitration services provided by its Thai Commercial Arbitration Committee. The arbitration proceedings are conducted under its own rules, which were adopted from the ICC Rules of Arbitration, and the Economic Commission for Asia and the Far East (ECAFE) Rules of International Commercial Arbitration and the ECAFE Standard for Conciliation. The TCC appears to be the preferred arbitration institution for foreigners that have businesses in Thailand.

Thailand Arbitration Center[14]

The Thailand Arbitration Center (THAC) was established under the Arbitration Institution Act 2007 as a non-governmental organisation to ensure the neutrality of the institution. Its objectives are to promote and develop procedures in arbitration, and to provide arbitration services to resolve domestic and international civil and commercial disputes in various areas (e.g., international trade, finance and banking).[15] In 2019, the THAC administered and resolved 10 arbitration cases.

11 Thai Arbitration Institute, http://www.tai.coj.go.th/ (accessed 28 April 2020).

12 Arbitration Rules, the Arbitration Institute, the Office of the Judiciary.

13 https://www.thaichamber.org/th/home/mainpage/3/10 (accessed 28 April 2020).

14 http://thac.or.th/ (accessed 28 April 2020).

15 As the TAI was established first (30 years ago), many contracts that contain arbitration clauses and are governed by Thai law usually specify the TAI as an arbitration venue in the event of a dispute. However, the THAC is a new institution, which sometimes causes confusion for contracting parties. Therefore, the THAC is currently being promoted at various dispute resolution seminars and other academic meetings for a better understanding of THAC's rules and services.

v Arbitration proceedings in special government institutions

Throughout the years, arbitration has been promoted by various government institutions to solve commercial claims governed by special laws. Under this approach, claims are solved by professional officials or arbitrators who are specialised in specific areas to facilitate fair and expedited dispute resolution proceedings. This approach not only benefits the disputing parties, but also helps to reduce claims in arbitration institutions or other arbitration venues.

Office of Insurance Commission

In 1998, Department of Insurance Official Decree No. 95/2541[16] provided that all kinds of insurance policies, except for the Marine Hull Policy and Marine Cargo Policy, shall contain a provision that allows the parties to policies to settle disputes by arbitration. This rule also applies to all insurance policies issued before the date of the Official Decree. In the same year, the Department of Insurance, Ministry of Commerce (which turned over its authority to the Office of the Insurance Commission (OIC) in 2007) set out rules on arbitration for claims arising from insurance agreements to be resolved by arbitration committees. Any person wishing to claim his or her rights under an insurance agreement by arbitration proceedings may submit a claim to the Department of Insurance, and the claim will be resolved within 90 days from the date that the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator's discretion.[17] In 2008 and 2010, some details of the rules were slightly amended by the OIC to be in line with the current insurance business; however, the general principles are still the same.[18] Each year, over 600 insurance disputes are filed with the OIC.[19] Some of them are settled by mediation and some are resolved by arbitration.

Department of Intellectual Property

Intellectual property is an important part of global business, and the infringement of intellectual property rights has often been of serious concern in Thailand. In 2002, the Department of Intellectual Property (DIP) announced its rules on intellectual property arbitration proceedings to facilitate intellectual property claims. Any person wishing to claim his or her rights under the intellectual property laws by arbitration proceedings may submit a claim to the DIP, and the claim will be resolved within 90 days from the date the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator's discretion, but it shall not be more than an extra 90 days.[20] At present, there is no arbitration dispute pending before the DIP, as the positions on the arbitration committee of the DIP are still vacant.[21]

16 Department of Insurance Official Decree, 19 November 1998, No. 95/2541.

17 Regulation of Insurance Department on Arbitration Proceedings, 1 September 1998 (as amended).

18 Notification of the Office of Insurance Commission on Arbitration, 25 July 2008 (as amended); the Office of Insurance Commission, Arbitration Laws and Regulations, www.oic.or.th/en/consumer/law/arbitration/law (accessed 29 April 2020).

19 Information from informal discussion with an officer of the Office of Insurance Commission.

20 Regulation of the Ministry of Commerce on Intellectual Property Arbitration Proceedings, 11 July 2002.

21 Information from informal discussion with an officer of the Department of Intellectual Property.

Securities and Exchange Commission

Since securities transactions have dramatically increased during the past 10 years, in 2008, the Securities and Exchange Commission (SEC) set out rules on arbitration to allow disputes that arise from breach of contracts or violation of securities and exchange laws, provident funds laws, derivatives laws or related rules to be overseen by arbitrators. For a petition for arbitration to be submitted to the SEC, the value of the claim of each investor must not exceed 5 million baht and, if it is a securities claim, it must meet certain other conditions. If the claim falls under the conditions set out in the Notification of the Securities and Exchange Commission on Arbitration Proceedings, the SEC will allow such claim to be resolved by the SEC's arbitrators. The claim will be resolved within 90 days from the date the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator's discretion, but it must not be more than an extra 180 days unless the parties agree otherwise.

Based on the above-mentioned trends, in the near future, arbitration may be adopted in other governmental institutions to provide out-of-court dispute resolution between parties, and especially to protect individual consumers and contractors who cannot afford the time and expense of complicated, lengthy court proceedings.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The Arbitration Act 2002 was recently amended by the Arbitration Act (No. 2) (Amendment Act), effective from 15 April 2019. [22] The Amendment Act is designed to promote Thailand as the regional hub of international arbitration, and to attract more foreign arbitrators and foreign arbitration counsel to Thailand. This is a welcome move to liberalise the Thai arbitration market as part of Thailand's ongoing attempt to reduce restrictions imposed on foreign investors and investments. The Amendment Act expressly allows parties to arbitration proceedings or Thai courts (as the case may be) to appoint foreign arbitrators to conduct the proceedings in Thailand, and parties to engage foreign arbitration counsel to arbitration proceedings in Thailand. Once appointed or engaged, the foreign arbitrators or arbitration counsel will be required to obtain a certificate from the relevant authorities or arbitration institutions to obtain smart visas, which are designed to give privileges including, inter alia, longer visa terms and less frequent reporting obligations to the immigration offices.

Another welcome development is the introduction of the new TAI Arbitration Rules (TAI Rules 2017), which apply to all TAI arbitration proceedings commenced after 31 January 2017, unless otherwise agreed by the parties.[23] The aim of the TAI Rules 2017 is to promote the greater efficiency of TAI-administered proceedings and to reduce the ability of either party to use delaying tactics. Key changes include the process for challenging arbitrators, under which the arbitral tribunal will decide on the outcome of the challenge, unless the TAI deems it appropriate to appoint an independent umpire to consider and make a ruling on the challenge. The TAI Rules 2017, for the first time, also give an arbitral tribunal the power to grant interim measures. Although it remains to be seen how the Thai courts perceive the interim measures granted by an arbitral tribunal, this in itself is a step

22 Arbitration Act (No. 2) BE 2562 (AD 2019), 12 April 2019.

23 The Arbitration Rules (2017), the Thai Arbitration Institute, Office of the Judiciary, https://tai.coj.go.th/th/content/article/detail/id/2197/iid/18875 (accessed 29 April 2020).

towards less judicial interference in arbitration proceedings. Other practical key changes include rules on the consolidation of proceedings, the procedural timetable for more efficient proceedings, service and filing by email, the confidentiality of proceedings, and the latest update of arbitration proceedings conducted via electronic methods (e-arbitration).

ii Arbitration developments in local courts

Thai courts' authority to set aside foreign arbitral awards

Although not themselves regarded as a source of law, Supreme Court judgments practically have a strong persuasive authority. In the past few years, the number of Supreme Court judgments on arbitration law being published has steadily increased. This may be because of the rising popularity of arbitration as a means of dispute settlement, which in turn leads to more legal issues on Thai arbitration law being appealed to the Supreme Court. It is worth mentioning that, since Supreme Court judgment No. 13534/2556 (AD 2013), the Supreme Court has on several occasions emphasised that Thai courts have no authority to set aside awards made in foreign countries.[24] This is generally recognised as a departure from a Supreme Court decision in 2009 in which the Supreme Court, relying on Section 40 of the Arbitration Act 2002, held that Thai courts have the power to set aside an arbitral award notwithstanding the place where the award was made.[25] The 2009 decision led to Thailand being widely criticised for rejecting the internationally accepted principle that only the courts that have jurisdiction over the place where an award was made can set aside the award, and other courts can determine only whether to enforce such arbitral award within their jurisdiction. This signifies a change of perspective in the Thai arbitration law landscape, and is a welcome attempt to bring Thai arbitration law and practices into line with international arbitration practice.

Interpretation and enforcement of arbitration clauses

In 2017, Supreme Court judgment No. 1115/2560 (AD 2017) provided its interpretation of an arbitration clause in a subcontract agreement, which reads as follows: 'If the decision of the Contractor is not acceptable for the Subcontractor, the Subcontractor may proceed with dispute resolution mechanism as stipulated in [the arbitration clause] of this Agreement. However, the parties are not bound to always do so.' In this regard, the Supreme Court found that such provision does not force the parties to pursue a dispute only by means of arbitration; it also permits the parties to resolve their disputes by litigation or arbitration. Thus, the Court ruled that a party to an agreement is entitled to commence litigation without being required to first submit a dispute to arbitration.

In 2019, the Supreme Court took a revised stance in its judgment No. 3427/2562. The dispute resolution clause in the agreement provided that the parties must first attempt to amicably and in good faith resolve any disputes or disagreements arising out of the parties' agreement for the first 60 days, and if within those 60 days, the parties are unable to come to an agreeable solution, then parties may refer such dispute to arbitration. In this instance, after considering testimony of an expert witness, the Supreme Court opined that an agreement of such nature demonstrates that the parties, in entering into such an agreement, did not wish for disputes to be litigated and adjudicated by the court. Thus, the term may being

24 Supreme Court judgments Nos. 8539/2560 (AD 2017) and 9476/2558 (AD 2015).

25 Supreme Court judgment No. 5511/2552 (AD 2009).

present in the said clause indicates the parties' agreement to refer the unresolved dispute to arbitration, not the local courts, upon the expiry of the 60-day period. The term may does not provide a party with the right or option to instead litigate a case before the courts.[26] The key point to be derived from these cases is that although permissive language (together with admissible evidence) may be interpreted in favour of parties' agreement to arbitrate, mandatory language (as opposed to permissive language) should be used in the context of an arbitration agreement to ensure the binding effect of the arbitration agreement. Debates on these Supreme Court judgments go so far as considering the extent to which the Court took into account the intention of the parties to insist on arbitration, and the extent to which the Court perceived such arbitration clause as being invalid and unenforceable.

Appointment of arbitrators

During the past few years, there have been disputes over the validity of an arbitration clause that provides for an even number of arbitrators in the administrative courts. The issue arises because there was a transition in arbitration law in 2002, when the Arbitration Act 1987[27] was replaced by the Arbitration Act 2002. Both Acts allow parties to fix the number of the arbitrators by themselves. However, while the Arbitration Act 1987 did not explicitly provide that the number of the arbitrators has to be odd,[28] the Arbitration Act 2002 specifically provides that the number of arbitrators shall be odd, and if the parties agree to an even number, the arbitrators appointed by the parties shall jointly appoint an arbitrator who shall act as the chairperson of the arbitral tribunal.[29]

Some disputes in the administrative courts between state enterprises and private companies involve arbitration clauses providing for an even number of arbitrators because they were made at the time that the Arbitration Act 1987 was in force. In 2016 and 2018, the Supreme Administrative Court in two cases held that such arbitration clauses were valid since they were made during the time that the 1987 Act was in force, and the Arbitration Act 1987 did not require an odd number of arbitrators. The transitional provision of the Arbitration Act 2002 also endorses the validity of those arbitration agreements made in accordance with the Arbitration Act 1987. However, since the Arbitration Act 2002 was effective at the time of those disputes, the arbitration proceedings in relation to such disputes

26 Supreme Court judgment No. 3427/2562 (AD 2019).

27 Arbitration Act BE 2530 (AD 1987).

28 Arbitration Act 1987, Section 11:

There may be one or more arbitrators. In the case that there is more than one arbitrator, each party will be entitled to appoint an equal number of arbitrators.

In the case that the arbitration agreement did not specify the number of the arbitrators, each party shall appoint one arbitrator, and the appointed arbitrators shall mutually appoint one more person to be another arbitrator.

29 Arbitration Act 2002, Section 17:

The arbitral tribunal shall be composed of an uneven number of arbitrators.

If the parties have agreed on an even number, the arbitrators shall jointly appoint an additional arbitrator who shall act as the chairman of the tribunal. The procedure of appointing the chairman shall be in accordance with Section 18 paragraph one (2).

If the parties fail to reach an agreement on the number of arbitrators, a sole arbitrator shall be appointed.

must be conducted in accordance with the provisions of the Arbitration Act 2002. Thus, arbitral tribunals constituted when the Arbitration Act 2002 was effective must be composed of an odd number of arbitrators.[30]

Qualifications and challenges to arbitrators

Similar to the UNCITRAL Model Law, Section 19 of the Arbitration Act 2002 stipulates that an arbitrator may be challenged in circumstances that give rise to justifiable doubts as to his or her impartiality or independence. For instance, an arbitrator who received a subscription form for new shares of a party before an arbitration and subsequently granted the right to buy such shares to an employee under his supervision was deemed to have an obligation to disclose such fact, because this circumstance was likely to give rise to justifiable doubts as to his impartiality or independence. Having failed to do so, the arbitrator was disqualified by the Supreme Court.[31]

Furthermore, the Arbitration Act 2002 also imposes liability on arbitrators for civil actions conducted as an arbitrator with the intent to cause gross negligence giving rise to damage to any party.[32]

There has been some discussion among the responsible authorities and practitioners with regard to the need to provide stricter guidance on the ethical conduct of arbitrators and the prevention of unethical actions. The TAI has its own code of ethics for arbitrators,[33] and in 2015, arbitration rules adopted by the THAC included rules relating to the conduct of arbitrators.[34]

Recently, concern over the impartiality of arbitrators has been reflected in disputes between government agencies and the private sector in Thailand. Administrative contracts between the government agencies and the private parties in question are reviewed and sometimes drafted by a public prosecutor. When a dispute arises from such contracts that include an arbitration clause, government agencies often appoint public prosecutors to be both the attorney and the arbitrator for a case. There have been many cases where a party from the private sector has alleged that the public prosecutor appointed as arbitrator to the court of justice or the administrative court lacked the necessary qualifications of being fair and impartial, because public prosecutors playing different roles are from the same office. Nevertheless, there has yet to be a case where arbitrators who were selected from the Office of Public Prosecutor have been removed because of this reason.[35]

In 2018, the plenary session of the Supreme Court also considered the issue of impartiality and independence in a case where the chairperson of an arbitral tribunal that rendered an award on a disputed incident did not disclose the fact that he had previously represented a client as a lawyer in a court proceeding that involved the very same incident. As the lawyer, the chairperson filed a defence for his client (as defendant) in the proceedings arguing that

30 Supreme Administrative Court Order No. Khor 4/2559 (AD 2016) and Supreme Administrative court order No. Khor. 1/2561 (AD 2018).

31 Supreme Court judgment No. 2231-2233/2553.

32 Arbitration Act 2002, Section 23.

33 Code of Ethics for Arbitrators, the Arbitration Institute, Office of the Judiciary.

34 Rules of the THAC relating to Regulations of the Thailand Arbitration Center RE: Ethics of Arbitrator BE 2558 (AD 2015), thac.or.th/index.php/th-rules-regulations (accessed 14 April 2019).

35 Supreme Administrative court order No. Khor.1/2560 and Supreme Administrative court order No. Khor.3/2560.

his client should not be liable. After considering the relevant facts, the Supreme Court opined that the chairperson in the arbitration would naturally take on the same view as he did in the previous case. This issue affected the impartiality and independence of the chairperson, and he was thus obliged to disclose this information to the parties in the arbitration. Even if both cases dealt with different claims and different parties, both are disputes on the same incident, and the interests arising from the cases would be similar or related. According to the decision of the Supreme Court, the chairperson's failure to disclose his involvement as a lawyer in the previous proceedings led to the award rendered by the arbitral tribunal being set aside on the grounds that the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with applicable laws and that the recognition or enforcement of the award would be contrary to public policy.

iii Investor–state disputes

Cabinet resolutions for and against the use of arbitration

The Arbitration Act 2002 explicitly provides for the arbitrability of disputes relating to administrative contracts between government agencies and private enterprises.[36] However, after a series of cases where government agencies lost their claims and were required to pay substantial amounts of compensation to the other parties, the Cabinet passed a resolution on 28 July 2009 prohibiting the use of arbitration clauses in contracts between state agencies and private parties unless the prior approval of the Cabinet was first obtained. The purpose of the resolution was to significantly reduce the chance of investor–state arbitration. However, due to a change of policy regarding foreign and domestic investments, the government has become more open to the idea of arbitration, and on 14 July 2015, the Cabinet approved an amendment to the resolution dated 28 July 2009. In effect, contracts between state agencies and (Thai or foreign) private parties that are subject to prior approval for the use of arbitration clauses are limited only to contracts under the Public-Private Partnership Act[37,38] and concession agreements (under which state agencies grant concessions).

Recent court decisions

Recent court judgments show that Thai courts incline towards the enforcement of arbitral awards even in cases where the state or state agencies are the losing parties in arbitration proceedings. Notably, on 22 April 2019, the Supreme Administrative Court handed down a judgment overturning a judgment of the Central Administrative Court that had annulled and refused the enforcement of arbitral awards granting compensation of more than 11.88 billion baht, plus interest, to a private company, Hopewell (Thailand) Limited, for the termination of a concession agreement.[39] In the judgment, the Supreme Administrative Court found that the petition to annul and refuse the enforcement was submitted only to challenge the discretion of the arbitral tribunal (which was the matter of the parties to the agreement), and thus, the arbitral award was not found contrary to public policy.

On another occasion, the Supreme Administrative Court ruled in 2014 that, based on the arbitration award, the Pollution Control Department must pay compensation of more than

36 Arbitration Act 2002, Section 15.

37 Public-Private Partnership Act BE 2556 (AD 2013).

38 The Act was later repealed and replaced by the Public-Private Partnership Act BE 2562 (AD 2019).

39 Supreme Administrative Court judgment red case No. Aor 221-223/2562.

9 billion baht to a six-firm joint venture that had won a case related to a contract to construct the Klong Dan wastewater treatment plant. The Cabinet approved the payment according to the Court's judgment on 17 November 2015. However, after making some instalment payments, a government agency made a petition to the Central Administrative Court to reopen the case and request the annulment of the arbitration award. On 6 March 2018, the Central Administrative Court rendered a judgment to annul the arbitration award on the grounds that corruption (which is a public policy issue) was discovered in the bidding process for the construction of the Klong Dan wastewater treatment plant.

Other investment arbitration procedures to which Thailand is a party include two arbitration proceedings, one commenced by Walter Bau AG concerning damage arising out of a breach of obligations under the Germany–Thailand bilateral investment treaty, and the other commenced by Kingsgate Consolidated Ltd concerning the shutdown of the Chatree gold mine and a breach of obligations under the Thailand–Australia free trade agreement.

In 2019, it was reported that Thailand was resolving a multimillion-dollar dispute with oil and gas companies in relation to the costs of decommissioning infrastructure in the Gulf of Thailand. Reportedly, the private entities commenced arbitration proceedings but later suspended the same due to negotiations between the parties.[40]

III OUTLOOK AND CONCLUSIONS

In the past couple of years, we have seen reasonable developments in the Thai arbitration landscape, not only in aspects regarding arbitral institutions and their regulatory frameworks, but also regarding the interpretation of relevant laws and regulations by Thai courts. Government sectors have implemented initiatives to actively promote arbitration, which can be seen from the amendment of the Arbitration Act 2002 and the increasing publication of Supreme Court and Supreme Administrative Court judgments in the field of arbitration. Although there are some limitations, especially in relation to the government's policy on entering into arbitration agreements with private entities, and some inconsistencies in the interpretation of arbitration law, we believe that the future of arbitration in Thailand is positive, and we look forward to more improvements in terms of both the arbitration regulatory framework and practices.

40 https://www.bangkokpost.com/business/1761564/thailand-welcomes-chevrons-resumption-of-talks-to-resolve-energy-dispute (accessed 29 April 2020).

Appendix 1

ABOUT THE AUTHORS

PATHORN TOWONGCHUEN

Weerawong, Chinnavat & Partners Ltd

Pathorn Towongchuen is a partner in the litigation and arbitration practice group at Weerawong C&P. He advises clients with respect to complex civil and criminal disputes in ligation and arbitration with particular experience in insurance, telecommunications, media, consumer products, concessions, white-collar crime, corporate–commercial, employment, insolvency and corporate restructuring matters. He represents clients in the resolution and enforcement of disputes at the Thai Arbitration Institute. He obtained an LLB degree (Hons) from Chulalongkorn University and an LLM degree from Northwestern University, School of Law, US. He is a Thai barrister-at-law.

JEDSARIT SAHUSSARUNGSI

Weerawong, Chinnavat & Partners Ltd

Jedsarit Sahussarungsi is a senior associate in the litigation and arbitration practice group at Weerawong C&P. He advises international and domestic clients in civil and criminal dispute resolution, including cross-border litigation and international arbitration. Jedsarit also has experience in corporate M&A and capital market matters. Jedsarit teaches arbitration and legal research at national law schools and serves on the Committee of the Asia-Pacific Forum for International Arbitration as Thailand's representative. Prior to joining the firm, he interned at a national legal research institute in London. Jedsarit obtained an LLB degree (Hons) from Thammasat University, an LLM degree (*summa cum laude*) from Université Toulouse 1 Capitole, France and an LLM degree (merit) from University College London, UK.

KAVEE LOHDUMRONGRAT

Weerawong, Chinnavat & Partners Ltd

Kavee Lohdumrongrat is an associate in the dispute resolution practice group at Weerawong C&P. He has experience in civil and criminal litigation, as well as domestic and international arbitration. Kavee has expertise in a wide range of matters, including corporate–commercial, insurance, labour and employment, international trade, real estate, torts, wills and estates, as well as restructuring and insolvency. He obtained an LLB degree from Thammasat University and an LLM degree in international dispute settlement and arbitration from Leiden University, the Netherlands. Kavee is a Thai barrister-at-law and a notarial services attorney.

CHADAMARN RATTANAJARUNGPOND

Weerawong, Chinnavat & Partners Ltd

Chadamarn Rattanajarungpond is an associate in the litigation and arbitration practice group at Weerawong C&P. She advises clients in a wide range of industries, including insurance, hotel and hospitality, energy and media, and has substantial experience in complex and protracted cross-border litigation and arbitration. She also has experience in capital market matters. Chadamarn obtained an LLB degree (Hons) from Thammasat University.

WEERAWONG, CHINNAVAT & PARTNERS LTD

22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand
Tel: +66 2 264 8000
Fax: +66 2 657 2222
pathorn.t@weerawongcp.com
jedsarit.s@weerawongcp.com
kavee.l@weerawongcp.com
chadamarn.r@weerawongcp.com
www.weerawongcp.com

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