Penn State Law
Penn State Law eLibrary

SJD Dissertations

12-17-2019

International Commercial Arbitration Law and Practice in Thailand

Parada Kaewparadai

Follow this and additional works at: https://elibrary.law.psu.edu/sjd

 Part of the Comparative and Foreign Law Commons, Dispute Resolution and Arbitration Commons, and the International Law Commons

The Pennsylvania State University

Penn State Law

INTERNATIONAL COMMERCIAL ARBITRATION

LAW AND PRACTICE IN THAILAND

A Dissertation in Law

by

Parada Kaewparadai

© 2019 Parada Kaewparadai

Submitted in Partial Fulfillment
of the Requirements
for the Degree of

Doctor of Juridical Science

December 2019

ABSTRACT

International Commercial Arbitration is one of the essential mechanisms that support and facilitate international trade transactions, especially when the parties are from different nations. Since it is an alternative dispute resolution that provides a final and binding award that is enforceable through the national courts mostly everywhere around the world, it becomes the most popular dispute resolution for international enterprises. Arbitration has been existence in Thai Laws for centuries, but its role has been minimal as litigation is the primary adjudicate method of the country. However, in the past twenty years, arbitration has been developing rapidly since Alternative Dispute Resolution was promoted to support the justice system of the country and social and economic development. Furthermore, the country aims to promote itself as the arbitration hub for international disputes of the region. Even though the law was amendment based on the UNCITRAL Model Law, the difference of some provisions and the way it was applied by the Courts is not in line with international standards, which causes obstacles to arbitration in practice and also affects investors' confidence to choose Thailand as arbitration seats.

In order to reveal the characteristics and flaws of international commercial arbitration in Thailand, the Justice System, Institutions' Arbitration Rules, Arbitration Laws, and Courts' decisions regarding International Commercial Arbitration were studied and analyzed in detail and compared to international trends and standards at some certain points. The research found that to promote the country as the hub for international arbitration and to build a pleasant investment environment, the amendment of arbitration law is a need, especially on the provisions that empower court intervention in arbitral proceedings. Furthermore, the building of knowledge on; foreign language, laws, practice, and trends of international commercial arbitration for lawyers and related service providers is needed. Last but not least, the government should present the policy supporting arbitration in all areas.

TABLE OF CONTENT

ABSTRACT 1

TABLE OF CONTENT 2

ACKNOWLEDGEMENT 8

Chapter 1 Introduction 10

1. Problem Statement 10
2. Research Objectives 12
3. Significance of the Research 12
4. Methodology 13
5. Research Limitations and Difficulties 15
6. Structure of the Research 16

Chapter 2 Introduction to Judiciary System of Thailand 18

1. History of Judicial System of Thailand 18
   - 1.1 Sukhothai Period (B.C.1238-1350) 18
   - 1.2 The Ayutthaya Period (B.C. 1351-1767) 22
   - 1.3 Thonburi Period (B.C. 1768-1782) 26
   - 1.4 Rattanakosin Period (Since B.C. 1782) 26
     - 1) The beginning of the Rattanakosin Period (B.C.1782- King Rama 5) 26
     - 2) The Reform after King Rama V Reign 27
     - 3) Constitution Monarchy System 29
     - 4) The New Judiciary System Under the Constitution B.E.2540 (A.D.1997) 30
2. The Current Judiciary System in Thailand 33
   - 2.1 Courts of Justice 35
     - 1) Court of First Instance 35
     - 2) The Courts of Appeal 38
     - 3) The Supreme Court 41
   - 2.2 The Administrative Courts 47
   - 2.3 The Constitutional Court 52
   - 2.4 Military Courts 55
3. Judicial Appointments and Perception 59
4. Thai Courts and Alternative Dispute Resolution 60
5. Conclusion 61

Chapter 3 Mediation in Thailand 63

1. History 63
   - 1.1 Out-of-Court Mediation 63
   - 2.2 court-annexed mediation 66

2. Mediation Legal Framework in Thailand 68
2.1 Code of Civil Procedure 68
2.2 Civil and Commercial Code 69
2.3 Act on Governmental Administration (No.7) B.E.2550 (2007) 69
2.4 Act on Procedure of Consumer Case B.E.2551 (2008) 70
2.5 Act on Unsafe Product B.E. 2551 (2008) 70
2.6 Act on Protection of Victims in Domestic Violence B.E.2550 (2007) 71
2.7 Act of Juvenile and Family Courts and Juvenile and Family Procedural B.E. 2553 (2010) 71

3. First Mediation Act of Thailand (Mediation Act B.E.2562 (2019)) 72
3.1 Back Ground of Mediation Act 72
3.2 Scope and purposes of Mediation Act 73
3.3 Mediator under the Mediation Act 74
3.4 Important Provisions 77

4. Mediation Organizations and Institutions in Thailand 90
4.1 The Interior Ministry 91
4.2 The Ministry of Justice 93
4.3 Public Prosecutors 97
4.4 Office of Judicial Affairs 98
4.5 Thailand Arbitration Center (THAC) 102
5. Court-Annexed Mediation 112
5.1 Law and regulations regarding Court-Annexed Mediation 113
5.2 General Principles of Court-Annexed Mediation 114
5.3 Court-Annexed Mediation Procedures 119
5.4 Current Situation of Court-Annexed Mediation 124

5. Conclusion 125

Chapter 4 Introduction to Arbitration in Thailand 126

1. History 126
1.1 Before the Establishment of the Arbitration Act 126
1.2 The First Modern Arbitration Law 128
1.3 Establishment of the Arbitration Institution 129
1.4 The Current Arbitration Law 130

2. Arbitration Legal Frameworks 131
2.1 International Convention and Treaties 131
1) The Geneva Protocol on Arbitration Clauses of 1923 131
2) The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 131
3) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 131
4)Bilateral Treaties 132
5) Others International Agreements regarding Arbitration 132
2.2 Arbitration Act B.E.2545 (2002) 133
2.4 The Amended of Arbitration Act 134

3. In-Court Arbitration and Out-of-Court Arbitration 135

4. Competent Courts 136

5. Arbitration Institutions 140
5.1 Thai Arbitration Institute, Office of the Judiciary (TAI) 140
3.2 Thailand Arbitration Center (THAC) 146
3.3 The Council of Arbitration of the Thai Chamber of Commerce 149

4. Arbitration in Administrative Contract 149

5. Conclusion 152

Chapter 5 International Commercial Arbitration Agreement under Thai Law ... 154

1. Form and Content of Arbitration Agreement 154
1.1 Arbitration Clause and Submission Agreement 154
1.2 Form and Contents of the Agreement 155
1.3 Model Arbitration Clause 156

2. Parties to Arbitration Agreement 158
2.1 Capacity 158
2.2 State or State Agencies 159

3. Arbitrability 160
3.1 General Principles 160
3.2 Administrative Contract 161

4. Separability 164

5. Interpretation of Arbitration Agreement 165
5.1 The Person who has the power to Interpret Arbitration Agreement 165
5.2 The Rule to Interpret Arbitration Agreement 165

6. Effect and Enforcement of the Arbitration Agreement 167
6.1 Obligation to Arbitrate in Good Faith and Not to Litigate Arbitration Dispute 168
6.2Incapacity Party after the Agreement 169
6.3 The transferee of Claim or Liability 170
6.4 Interim Measure 171
6.5 Periods for the Commencement of Arbitration 175
6.6 Enforcement of Arbitration Agreement 176
6.6.1 Domestic Agreement 178
6.6.2 International Agreement 183
6.7 Termination of Arbitration Agreement 184

7. Conclusion 185

Chapter 6 Arbitral Tribunal and Arbitral Proceeding under Thai Law 187

1. Arbitrators 187
1.1 Qualifications 187
1.2 Appointment of Arbitrators 188
1.2.1 Appointment Proceedings 188
1.1.2 Foreign arbitrators 190
1.3 Number of Arbitrators 193
1.4 Challenge to Arbitrators 194

1.5 Termination of the Arbitrator's Mandate 196
1.6 Replacement of Arbitrators 196
1.7 Rights and Duties of Arbitrators 197
1.7.1 Status of Arbitrators 197
1.7.2 Obligations of Arbitrators 197
1.7.3 Rights and Protection of Arbitrators 199
1.7.4 Liability of Arbitrators 201
1.7.5 Ethics of Arbitrators 202
1.8 Arbitrators in Administrative Contract Arbitration 202

2. Power of Arbitral Tribunal 205
2.1 The Competence-Competence doctrine 205
2.2 Timing of objection arbitral tribunal decision regarding jurisdiction: 205
2.3 Form of Jurisdictional decision 206
2.4 Appeal jurisdiction to court 206
2.5 Deviate from the Model Law 206

3. Arbitral Proceeding 207
3.1 Selection of Arbitral Seat 207
3.1.1 Determination 207
3.1.2 Legal Consequences 208
3.2 Arbitral Proceeding in General 209
3.2.1 Fundamental Principle 209
3.2.2 Commencement of Arbitral Proceeding 210
3.2.3 Language of Arbitration 211
3.2.4 Exchange of Written Pleadings 212
3.2.5 Oral Hearing 212
3.3 Evidence 213
3.4 Tribunal-Appointed Experts 215
3.4.1 Power of the Tribunal 215
3.4.2 Role of the Parties 215
3.5 Interim Measures of Protection 216
3.6 Default 217

4. Confidentiality of the Arbitral Proceedings 218
4.1 Confidentiality of the Arbitral Proceedings 218
4.2 Confidentiality of Arbitration-Related Court Proceedings 220

5. Arbitral Awards 221
5.1 Types of Arbitral Award 221
5.2 Making of the Arbitral Award 221
5.3 Form and Contents of Arbitral Award 223
5.4 Jurisdiction 224
5.5 Applicable Law 225
5.6 Settlement 228
5.7 Consequence of the Award 229
5.8 The End and Termination of Arbitral Proceeding 232
5.9 Correction and Interpretation of the Award 233
5.10 Additional Award 235
5.11 Fees, Expenses and Remunerations 235

6. Conclusion 236

Chapter 7 Annulment of International Commercial Arbitral Awards 239

1. Introduction 239

2.Presumptive Validity of Arbitral Awards under Thai Law 240

3. Challenge of International Commercial Arbitral Awards in Thailand 240
3.1 The motion for setting aside 240
3.2 Competent court 241
3.3 Time limitation 241
3.4 Burden and Standard of Proof 242
3.5 Grounds for Setting Aside Rise by the Party 243
3.5.1 Party Lack of Capacity 243
3.5.2 Nonexistent or Invalid Arbitration Agreement 243
3.5.3 Denial of Opportunity to Present Case 246
3.5.4 Excess of Authority 246
3.3.5 Failure to Comply with Arbitral Procedures Agreed by Parties 247
3.6 Grounds for Setting Aside may Rise by Court 248
3.6.1 Non-arbitrability of Dispute 249
3.6.2 Public Policy 250

4. Suspending the Setting -Aside Proceedings 252

5. Setting Aside International Commercial Arbitral Awards rendered in Foreign Countries 252
5.1 General Principle 253
5.2 Change and Development of Judgements 253

6. Conclusion 255

Chapter 8 Recognition and Enforcement of International Commercial Arbitration Awards in Thailand 256

1. Legal Framework for Recognition and Enforcement of Arbitral Awards in Thailand 257

2.Comparative of Recognition and Enforcement of Foreign Judgment and Foreign Arbitral Awards 258

3.Competent Court to Recognition and Enforcement of International Commercial Arbitral Awards in Thailand 258

4.Petition to Recognition and Enforcement of Arbitral Awards 259
4.1The Right to File the Petition 259
4.2 Time Limitation 260
4.3 Documents Required 261
4.4 Burden and Standard of Proof 262
4.5 Court Procedure 262

5. Challenging the Enforcement of International Commercial Arbitration Awards 263
5.1 General Principles 263
5.2 Burden and Standard of Proof 264

5.3Grounds for Refusing to Recognize and Enforce International Commercial Arbitral Awards initiated by the party 264
5.3.1Party Lack of Capacity..... 264
5.3.2 No Valid Arbitration Agreement..... 265
5.3.3 Denial of Opportunity to Present Party's Case 266
5.3.4 Arbitral Tribunal Excess of Authority 267
5.3.5 Failure to Comply with the composition of the arbitral Tribunal or Arbitral Procedures Agreed by Parties 268
5.3.6 None Binding Awards or Annulment or Suspension of Award in Arbitral Seat..... 269
5. Court's Power to Refuse Arbitral Award Enforcement 270
5.1 General Principle..... 270
5.1.1 None-arbitrability Awards..... 271
5.1.2 Awards Contrary to Public Policy 271
6.Appealing of Court's Order or Judgement relevant to Arbitration 274
7. Fee, Expense and Remunerations 275
8. Conclusion 275
Chapter 9 Conclusion and Recommendation..... 277
Bibliography ……..280
Appendix A Thailand Arbitration Act B.E.2545 (2002) ……...…292
Appendix B Thailand Arbitration Act (No.2) B.E.2562 (2019)…..…….……..315

ACKNOWLEDGEMENTS

It is impossible to complete this research without help, supports, love, trust, believe, and encouragement from all the people in my life. I am grateful for all of you that came across me even for a short or long time. I am grateful for all good spirits for helping and comforting me in the time I need.

First, I would like to pass my gratitude to Bangkok University for providing me opportunity and scholarship to pursue the degree, I am grateful for the strong trust and support from the first day through the end of program.

To my beloved advisor, Professor Catherine A. Rogers. I remember writing the first letter asking for your available to be my advisor to be able to accepted to the SJD program, telling you that it would be my gratitude to work with you. Today I am confirming that it is true. This research cannot be done without your advices, supports, patient and encouragement. I am grateful for all of your generous words, messages, and hugs for many times they saved my soul.

I am grateful for all the authors of books, articles, all kinds of academic works for your hard work producing and sharing your wisdom, knowledge and opinions through your work. Especially thank for all Thai practitioners who I have interviewed for sharing priceless information, opinions and experiences as they open my eyes and idea regarding arbitration in Thailand.

To my beloved family, without you this research will mean nothings to me. Dear the love of my life, Mr.Chawapon Changklang, who brought this journey to me and walked with me through every steps. I am grateful for your unconditional love. Thank you so much for taking great care of me and our wonderful kids. You support me with everything in your life, and never give up on me. This research owes much to you. To my dear sweet daughter, Nittany who did not mind sleeping under the table when mommy needed to work. I am grateful for your sweet words, your love, and your hugs. You make me believe in myself in the hardest day of my life. To my awesome little son,

Charlie who always bring joy to me. I am grateful for your easy manners and gentle hands that make things easier in the hard day.

Last but not least, I am grateful for all kinds of support from my family who always trust and believe in me. Dear, Mr.Wittaya , Ms. Jirapapai Kaewparadai, Mr.Phongpit, Ms. Lakkana, Miss Saochao Changklang , Panrapee and Poonwit, I am grateful for your love and all the conversation we have which always bring home close to me when I need to be far.

Chapter 1

Introduction

1. Problem Statement

Arbitration has long been an important part of Thailand's justice system, and the Thai government has actively embraced important international commercial arbitration laws. It ratified the 1923 Geneva Protocol on Arbitration on September 3, 1930,[1] and implemented the protocol as a national law under the name Act Regarding the Rendering of Disputes to Arbitration B.E.2473 (1930). On July 7 of the following year, it ratified the Convention for the Execution of Foreign Arbitral Awards, League of Nations, Geneva, 1927,[2] Thailand went on to become a member state in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nation, New York, 1958 (New York Convention) in December 1959.[3] It implemented the New York Convention by enacting the country's first arbitration act, the Arbitration Act B.E.2530 (1987). This Act was eventually repealed and replaced by the Arbitration Act B.E.2545 (2002), and in May 2019, the Thai parliament enacted the Arbitration Act No. 2 with the aim of facilitating assessment and the work of foreign arbitrators in Thailand.

---

[1] United Nations Treaty Collection, Ratification List of The Protocol on Arbitration Clauses 1923, *available at*, https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=548&chapter=30&clang=_en.

[2] United Nations Treaty Collection, Ratification List of The Geneva Convention on the Execution of Foreign Arbitral Awards 1927, *available at* https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=549&chapter=30&clang=_en.

[3] Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958's status, *available at* https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

Alternative dispute resolution has served as a central tool for managing case overload and reducing the number of cases entering the Thai courts. Government agencies and courts have attempted to promote the use of alternative dispute resolution in many ways. Parliament recently enacted the first mediation law, the Mediation Act B.E.2562 (2019), to encourage the use of state agency and organization-based mediation to resolve civil and criminal disputes. Meanwhile, court-annexed mediation remains the most significant case management scheme in the Courts of Justice. Most of the recent changes, however, have focused on domestic disputes and have had limited benefits for international transactions.

Thailand's current arbitration law is mainly based on the UNCITRAL Model Law on International Commercial Arbitration, but some of its provisions deviate from the Model Law. Furthermore, although parliament enacted the Arbitration Act B.E.2545 (2002) almost twenty years ago, interpretations of the law and its implementation remain inconsistent and continue to evolve. Many practical developments in the past ten years have nevertheless enabled arbitration to progress in Thailand; these include the establishment of the new institution, the Thailand Arbitration Center (THAC) in 2016 and the amendment of the Thailand Arbitration Institution's (TAI) rules in 2017. Several arbitration training and education courses have also been established for the public with the goal of building awareness and preparing relevant parties to participate international arbitration and to support the country's goal of becoming the center of arbitration for ASEAN countries.

Thailand has generally been an active proponent of alternative dispute resolution and arbitration both domestically and internationally. Some negative attitudes and improper practices, however, still manifest in the field; the government's unclear perspective on arbitration in administrative contracts is a notable example. Arbitration in Thailand thus appears caught in a kind of limbo—simultaneously pushed and pulled. Thailand's status as a member of international commercial society, however, means that it must remain cognizant of global trends in international commercial arbitration and make its perspectives clear to its business partners. The close study and

analysis of relevant Thai law and the application and practice of arbitration in Thailand will thus shed light on the country's current situation and elucidate the issues it must address.

2. Research Objectives

This study examines the status of international commercial arbitration in Thailand, focusing on the stipulations and applications of current legislation (the Arbitration Act B.E.2545) and the current practices and attitudes of relevant parties, and comparing trends in these areas to global trends in international commercial arbitration. The study thus aims to clearly identify and analyze the characteristics, strengths, and weaknesses of international commercial arbitration in Thailand as a member of the international business community. It also aims to propose strategies Thailand could implement to improve its laws and practices to bolster international commercial arbitration. It does not, however, address investment arbitration governed by bilateral treaties or investment conventions. The study also examines Thailand's judicial system and other forms of alternative dispute resolution that relate to the development of arbitration and warrant mention in particular contexts. This section of the study provides a broad view of the Thai justice system that can serve as a manual for those considering conducting business in Thailand.

In order to achieve these research goals, the main object of this study are 1) the Thai judiciary system; 2) Thai mediation laws; 3) Thai arbitration laws, focusing on the Arbitration Act B.E. 2545 (2002); 4) the Thai courts' judgments regarding international commercial arbitration and arbitration principles; and 5) the development, rules, characteristics, and current status of Thai arbitration institutions.

3. Significance of the Research

Arbitration has been a part of the Thai legal system for centuries, but its role long remained fairly minimal. The implementation of a modern arbitration system in Thailand began in the past

two decades with the introduction of the Arbitration Act B.E.2530 (1987) and the establishment of Thailand Arbitration Institution (TAI). The other significant change that occurred in the past ten years was the establishment of ASEAN (Association of Southeast Asian Nations), which contributed to increases in economic and international commercial transactions in Thailand.

Thai arbitration laws and practices have changed dramatically since the initial establishment of a modern arbitration system in the country. The parties involved in arbitral proceedings have also acquired considerable experience and understanding over time. However, few studies of Thai arbitration laws and practices or of Thai courts' judgments related to international commercial arbitration have been translated from Thai. This is one of the obstacles for arbitration practitioners and foreign investors seeking to understand the status of arbitration in Thailand.

This study will, therefore, benefit both the Thai and foreign arbitration practitioners, investors, and scholars involved or interested in international commercial arbitration in Thailand. It will also demonstrate the strengths and flaws of current laws and practices related to international commercial in Thailand. The recommendations for legislative bodies and practitioners that this study makes should, moreover, make Thailand a more hospitable venue for international commercial arbitration.

4. Methodology

This study is descriptive and analytical in nature, and therefore relies primarily on the method of document analysis. As the study is about international commercial arbitration in Thailand, reviewing and analyzing related Thai legislation, rules, and policies of the country will be reviewed and analyzed in order to understand the characteristics and details of the law. The study also considers existing scholarly studies and articles, reports, news, acts, journals, and conference papers related to international commercial to support the analysis of primary sources.

The researcher reviews and analyzes case law and judgments, focusing on Thai courts' judgments with the aim of understanding the ways the courts have applied laws related to international commercial arbitration. Analyses of case law and judgments can shed light on the views and attitudes of national courts regarding international commercial arbitration. The researcher also analyzes case law from other jurisdictions to compare the application of arbitration law regarding particular issues in these jurisdictions and in Thailand.

The researcher utilizes the comparative method to analyze Thai arbitration provisions, applications, and practices in relation to the provisions, applications, and practices of other foreign jurisdictions. The study thereby illustrates the differences and similarities in trends and developments regarding the same issues and elucidates how given problems could be addressed in the Thai context. It does not, however, focus on comparing international commercial arbitration in Thailand to any specific jurisdictions.

This study also relies on in-depth interviews to derive context-related insights regarding international commercial arbitration regulations and practices in Thailand. The interviewees selected in this study are judges, arbitrators, lawyers, and business people in Thailand who participate directly in international commercial arbitration. The researcher conducted these interviews to determine their attitudes about the current legal situation of arbitration in Thailand. This method makes it possible to gauge whether, in the views of practitioners, current regulations or other factors are obstructing international commercial arbitration in Thailand. The opinions of interviewees with arbitration experience contribute to some of the study’s practical recommendations.

Finally, although it mainly relies on qualitative methods, the study does evaluate international commercial arbitration acceptance trends in Thailand by quantitatively analyzing international commercial arbitration data collected from the publications of national courts,

arbitration institutes, and other organizations. It also compares these trends to those in certain other countries around the world, focusing particularly on the Southeast Asia region.

5. Research Limitations and Difficulties

Most Thai laws, regulations, and judgments do not have official translations. Careful translations have, however, been conducted for this study to faithfully capture the meaning and approaches of the primary texts. While Thailand's Supreme Court's judgments are published, most decisions of the Courts of First Instance and the Appeal Courts are not. The analysis in this study is, therefore, limited to Supreme Court decisions.

Understanding the differences in the application of the arbitration law between the Courts of First Instance and the Supreme Court, however, required examination of the judgments of those courts. The researcher, therefore, submitted a special request and was kindly granted access to the Thai Intellectual Property and International Trade Court's judgments. Since the researcher had to examine the Intellectual Property and International Trade Court's judgments inside the court and under time constraints, the study only includes judgments through 2016 when the researcher last visited the court.

The researcher initially planned to include empirical interview- and questionnaire survey-based research in this study to analyze the characteristics of international commercial arbitration practiced by corporations in Thailand. Time limitations and other data collection problems, however, made it necessary to postpone this portion of the study; it will be included in a research future project.

Many arbitration-related changes occurred in Thailand while this research was being completed. These changes included: the establishment of a new arbitration institution, the Thailand Arbitration Center (THAC); the reorganization and amendment of the arbitration rules of the Thai Arbitration Institution (TAI); and the amendment of the Thai Arbitration Act. The researcher

therefore needed to keep the content of the work up to date, which added time to the editing process. The completed research ultimately represents the international commercial arbitration laws and practices in Thailand through August 2019.

6. Structure of the Research

This research is presented in three parts. The first part, Part 1 Introduction, introduces the study, providing readers an overview of the research and explaining its entire framework. The first part also describes the problem, background, objectives, significance, methodology, limitations, and difficulties of the study.

Part 2 examines the Thai judicial system and alternative dispute resolution in Thailand. This part is divided into three chapters, Chapters 2, 3, and 4. Chapter 2 introduces the Thai judicial system, outlining the system's history and current status, and explaining the relationship between the Thai courts and alternative dispute resolution. Chapter 3 focuses on mediation in Thailand; it presents an overview of Thai mediation, describing its history, legal framework, practices, and relationship with the courts. The chapter reviews and analyzes mediation-related laws, giving particular attention to the Mediation Act 2019. Chapter 4 examines arbitration in Thailand, outlining its history, legal framework, and practice, focusing on Thai arbitration institutions. Part 2 concludes by describing the current state of the judicial system and alternative dispute resolution and comparing adjudication, mediation, and arbitration in Thailand. These comparisons serve as the basis for recommendations for international commercial participants seeking to conduct business in Thailand or with Thai parties.

Part 3, Selective Issues in International Commercial Arbitration in Thailand, is the central part of the study. It is divided into four chapters, all which focus on international commercial arbitration in the Thai context: Chapter 5 examines the International Commercial Arbitration Agreement under Thai Law; Chapter 6 focuses on arbitral tribunals and arbitral proceedings;

Chapter 7 addresses the annulment of international commercial arbitral awards; and Chapter 8 investigates the recognition and enforcement of international commercial arbitral awards in Thailand. Each chapter reviews related portions of Thai arbitration law and relevant Thai court judgments, comparatively analyzes jurisdictions selected on an issue-specific base, and concludes by comparing the characteristics of Thai arbitration law to international trends and recommending strategies for improvement in Thailand. Chapter 9 sums up the entire study and provides recommendations for arbitration practitioners, Thai legislators, and foreign investors undertaking international commercial arbitration in Thailand.

Chapter 2

Introduction to Judiciary System of Thailand

Legal and Judicial System of Thailand can be studied far back to more than a thousand years ago when the country was formed. In the old day, the legal and judicial system was established and developed by the leader of the country. Since the country has gone through many changes of era and governing system, Thai legal and judicial system has developed in the same way as the global stream. Courts have been the primary institution that taking care and providing justice to all people in the country. Under the Constitution of the Kingdom of Thailand B.E.2560 (2017), the supreme law of the country, Court has authorized the exclusive judicial power to try and adjudicate cases according with the laws and in the name of the King independently, fair, and impartiality.

Although Thai Courts will not have jurisdiction over disputes relating to international commercial arbitration entirely, the Courts will be called upon to resolve discrete legal issues and to assist in some procedures requiring judicial power.

This Chapter will introduce the Judicial system and ADR in Thailand form the past until present to give an overview idea and understanding of the relationship between Judicial System and ADR, especially arbitration before presenting the current characteristics of international commercial arbitration in Thailand in the following Chapters.

1. History of Judicial System of Thailand

1.1 Sukhothai Period (B.C.1238-1350)

The history of Thai legal and judicial system can be traced back since *the Kingdom of Sukhothai*, were regarded as the first Thai kingdom. During the period, the kingdom was governed

under “paternal system” as Thai society was not complicated and less populated. The king was considered as a father and the people as children.

The oldest evidence of Thai law is the *Ram Khamhaeng Inscription* [4], which formally knowns as the *Sukhothai Inscription No. 1*.[5] The stele was discovered by King Mongkut (Rama IV)[6](who was a monk at that time and later became the King of Thailand in Krung Ratttangosin regime) in 1833.[7] King Ram Khamhaeng was the 3rd king of Sukhothai. He is credited with the creation of Thai alphabet, which appears on the inscription. Thai historical scholars believe that the inscription was established between 1285 and 1292 which should be the same time as the creation of Thai alphabet.[8] The Ram Khamhaeng Inscription is one of 210 steles discovered in Thailand. The shape of stele is four-sided pillar, mostly square with a rounded pyramidal top made of siltstone. The inscription is still in good condition, so the text is readable from the beginning to the end.[9] The text consists of three-part. The first part is about the personal history of King Ram Khamheang from birth until his accession time. This part is written using the first person as the subject, so it is believed that the King was the one who told the story himself. [10]The second part

[4] Nittisart Prisan Wan, *Thai Laws History, lecture for Thammasat Faculty of Laws*, [ประวัติศาตร์กฎหมายไทย, คำสอนชั้นปริญญาตรี มหาวิทยาลัยธรรมศาสตร์], 1459 p. 23.

[5] *Ramkhamhaeng Inscription, available at* https://en.wikipedia.org/wiki/Ram_Khamhaeng_Inscription.

[6] Known as King Mongkut in English speaking countries, Phra Bat Somdet Phar Poramenthra Maha Mongkut Phra Chom Klao Chao Yu Hua was the fourth monarch of Thailand under the House of Chakri ruling from 1851 to 1868.

[7] Praya, s*upra* note, at 27.

[8] *Id.*

[9] The letters used in the inscription were similar to the Khmer's ancient letters, while very different from the letters that are used in Thailand today. *See. Ram Khamhaeng Inscription* https://en.wikipedia.org/wiki/Ram_Khamhaeng_Inscription. (last visited June 27, 2018)

[10] A.B. Griswold and Prasert na Nagara, *The Inscription of King Rama Gamhan of Sukhodaya (1292 A.D.) Epigraphic and Historical Studies No.9,* p.191-192, *available at* http://www.siamese-

speaks of the King in the third person describes the living of the people in various aspects, including the people's freedoms, the ruler's justice, and geographical and physical features of Sukhothai. This part tells about the critical event that happen in King Ram Khamheang period such as the installation of a stone throne in 1291 B.C. (the year of 1214 of Saka era, M.S.), the installation of the relics at Si Sathchanalai in M.S. 1207 (1285B.C.) and the king's invention of the script in M.S. 1205 (1283 B.C.) The third part on the fourth side of the inscription after line 12 is written in a different hand and has some different spelling, showing that it was added many years later. This part served as a eulogy of King Ram Khamheang. [11]

One part of the inspection showing that in the period of Sukhothai, the King himself was the one who took care of people's disputes and intervention fairy without any prejudice. According to Griswold and Prasert na Nagara's translation of the inscription, text on the 1st sideline 32 to line 35 and the 2nd sideline 1 and line 2 of the inscription says " When commoners or men of rank differ and disagree, [the King] examines the case to get at the truth and then settles it justly for them[12]……He has hung a bell in the opening of the gate over there: if any commoner in the land has a grievance which sickens his belly and gripes his heart, and which he wants to make know of his ruler and lord, it is easy; he goes and strikes the bell which the King has hung there; King Ràma Gamhèń, the ruler of the kingdom, hears the call; he goes and questions the man, examines the case, and decides it justly for him. So, people of this Möan of Sukkhodai praise him." [13]

heritage.org/jsspdf/1971/JSS_059_2k_GriswoldPrasert_InscriptionOfKingRamaGamhenOfSukhodaya1292.pdf. (last visited June 27, 2018)

[11] Griswold, A. B. and na Nagara, Prasert, *supra* note 10, at 190.

[12] *Id.* at 207.

[13] *Id.*at 198, 208.

According to Ramkhamhaeng's inscription, the rule of judgment had been applicable, even though; judiciary power has not yet applied by court of justice. Otherwise, with his judiciary power, the king can endorse any person to adjudicate the dispute. The judge must consider the case with honesty, fairness, and impartiality regardless of any gifts or rewards.

> "… When disputes arise between common people and members of the nobility, they will be examined into and decide with justice, both parties being equally regarded as subjects. The judge must not side with the person who clandestinely steals and defrauds. He must not harm the property of the litigation and take from it by his greediness…"[14]

Also the inscription has indicated many of people's right and rules that were used to governed during the period as it mentions that; the ruler of the realm does not levy toll on his subject for traveling roads, people are free to doing trade in very thing they want, when the father died all of his properties is left in its entirety to his son, the land belongs to anyone who obsesses it, the fruits belong to anyone who plants them, the enemies of war will not be killed, and how to treat political prisoners. The laws in Sukhothai mostly were public laws which mainly talked about the people's right and the relationship between the ruler and the citizens rather than the private law that deals with the relations between individuals.[15]Although the massage in King Ram Kamheang inscription is not the law itself as it only gathered citizen's rights and duties under the laws, at least we have the evidence indicates that Thai laws have been written more than 600 years ago.[16]One profound Thai legal historian had compared the Sukhothai inscription No.1 as the first constitution

---

[14] Boonyawan Chanchai and Apirach Petsiri. *"The History of Justice and Legislative Process of Thailand." Chap. 5, In Legislative Process in Thailand,* edited by Thanitcul, Sakda and Shinya Imaizumi, p.66: IDE-Jetro (Institution of Development Economies Japan External Trade Organization), 2011.

[15] *supra* note 4, at 18.

[16] *supra* note 4, at 47, 48.

of Thailand to Magna Carta of England, especially in the aspect of citizens' rights, freedom, and liberty. The only difference is that the right and liberty was offered and guarantee to the citizens by the King without any request.[17]

1.2 The Ayutthaya Period (B.C. 1351-1767)

The laws during Ayutthaya Period can be studied through *the Three Seals Law of the Three Seals Code*, the collection of Ayutthaya's law text compiled by a group of specialists according to the order of King Rama I (the first king of Rattanakosin period) in 1805. As a result of Bunsi petition, claiming the biased judge who awarded a divorce to his wife who had committed adultery, the King suspected the inaccurate and believe the laws had been modified as the marriage law showed that the woman had the right to do such divorce. [18][19]

Ayutthaya laws were derived from the Dhammasattham, the ancient Hindu jurisprudence, as same as Sukhothai law, with some development during each king realm. The laws covered citizens' liberty and private right, both civil and criminal matters. There are 1603 provisions of law in the Three Seals Law, consisted of substantive law, procedural law, and administrative law. This law had been using as the fundamental law of the land until the region of king Rama V. Some provisions such as those that are related to family and heritage remaining until now.

---

[17] The Institution for Justice of Thailand, Dumrong Rachanubhab [สถาบันเพื่อการยุติธรรมแห่งประเทศไทย, ดำรงราชานุภาพ, สมเด็จฯกรมพระยาม], *The Legend of Thai Laws,* [*ตำนานกฎหมายเมืองไทย*] 24,25 (2015).

[18] Seni Pramoj, *A lecture on Law in the Ayutthaya Era* [ปาฐกถา เรื่อง กฎหมายสมัยอยุธยา], (1957).

[19] Hence the king graciously commanded that subjects with knowledge be assigned to cleanse (*chamra*) the royal decrees and laws in the palace library from the Thammasat onwards; ensure they are correct in every detail according to the Pali with no inconsistencies in their content; arrange them into chapters and groups; and take pains to cleanse and adjust any aberrations to accord with justice, in keeping with the king's gracious intent to be of benefit to kings who reign over the realm in future. *See.* (Royal preface to the Three Seals Law) from *Royal Institute of Thailand (2007),* vol. 1, p.106. *Kotmai tra sam duang: chabap ratchabandittayasathan [Three Seals Code: Royal Institute Edition]. Bangkok: Royal Institute of Thailand.*

The laws in Ayutthaya did not make in the form of a statute; it instead derived from the judicial precedent of the King, similar to the common law of England.[20] Instead of adjudicated and delivered the royal decision to all the disputes by the king himself, the King delegated his power of judiciary to his noble royal officials. When the King delivered judgment by himself, it was the model and royal precedent for others to follow. Consequently, it became law. The King also exercised his legislation power ordering the royal officials drafting law to be reviewed and declared by him. For the first time the legal matters were assembled in written form was during the period of King U-Thong. [21]Even though during the period the country was in the absolute monarchy system that the sovereign power has belonged to the King, the legislation of law has to indicate the reason why that law is needed for the right living of the people.

Further than that all the legislation has to refer to the jurisprudence in Dhammasttham. Therefore, this can be remarked that the character of Ayutthaya's sovereignty did not arbitrarily depend on King's wills rather than the citizens' peaceful livability.[22]

H.R.H Prince Damrong Rajanupab once mentioned about Ayutthaya's Judicial system that

> "Ayutthaya adjudication system…was rather uncommon since it was a mixture of Indian and Thai adjudication. Another unique point is that the judiciary was formed by two groups of people. The first group consisted of 12 foreign Brahmin, who were legal experts. They were called "the Jury of Royal Court" and led by the great master Purohit and the great master Mahithorn, who ranked the highest of Thai nobility – Jaopraya. The Jury of Royal Court was responsible for

[20] *supra* note 14, at 69.

[21] Joint-Project between the Central Intellectual Property and International Trade Court and the Institute of Developing Economies, Japan External Trade Organization, *The Judicial System in Thailand: An Outlook for a New Century*, March 2011, p.61

[22] *supra* note 14, at 162.

applying the law. However, they could not make any orders. This duty lay merely on Thai officers…"[23]

The concept of royal justice administered during Sukhothai was also carried through the Ayutthaya. According to the law on judges (the law of Tra-la-karn), a part of the Three Seals Code, has specified that the judges have the duty to adjudicate justly without the *four prejudices (it-ti-baht-see)* which are; the prejudice due to love and admire, the prejudice due to anger or hatred, the prejudice due to fear, and the prejudice due to delusion or stupidity. In accord with the law of judge, Ayutthaya judges could be the judge who was endorsed by the king or a man whom the party to the dispute agreed and appointed him to adjudicate their case. Under the Law of Court Organization (Pra-Tham-Ma-Noon), any bureaucrat who was not endorsed as a judge cannot adjudicate any disputes of the citizen. The reason behind this rule is to avoid the vigilante between any nobility and the citizen.

One of the characteristics of the Ayutthaya judicial system is that the judicial duties were decentralized and distributed to different departments and ministries, combined with the department of charges, the jury, judge (Tra-la-karn), and executors. The accuser must file the claim to the department of charges (Koon-Gan), then it would be handed over to the Jury. After the Jury classified the claim accorded to the Law of Court Organization, the department of charges would distribute the claims to different courts of divisions depends upon the type of the case. Each division has its Tralakarn to consider the fact of the claim finding the truth out of it, any claims with question of law would be sent to "The July of Loyal Court" to consider. The cases with complicated issues must be handed to the King; other standard cases would be handed to the judge in the ministry, which jurisdiction over the claim to consider and render the judgment.[24]

---

[23] *supra* note 11, at 66-67.

[24] *supra* note 1, at 170-184.

Besides the laws controlling the disputants, the law on judges also had the provisions and rules to control judge behavior during the trial. In general, appeals were not allowed under Ayutthaya judiciary system unless, in the case where the litigants felt that the judge was not treating him right or not being fair, they could appeal their concerns to the king. If the examination turns out that the judge has committed undue process as the appealer mention, the impaired judgment would be dismissed followed by the appointment of a new judge to reconsider the case. The guilty judge would be punished and responsible for any compensation and court fees. [25]

Even though the King in Ayutthaya realm was the sovereignty which all of the land and the life in the kingdom were belong to him, he accepted that even the King could make mistakes. This concept is hardly found in other kingdoms. A remarkable law of Ayutthaya that should be observed are some provisions in the Royal Family laws which the king himself was enacted to control his absolute judicial power. According to the Royal Family Law, article 106 of the Three Seals Code prescribed that[26]

> "When the King adjudicates any law-suites accorded to the laws justly, shall follow it, if not, do not follow and shall challenge and ask the King three times, refrain the order if do not listen. Then privately ask him again, if the King does not listen and confirm his decision after that, then follow his order. Anyone who does not obey this rule, that person violates king's law." [27]
>
> "อนึ่งพระเจ้าอยู่หัวดำรัสด้วยกิจราชการคดีถ้อยความประการใด ๆ ต้องกฎหมายประเวณีเป็นยุติธรรม แล้วให้กระทำตาม ถ้าหมีชอบ จงอาจพิดทูลทัดทานครั้งหนึ่งสองครั้งสามครั้ง ถ้าหมีฟังให้งดไว้ อย่าเพ่อสั่งไปให้ทูลในที่รโหฐาน ถ้าหมีฟังจังให้กระทำตาม ถ้าผู้ใดมิได้ทำตามพระอัยการ ดั่งนี้ ท่านว่าผู้นั้นละเมิดพระราชอาญา"

[25] Pramoj, Seni *supra* note 15, at 114.

[26] *Id*. at 126.

[27] Own translation

1.3 Thonburi Period (B.C. 1768-1782)

As a result of the long-term wars and series of battles, Ayutthaya's judicial system was carried on during the reign of King Taksin the Great.

1.4 Rattanakosin Period (Since B.C. 1782)

The judicial history of Thailand in Rattanakosin kingdom can be divided into three periods:

1) The beginning of the Rattanakosin Period (B.C.1782- King Rama 5)

As a result of the long war with Burma, some collection of the law recorded during the Ayutthaya period was destroyed. King Rama I, the first monarch of Chakri Dynasty exercised the law partly inherited for Ayutthaya. Meanwhile, he engaged the judiciary power and created the precedent of law to fulfill the missing. The Three Seals Laws were regulated after the assembled, revised, and rectified all Ayutthaya laws, according to King Rama I ordered. This Law was considered as the original formality of the Law of the Land and had been used for 103 years. Ayutthaya's judicial system was remained during this period because of the similarity of the culture and the reconstruction from the prolonged war.

During the reign of King Rama IV, the country had been developing trade relations with western countries. In A.D. 1827, Bowring Treaty, the Royal Relation Treat with England, was concluded inevitably to avoid the use of arm force, even though it had brought unequal economic, law, and judiciary to Thailand. Not only England but also other colonial hunting countries requested a unique judiciary right over Thailand's sovereignty by claiming that the country’s laws and judicial system were outdated and unsystematic. As a result of this situation, several attempts were applied to gain back the judicial independent from western countries, claiming that because of the unsystematic and obsolete law and judicial system, their people should respond only to their laws and special judiciary tribunal established by them. The law was written and promote to Thai

and foreigner; the printing technique was invented, which rapidly raised people understanding of Thai laws.

2) The Reform after King Rama V Reign

During King Rama V reign (A.D.1860 - 1920), Thailand faced several changes from both internal and external of the country. The idea of centralizing the power to the King was developing to move the country forward systematically to avoid being the prey of aggressive colonialism from the western countries. This period the Kingdom was the so-called "Absolute Revolution" stage. To challenge and slow down the threat from foreign countries, the improvement and development of the Kingdom in the westernization was the plan. English system style of state administration was employed, the Privy Council and the Council of State was appointed to delivery advice of state administration and policies. To improve public welfare, water supply, electric, post offices, hospital, and medical school was established. One of the most significant changes for the country was the declaration of the abolishment slavery system in Thailand.

The number of foreigners who came to do business in Thailand increased dramatically during that period. However, there was one of the challenging problems that the country had to face due to the undue interpretation of the treaty. Such a problem causes the loss of judicial independence to control people of the western nations living in Thailand. The improving of Thai law and the judicial system to reach the acceptance of the western nations was the only resolution of the problem.

The civil law system was chosen as the model to move the country's legal system followed European modernization as the system was well-organized into sections of code that were suitable for the country to learn and adopted. The need of the people, custom practice, tradition, culture, and way of life of the country were considered under the legal reform. In 1908 the Criminal Code was enacted as the first modern law of Thailand. The Code was the first draft in English by the committee included some legal experts aboard, and then it was translated to Thai. In 1895 the Civil

Procedure Code and Constitution of the Court of Justice were drafted. By A.D. 1935 in the reign of King Rama VII, Thailand had the full set of code laws, including Criminal Code, Civil Code, Criminal Procedure Code, Civil Procedure Code, and Constitution of the Court of Justice. Eventually, Thailand entirely gained back its independence of the law and judiciary from western countries in A.D.1938 (B.E.2481)[28]

Meanwhile, the reform of the Judiciary system was processed together with the reform of the Thai law. In 1882, King Rama V founded the first building of the Court of Justice. Later in A.D.1891 (B.E.2434), the Ministry of Justice was established by the Royal Thai Government to organize and reform Thai judiciary. Since the distribution of courts to several government bodies and involvement of many government agencies in judiciary process caused delay and jurisdictional problem, the judicial system was reorganized by combining 16 courts into 7 courts which were the Royal Appeal Court, the Appeal Civil Court, the Royal Criminal Court, the Kasem Civil Court, the Central Civil Court, the Revenue Court and International Court. The Ministry of Justice was first established in A.D.1891 to take care of the reorganization of courts and to improve Thai Judiciary. When the laws were being reformed Thai government temporally hired legal experts to work with Thai judges from foreign countries such as Japan, Belgium, Sri Lanka to ensure that the reform laws were potentially employed. According to the commitment of the treaty between the countries, legal advisers form England and France were hired with the limit of numbers due to their view of interest. In order to handle judiciary tasks under the reformed judicial system, legal education was encouraged by sending Thai officer to study oversea and establishment of the law school. In 1987 (B.E.2440) the school of law was introduced by HRH Prince Rapee -Pattanasak, the Head Official of the Ministry of Justice to produce new generation of legal official. [29]

---

[28] *supra* note 21, *at* 64.

[29] *Id.* at 65.

Laws and regulations concerning the organization and administration of Judicial bodies were amendments from time to time to improve and develop the judicial system in order to ensure the adjudication autonomy of court and the ability to provide real justice to people in the country.

In 1908, the Court of Justice was established to replace ministry courts. Four years later, the Regulation on Justice Administration B.E.2455 was promulgated to divide the Ministry of Justice into the administration of affairs under the supervisory of the Ministry of Justice and the judiciary affairs under the supervision of the Chief Justice of Supreme Court who any legal matter would be considered by him. While, Judicial affairs including regulating, appointing, promoting and transferring were under the responsibility of the Supreme Court, the Minister of Justice was empowered to make any suggestion on the judiciary affairs. Any conflict between these two bodies could be rendered for the King's opinion or royal custom. In 1930, Judiciary Act B.E.2477 discontinued the ministry supervision over the courts. The Courts were renamed to the Courts of Justice and classified into the Court of First Instance, the Court of Appeal, and the Supreme Court. [30]

3) Constitution Monarchy System

Since the Revolution of 1932, Thailand had changed from the absolute monarchy to the constitutional monarchy system. This change had a significant effect on the Thai legal and judiciary systems. From then, the Constitution has been the supreme law of the country that establishes the structure of the Executive body, Legislative body, and Judiciary body as well as their powers, functions, and duties. The Constitution vested the judiciary power with the Courts. Judges are assured of independence in adjudicating cases under the law and performing their duties in the name of the King.

[30] *supra* note 14, at 68-70.

Due to the instability of politic in the country during the past 75 years, Thailand has over 20 constitutions, as many of them adopted following military coups. After each successful coup, military regimes abrogated existing constitutions and promulgated the new ones. However, there was one of the constitutions that had a significant effect on the judiciary system of Thailand, which is the Constitution of the Kingdom of Thailand B.E.2540.

4) The New Judiciary System Under the Constitution B.E.2540 (A.D.1997)

Unlike other chapters which were drafted to adjust the power and benefit among the elite who in charge during the time of promulgation, the Constitution of the Kingdom of Thailand B.E.2540 (A.D.1997) also known as the "People's Constitution" was the first Constitution of Thailand that had established on the ground of securing accountability of politicians and bureaucrats to the public. The constitution B.E.2540 was drafted by the special Assembly formed with 76 members who were indirectly elected from each province to represent the province, and 23 members were chosen by Parliament from experts in public law, political science, and public administration shortlisted by universities. It was also the first time that Thai Constitution clearly adopted the Constitutional Supremacy concept, as stated in Article 6 that "The Constitution is the highest law of the country. The provision of any law, act or decree which is contrary to or inconsistent with this constitution shall be unenforceable." Article 27 which binds all branches of the government reinforce the supremacy by stated that "Rights and liberties endorsed by this Constitution explicitly or implicitly, or by the Constitution Court, shall be protected and legally bind Parliament, the Cabinet, courts and other government agencies in making, enforcing and interpreting laws."

The Constitution of the Kingdom of Thailand, 1997 (B.E.2540) had the purpose of reforming the political structure of the country in order to support people's rights involve politic, good governance, and transparency of public sectors. It was the first time in Thai Constitution history to expand citizen participation in governance, public policy, local resource management,

and citizen participation through administrative decentralization and public policy referendum. [31]Before 1997, the senators or the Upper House as second category of representatives, the executive branch which has the power to control the legislative branch, always came from the appointment of bureaucratic bodies. The Constitution 1997 required senators to be elected by popular vote to ensure that they will represent a cross-section of diverse national interests, rather than bureaucratic focus of previously appointed Senates.

Judicial Review: The lack of an independent Judicial Review organization was another problem under constitutions of Thailand. As a result, the power to interpret the meaning or intent of the constitution or the power to address that any law, rules or actions were unconstitutional was under the executive branch. The process of judicial review was not addressed in the constitution until the 1946 Constitution article 86 [32] which vested the right to interpret the constitution to the Parliament, even though there was Judicial Committee with absolute judicial review power created under this Constitution.[33] With the effort to found special tribunals to exercise judicial review

---

[31] James R. Klein, *THE ASIA FOUNDATION WORKING PAPER SERIES: The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy* 22 – 27 (1998). *available at*
http://www.constitutionnet.org/sites/default/files/Paper_on_the_1997_constitution_2.pdf

[32] The Constitution of the Kingdom of Thailand B.E.2489 (A.D.1956) Article 86: "Subject to the provision of Section 88, absolute right to interpret this Constitution must be passed by not less than half of the total number of members of both House."

[33] Somyos Chuathai, *The explanation of General Constitutional Principles* [คำอธิบายหลักรัฐธรรมนูญทั่วไป คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์] *59*-60 (1992).

power, the Constitution 1957 and 1974 remain the right to interpret the Constitution in the hand of executive branch as those tribunals were not independent judicial institutions.

To find the solution for political interference in judicial review, the Constitution of the Kingdom of Thailand B.E.2540 had established the Constitution Court as the independent judiciary institution. To ensure the independence of the Constitution Court, according to Article 259, this court consisted of 15 full-time judges who do not hold any position in political bodies or any local administration appointed by the king with the advice of the elected Senate after the special election eliminated political interference.[34] The judges must resign from any position or association in government, state agency, partnership or any profit organization.[35]

Dual Court System: The Constitution B.E.2540 (1997) also had a significant impact on the judiciary system of Thailand as it transformed the court system from single court system to dual court system. Before 1997, all the law-suits in the country were under the jurisdiction of the Court of Justice. However, to build the legal state, the state governs by the rule of law according to the principle of democracy, "the Dual court system" whereby the administrative court is the sole body responsible for administrative dispute adjudication was picked among other schemes as the most efficient power system.[36]Under the Constitution B.E.2540 the Administrative Court was established to try and adjudicate administrative cases separately from the Court of Justice. According to article 276 of the Constitution B.E.2540, Administrative Court has the powers to try and adjudicate cases of dispute between a State agency, State enterprise, local government organization, or State official under the superintendence or supervision of the Government on one part and a private individual on the other, or between themselves, where the dispute is the

[34] The Constitution of The Kingdom of Thailand B.E.2540 Article 255

[35] The Constitution of The Kingdom of Thailand B.E.2540 Article 258

[36] Chanchai Boonyawan, *Report on the Follow-up and assessment of the affairs of the Administrative Court,* 71 (2011).

consequence of the act or omission of the act that must be performed or under the responsibility of such State agency, State enterprise, local government organization or State official under the law, as provided by law.

The Separation of Courts from the Ministry of Justice:

According to the Constitution B.E. 2540 article 222, the Court of Justice shall have an independent secretariat, with the Secretary-General of the Office of the Courts of Justice, as the superior responsible directly to the President of the Supreme Court of Justice. The provision also ensured the concept of separation of power by giving the power of selection and appointment of the Secretary-General of the Office of the Court of Justice to the President of the Supreme Court of Justice with the approval of the Judicial Commission of the Courts of Justice instead of handling this authority to any political bodies or government issues. Under the Constitution, the Office of the Courts of Justice has autonomy in personnel administration, budget, and other activities as provided by law. With the same principles, the Constitution B.E.2540 also establishes the position of the Secretary-General of the Office of the Administrative Courts to takes care of personnel, administration, budget, and other activities of the Administrative Courts as well.[37] In August 2000 the Court of Justice was separated from the Ministry of Justice. Since then Courts in Thailand are independent institutions.

2. The Current Judiciary System in Thailand

Thailand adopts a democratic regime of government with the King as Head of State. The Sovereign power belongs to the Thai people. Under the concept of separation of power, the King, as Head of State, exercises power through the National Assembly, the Council of Ministers, and the Courts by the Constitution. The Constitution is the supreme law of the country. The National Assembly, the Council of Ministers, Courts, Independent Organs and State agencies shall perform

[37] The Constitution of The Kingdom of Thailand B.E.2540 Article 227

duties by the Constitution. The provisions of any law, rule, or regulation or any acts, which are contrary to or inconsistent with the Constitution, shall be unenforceable.

The Constitution of the Kingdom of Thailand B.E.2560 (the 2017 Constitution) prescribes the judicial power to try and adjudicate cases to the Courts, which must be carried out in accordance with the laws and in the name of the King.[38] Judges and justices are independent in trial and adjudication of cases, under the Constitution and laws instantaneous, fair, without partiality.[39]

The established of the new courts only can be done by the Acts. There shall be no establishment of the new court to adjudicate any particular case or a case of any particular charges in place of an ordinary court which is having jurisdiction over such case.[40]

The Court recognized by the 2017 Constitution is the Court of Justice, the Administrative Court, the Military Court, and the Constitutional Court. In the case of dispute on the competent jurisdictions between the Court of Justice, the Administrative Court, or the Military Court, the issue shall be solved by the Commission on Jurisdiction of Court consisting of the President of the Supreme Court as a Chairperson, the President of the Supreme Administrative Court, the Chief of Military Judicial Office and not more than four qualified persons as provided by law as members.[41]

To ensure the independence of the court of the political body, since 1997 the Constitution prescribes that all courts except the Military Court shall have a secretariat which is independent in personnel administration, budget and other activities, with the Head of the Office as the superior official directly responsible to the President of each Court.[42]

---

[38] The Constitution of the Kingdom of Thailand B.E.2560 Article 188

[39] *Id.*

[40] *Id.* Article 189.

[41] *Id.* Article 192.

[42] *Id.* Article 193.

2.1 Courts of Justice

According to the Constitution of the Kingdom of Thailand B.E.2560 (A.D.2017) article 194, the Courts of Justice have the powers to try and adjudicate all cases except those specified by the Constitution or the law, to be within the jurisdiction of other Courts. The Courts of Justice are classified into three levels; Courts of First Instance, Courts of Appeal, and the Supreme Court. The Courts of Justice have continually improved the efficiency in handling cases by; increase the number of courts, established the new divisions and branches of courts, established of the specialized courts, and promoting ADR by setting up the Alternative Dispute Resolution office. In 2017 there are 273 Courts of Justice around the country.[43]

1) Court of First Instance

Court of First Instance is categorized as general courts, juvenile and family courts, and specialized courts. All cases shall commence at the Court of First Instance with some exception under the Constitution or other laws. Courts of First Instance also

i. **General Courts**: The General Courts are ordinary courts that have authorities to try and adjudicate criminal and civil cases. The General Courts consist of the Civil Courts, Criminal Courts, Provincial Courts and Municipal Courts (Kwaeng Courts). In the General Courts (except the Municipal Courts), at least two judges form a quorum. Any judge who is not sitting at the hearing of a case shall not give judgment or decision, except the case of force majeure or any other unavoidable necessity. The appeal of the judgment of the Court of First Instance both questions of law or the questions of fact shall be filed to the Court of Appeals with some restrictions.

According to the Code of Civil Procedure, the plaintiff must bring a civil case to the court where the cause of action arises or where the defendant is domiciled. Any cases involve with the immovable property; the plaintiff has to bring a lawsuit to the court where such property is situated,

[43] *The Court of Justice System, available at* https://coj.go.th/th/content/page/index/id/91994.

or where the defendant is domiciled. The Civil Court, which located in Bangkok has the discretion either to try and adjudicate the civil cases brought to the court or to transfer them to the court, which has territorial jurisdiction over such cases.

The Courts that have jurisdiction over the criminal cases are the courts in the district where an offense has been committed, alleged or believed to have been committed, or where an accused resides or is arrested, or where an inquiry official conducts an inquiry. In the same way as the Civil Court, the Criminal Court has the discretion either to try and adjudicate the criminal cases brought to the court or the transfer them to the court, which have territorial jurisdiction over such cases.

ii. **Municipal Courts:** In 2017, there are 32 Municipal Courts in Thailand, 5 in Bangkok Metropolis, and 27 in other provinces.[44] The Municipal Courts have the principal purpose of reducing caseload from Civil Court, Criminal Court and Province Courts. The primary function of the Municipal Courts is to try and adjudicate small cases with minimum formality, expense and time. The Municipal Courts jurisdiction covers both civil and criminal cases. Civil Cases that have the number of claims from 300,000 Thai Baht and under are under the jurisdiction of Municipal Courts as well as the criminal cases dealing with criminal offense punishable with maximum of three years imprisonment, or fine not exceed 60,000 Thai Baht or both. In order to dispose of the cases quickly, the trail in these courts will be simpler compared to other general courts. The Municipal courts may order oral judgments or summarized judgments.

iii. **Provincial Court:** Provincial Courts are general courts located in every province around the country. Some provinces may have more than one provincial court to expand the service to the distant area. There are currently 120 provincial courts in Thailand divided into nine regions. The provincial courts have jurisdiction over all general civil cases and criminal cases. A quorum

---

[44] *The Court of Justice System* (ระบบศาลยุติธรรม), *available at* https://www.coj.go.th/home/file/structure_22052560.pdf

of provincial courts consists of at least two judges, with no more than one junior judge (the judge who has been working lease than three years, after has been trained as judge trainee for one year). The provincial courts also have the power to adjudicate cases that fall under the jurisdiction of municipal courts, when there is no municipal court in such provinces. In this case, a quorum of one judge of the provincial court can try the case. The administrative offices of the court of justice, region I-IX, take care of administrative work of all provincial courts and municipal courts in the regions head by the Regional Chief Justice. Each provincial court has its own administrative office to take care the general affairs as well.

iv. The Juvenile and Family Courts

The Juvenile and Family Court is a special court which has jurisdiction over;

1) criminal cases accuse that persons aged under 18 convict any criminal act against the laws,

2) criminal cases that were transferred from other courts which have jurisdiction over general criminal cases,

3) family cases (civil cases brought to courts concerning juveniles or family which need court enforcement according to the Civil and Commercial Code, the Family Registration Law, or other laws concerning family's issue),

4) cases concerning the protection of children or family members who need courts' enforcement according to the Child Protection Act, the protection for the victims of domestic violation laws, or other laws regarding children and family members' protection.[45]

There are at least one Juvenile and Family Court in every province. The Central Juvenile and Family Court are located in Bangkok. Some big provinces which have more than one provincial court may have the juvenile and family division in the provincial courts of those provinces. A

[45] The Juvenile and Family Court and Its Procedure Act, B.E. 2553 (2010) Article 10.

quorum of Juvenile and Family Court consists of two career judges and two lay judges with at least one woman.

V. Specialized Courts

Due to the requirement of special knowledge and special technics in some specific cases, the special courts in Thailand were established to ensure that all disputes will be appropriately adjudicated. There are four types of specialized courts in Thailand. The Tax Court, the Intellectual Property and International Trade Court, and the Bankruptcy Court have only central courts located in Bangkok. The Labor Court is the only type of specialized court the has been established in the regions along with the central court in Bangkok. In the Intellectual Property and International Trade Court and the Labor Courts, two judges with one judge who has competent knowledge in particular matters and one lay judge, make a quorum in adjudicating the cases. The lay judges are the persons with specialized knowledge in the specific issue concerning the cases who were recruited to work with the career judges. Each specialized court has its procedures which included in the establishment and procedure Acts of such court.[46] The appeal against the judgments orders of Specialized Courts shall significant to the Specialized Court of Appeal where there are individual divisions were established to take care of specific types of cases.

2) The Courts of Appeal

i. General Courts of Appeal consists of the Court to Appeal and nine Reginal Courts of Appeal. The Court of Appeal and the regional courts of appeal I, VII, and IX are located in Bangkok. The Court of Appeal, Region II is in Rayong Province, the Court of Appeal, the Court

[46] The Juvenile and Family Court and Its Procedure Act, B.E. 2553 (2010),
Act on the Establishment of and Procedure for Labor Court B.E.2522 (1989),
Act on the Establishment of and Procedure for Tax Court, B.E. 2528 (1985),
Act on the Establishment of and Procedure for Intellectual Property and International Trade Court B.E.2539 (1997),

of Appeal, Region IIV is in Nakorn Ratchasima province, the Court of Appeal, Region IV is in Khonken Province, the Court of Appeal, Region V is in Chiang Mai Province, the Court of Appeal, Region VI is in Nakorn Sawan province, and the Court of Appeal, Region VIII is in Phuket Province. The Court of Appeal is responsible for any appeals against judgments or orders of Civil Court and Criminal Courts. While the Regional Courts of Appeal take care of the appeals against the judgments or orders of the Courts of First Instance located within their regions.

According to the amendment of the Civil Procedure Code in 2015, section 4, which added article 244/1 to the Civil Procedure Code, the judgments and orders (in civil cases) of the Court of Appeals shall be final.[47] Under section 5 of the same amendment act which repealed and replaced section 247 of the Civil Procedure Code[48], the petition of the judgment or order of the Court of Appeals may be done when permission has been granted by the Supreme Court.

The jurisdictions of the Regional Courts of Appeal and the jurisdictions of the Regional Courts of First Instance are consistent. The Presidents of the Court of Appeal are the heads of each court. A quorum in the appeal courts consists of at least three-justice. The Courts of Appeal adjudicate the case by examining and review the judgments of the Courts of First Instance without re-try the cases all over again. Each court of Appeal has a Research Justice Division of research judges to assist justices of the Courts of Appeal in examining and research the legal issues of the cases.

ii. The Specialized Court of Appeal

The Specialized Court of Appeal was established by the Act on Establishment of the Specialized Court of Appeal B.E.2558 (2015) and started its service on October 1st, 2016. The Specialized Court of Appeal is established to handle the exceptional cases from the Specialized

[47] Act Amending the Civil Procedure Code (No.27), B.E.2558 (2015)

[48] The former article 247 of the Civil Procedure Code was amended by the Act Amending the Civil Procedure Code (No.5), B.E.2499 (1956)

Courts of First Instance. Before the establishment of the Special Court of Appeal, the petition of the judgments or orders of the Special Court of First Instances could be appeal directly to the Supreme Court in order to adjudicate the cases expeditiously. However, in September 2015, the Act Amending the Civil Procedure Code (N0.27), B.E.2558 was issued and prescribe that the judgments and orders of the Court of Appeal shall be final, and the petition of the judgments or orders of the Court of Appeal can be done only the Supreme Court grants the permission. Due to such change, the appeal against the Specialized Court's judgment or orders would be no longer consistency of the new civil procedure code. Therefore, the Special Court of Appeal needs to be established to take care of the appealing against the judgment and orders of the Specialized Courts. By virtue of the law, judgments and orders of the Specialized Court are final in the judgments and orders of the Appeal Court. However, the litigant may file the petition of the judgments or orders (civil issue) of the Specialized Court of Appeal when the permission has been granted by the Supreme Court.

The Specialized Court of Appeal has the jurisdiction over the cases appealed against the judgments or orders of, the Intellectual Property and International Trade Court, the Tax Court, the Labor Courts (including the regional labor court), the Bankruptcy Court, and the Juvenile and Family Court. There are five divisions in the Specialized Court of Appeal, namely, the labor division, the intellectual property, and international trade division, the bankruptcy division, the tax division, and the juvenile and family division. The justices in each division have the specialized knowledge and experience in the specific field for more than 20 years.[49] At least three justices of the Specialized of Appeal formed a quorum. (September 21, 2018)

[49] The interview of the Chief Justice of Specialized Court of Appeal on September 27, 2016, [บทสัมภาษณ์ ท่านเมทินี ชโลธร ประธานศาลอุทธรณ์คดีชำนัญพิเศษ คนแรก โดย ไทยรัฐออนไลน์ วันที่ 27 กันยายน 2559], (December 2016). *Available at* https://www.thairath.co.th/content/734981

3) The Supreme Court

The Supreme Court is the highest court of justice in the country. The President of the Supreme Court is the head of Judiciary, who has the ultimate independent authority in court administration and judicial work over the Court of Justice according to the laws. The Supreme Court consists of the President, Vice-Presidents, the Secretary, and a number of justices.[50] There are 11 divisions in the Supreme Court to take care of specific cases which are 1) the Bankruptcy Division, 2) Labor Division, 3) the Environmental Division, 4) the Customer Division, 5) the Intellectual Property and International Trade Division, 6) the Election Case Division, 7) the Criminal Division for Persons Holding Political Position, 8) the Juvenile and Family Division, 9) the Tax Division, 10) the Commercial and Economic Division, 11) the Division of Consideration of Permission to Petitions to the Supreme Court.[51]

At least three justices of the Supreme Court form a quorum. To determine the special cases which having the chance to reconsideration or overruling of the precedents, the Supreme Court may sit in a plenary session (the Supreme Court General meeting) consisted of at least half of the total number of the justices of the Supreme Court forming the quorum. The justices of the Courts of Appeal with seniority, extensive knowledge and experience are the justices who may be appointed to serve as the Justices of the Supreme Court.

i. The recent change in appealing

The litigants may appeal (Dika) the judgments or orders of the Court of Appeals to the Supreme Court with some restrictions under the laws. In 2015, the Act Amending the Civil Procedure Code (No.27), B.E.2558 (2015) section 5 was repealed and replaced section 247 of the

---

[50] Preface - Supreme Court, *available a*t http://www.supremecourt.or.th/file/dika_eng.pdf

[51] *In the Supreme Court* ,[ในศาลฎีกา], (August 10, 2018)*available at* https://www.thairath.co.th/content/1317001

Civil Code B.E.2477 (1934) stipulated that "the petition of the judgment or order of the Court of Appeal may be done when the permission has been granted by the Supreme Court." The appellant must submit the application requested for permission to present a petition a claim together with the petition to the Court of First Instance who issued the judgment or order of such case within one month from the date that the judgment or order of the Court of Appeal is readout. Then the claim and the petition will be sent to the Supreme Court without delay. The President of the Supreme Court will assign the claim under section 247 to the group of judges consists of the Vice President of the Supreme Court and at least three justices of the Supreme court to consider the application for the petition. The decision will be made by a majority of votes. The opinion allowing for the petition will be executed when the votes are tied.[52] The claim will be considered to be significant and should be considered by the Supreme Court including the following circumstances:

(1) the question of the claim relating to the public interest or public order;

(2) where a judgment or an order of the Court of Appeal considered in the important points of law which conflict with the general precedent of judgment or order of the Supreme Court;

(3) a judgment or an order of the Court of Appeal considered in the important point of law which do not yet have the precedent of previous judgment or order of the Supreme Court;

(4) when the judgment or order of the Court of Appeal conflicts with the final judgment or order of other courts;

(5) where it is for the development of legal interpretation

(6) where there are any other significant questions as prescribed by the President of the Supreme Court

In November 2015, the Government Gazette of the Prescription of the President of the Supreme Court regarding the petition to appeal civil cases to the Supreme Court, B.E.2558 (2015)

[52] The Civil Procedure Code B.E.2477 (1934) section 248 as amended by the Act Amending the Civil Procedure Code (No.27), B.E.2558 (2015) section 6.

was published. Under the power of section 247 paragraph two (6) and the approval of the General Meeting of the Supreme Court, the President of the Supreme Court has prescript that the other significance question which should be consider by the Supreme Court are the circumstances that; (1) the judgment or order of the Court of Appeal which has the challenged opinion (from the judge in the quorum) in the significant point; (2) the judgement or order of the Court of Appeal which adjudicated regarding the important provision of law which contradict to the international agreements Thailand are bound.

In the case where the Supreme Court denies the application for the petition, the judgment or order of the Court of Appeal shall be final from the date that the judgment or order is readout.[53]

ii. Adjudication of the Supreme Court

The President of the Supreme Court will assign the appeal against the judgments of the Court of Appeal to a justice of the Supreme Court on a case by case. Some cases would be urgently adjudicated by the special division if they are special cases such as bankruptcy, juvenile and family, intellectual property and international trade cases, or the criminal cases which the defendants are in custody during the trials.

The draft of the judgments will be assigned to the Research Division to review and examine the factual and legal issues related to the cases. This Division is combined with the research justices and associate research judges, who are working as the assistance division to support the justices of the Supreme Court to ensure the correctness, consistency, and fairness of the result.[54] The draft with the comments will be submitted to the Vice-President and the President of the Supreme Court respectively to review and approve after the Research Division makes

[53] The Civil Procedure Code B.E.2477 (1934) section 249 as amended by the Act Amending the Civil Procedure Code (No.27), B.E.2558 (2015) section 6.

[54] *The Supreme Court of Thailand* (last visit August 2018), available at http://www.supremecourt.or.th/file/dika_eng.pdf

comments and consult with the senior research justice who is authorized to review the draft. (the last paragraph edits with Grammarly.com save in Chapter 3. edited. (1))

When there is a disagreement between the research justice and the presiding justice who draft the judgment, the draft judgment, and the research justice's comments and suggestions will be sent to the senior research justice, the Vice-President and the President of the Supreme Court respectively. After the consideration, the President of the Supreme Court may agree with the presiding justice or may suggest him or her to review the draft. If the President of the Supreme Court considers the case to be crucial, the case may be referred to plenary session of the Supreme Court for the consideration. After the draft of the judgment is approved by the President of the Supreme Court, the authorized Vice-President of the Supreme Court, or the authorized Chief Justice of the specialized division, it will be processed under the administrative system and sent to the Court of First Instance to pronounce. [55]

iii. Special function of the Supreme Court under the Constitution

Corruption is one of the severe problems which effects the development and the stability of the countries around the world. It also a critical crisis in Thailand.[56] Many schemes were employed to solve the problem. Since 1997 the Constitution of Thailand has granted extraordinary power to the Supreme Court by establishing "the Supreme Court's Criminal Division for Persons Holding Political Positions." In 2011, Thailand became a state party of the United Nations Convention Against Corruption 2003 (UNCAC).[57] To assure that the country's law is consistency with the Convention, the Organic Act on Counter Corruption was amended in 2015 and 2018.

---

[55] Id. at 12-13.

[56] *Corruption Index 2017*, (last visited Oct.19, 2018), *available at* https://www.transparency.org/country/THA

[57] Thailand signed United Nations Convention Against Corruption 2003 (UNCAC) on December 9 2003 and ratified the Convention on March 1, 2011, the status of avaialbe at https://www.unodc.org/unodc/en/corruption/ratification-status.html.

According to the Constitution of the Kingdom of Thailand B.E.2560 (2017) section 195 and the Organic Act on Criminal Procedures for Holders of Political Positions B.E.2560 (2017) section 9, the Supreme Court shall have a Criminal Division for Holders of Political Position which concluded of the judges who hold office not lower than Judge of the Supreme Court or senior judges who have previously held office not lower than Judge of the Supreme Court in a number deems appropriate of the President of the Supreme court to perform necessary work at the time when there is no quorum of judges in any particular case. Upon submission of cases, a quorum of nine judges in the Supreme Court who hold office not lower than Judge of the Supreme Court or senior judges who have previously held office not lower than Judge of the Supreme Court is secret ballot elected on a case-by-case basis at a general assembly of the Supreme Court. During trial and adjudication of such cases, no order shall be made for shifting such judges to work elsewhere outside the Supreme Court.

The Supreme Court's Criminal Division for Persons Holding Political Positions has the jurisdiction to try and adjudicate a case the cause of action which involves an allegation that a holder of political position,[58] a judge of the Constitutional Court, holder of a position in an independent organ, the Auditor-General, the member of the National Anti-Commission; has become unusually wealthy, committed corruption in office or intentionally performed the duty or exercised the power contrary to the provision of the Constitution or law;[59] or has intentionally failed

[58] According to Organic Act on Counter Corruption B.E.2016 (2018) section 4 "a holder of a political position" means (1) the Prime Minister; (2) the Minister; (3) a member of the House of Representatives; (4) a member of the Senate; (5) a political official other than (1) and (2) under the law on political officials; (6) a political parliamentary official.

[59] Organic Act on Criminal Procedures for Holders of Political Positions B.E.2560 (2017) Section 10 (1) and (2), available at http://www.krisdika.go.th/wps/wcm/connect/529ca1804507e58782bd9aefd8452bbc/ORGANIC+ACT+ON+CRIMINAL+PROCEDURES+FOR+HOLDERS+OF+POLITICAL+POSITIONS%2C+B.E.+2560+%282017%29.pdf?MOD=AJPERES&CACHEID=529ca1804507e58782bd9aefd8452bbc.

to submit an account showing particulars of assets and liabilities or intentionally submitted an account showing particulars of assets and liabilities with falsity or concealed facts which should be disclosed where circumstance make it reasonable to believe that such person has an intention not to indicate sources of assets or liabilities.[60] The Division also has the jurisdiction over a case in which the cause of action involves an allegation that a person whom is a principal, instigator or aider and abettor of the commission of such criminal offence; or a person who bribes a holder of political position, a judge of the Constitutional Court, holder of a position in an independent organ, the Auditor-General, the member of the National Anti-Commission for inducing an action, an inaction or delay in an action, which is unjustifiable in the performance of the duty.[61] Persons who have the power to institute a criminal action to the Supreme Court's Criminal Division for Persons Holding Political Positions are the Attorney-General and the National Anti-Corruption Commission following the rules and procedures prescribed by the organic law on anti-corruption.[62]

Different from the general criminal trial, the Supreme Court Criminal Division for Persons Holding Political Positions conducted the trial based on the inquisitorial system. Besides the inquiries conducted by the National Anti-Corruption Commission or by an independent inquiry panel, it is the court's competence to conduct inquiries for finding additional facts and evidence.[63] The judges can also question the witness themselves.

There were some recent changes in the procedurals of the Supreme Court Criminal Division for Persons Holding Political Positions under the Constitution of the Kingdom of Thailand B.E.2560 (2017) section 195. To appeal the judgment of the court the accused must submit the

---

[60] *Id.* Section 10 (4).

[61] *Id.* Section 10 (3)

[62] *Id.* Section 23.

[63] *Id.* Section 6.

appeal to the general assembly of the Supreme Court within thirty days from the date it is rendered.[64] Where the accused is not in custody of the court, he or she needs to appear before the Court official at the time of appeal submission; otherwise the appeal will be rejected.[65] When there is no appeal the judgment of the Supreme Court Criminal Division for Persons Holding Political Positions is final from the date the judgment is read or is deemed to have been read by the Court, except the judgment sentencing the accused to death or life imprisonment, the Court have to submit the briefs of the case to the general assembly of the Supreme Court to consider and decide as the appeal.[66] Whether or not there is an appeal, if the judgment of the Supreme Court Criminal Division for Persons Holding Political Positions is to remove any person from office or such judgment has the effect of removing any person from office, such person shall vacate office from the date of the judgment.

2.2 The Administrative Courts

Under the Constitution of the Kingdom of Thailand B.E.2560 (2517) Section 197, Administrative Courts have the powers to try and adjudicate administrative cases arising from the exercise of administrative power provided by law or from carrying out of an administrative act, as provide by law.

2.2.1 Brief History

The Administrative Court has a long history of development before it started to service the people on March 9, 2002 (B.E.2545). In the region of His Majesty King Chulalongkorn (Rama V) the Council of State was established according to the Council of State Act B.E.2471 (1874) in order to give advice to the King in state administration, law drafting and hear the people grievance

[64] *Id.* Section 60.

[65] *Id.* Section 61.

[66] *Id.* Section 62.

complaints which were considered as the administrative case. However, due to the unstable of the politics inside the country, this organization did not have any active roles after nine months of the council's assembly.

In 1933, one year after the Revolution of Thailand,[67] the Act on Council of State B.E.2467 was enacted to establish Administrative Tribunal, legal advisory commission and law drafting commission under the Office of the Prime Minister. The Council of State department was in the form of a Conseil d'état of France. However, the adjudication of administrative case function never been used under such act as the tribunal's power was according to the law, but the law, which given the Administrative Tribunal competence never been issued. Until the Petition Commission under the Petition Act, B.E.2492(1949) was authorized to try and adjudicate the administrative cases. Nevertheless, the decision of the Petition Commission would be subject to the Prime Minister's discretion whether make the order.

Since the Constitution of the Kingdom of Thailand B.E.2517, the idea of establishment of the Administrative Court was included in the Constitution. However, as a result of the change in governments' policies the Administrative Court could not be formally established until the Constitution of the Kingdom of Thailand B.E.2540 (1997). The Constitution 1997 stipulated that the Administrative Court shall be found separate from the Court of Justice. In 1999, the Act on Establishment of the Administrative Court and Administrative Court Procedure B.E.2542 was enacted. Since then Thailand was changed from single court system to dual-court system.[68]

2.2.2 The Structure of Administrative Court

---

[67] Thailand Revolution 1932 was the bloodless coup which transited the country from the absolute monarchy to a constitutional monarchy. *See Siamese revolution of 1932* available at https://en.wikipedia.org/wiki/Siamese_revolution_of_1932

[68] *The development of Thailand Administrative Court* [วิวัฒนาการศาลปกครองไทย ศาลปกครองไทยใต้พระยุคลบาท], *available at* http://www.admincourt.go.th/admincourt/upload/webcms/Court/Court_201212_160637.pdf

The Administrative Courts divided into two levels, which are the Supreme Administrative Court and Administrative Courts of First Instance.[69] Administrative Courts of First Instance divided into the Central Administrative Court, which located in Bangkok and Regional Administrative Courts. Currently, there are 13 Regional Administrative Courts out of the planed of 16 Regional Administrative courts throughout the country.[70] In the next few years tree remaining Regional Administrative Courts will be operated. According to section 198 of the Constitution of the Kingdom of Thailand B.E.2560 (2017), there shall be the Judicial Commission of the Administrative Courts to take care of personnel administration relating to judges of Administrative Court independently. This commission consisting of the President of the Supreme Administrative Court as Chairperson, and nine qualified members who are judges of the Administrative Courts, and two qualified members who are not administrative judges elected by judicial officers of the Administrative Courts.

2.2.3 The Competence of the Administrative Courts:

The Administrative Courts have the competence to try and adjudicate or order over the following cases:

1) cases of a dispute involved an unlawful act of an administrative agency or a State official whether in issuance of rule or order or acting; without or beyond the scope of powers and duties; or inconsistency with the law, the essential form, process or procedure of such act; or in bad faith; or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public; or abuse of discretion;

---

[69] Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999) (As amended by the Act on Establishment on Administrative Court and Administrative Court Procedure, (No.9) B.E. 2560 (2017) published in the Government Gazette, Vol.134, Part 98a, dated 26th September B.E.2560 (2017), (pages 5-22), section 7.

[70] *Id.* section 94.

2) cases of a dispute where an administrative agency or a State official neglecting official duty required to be performed by law or performing such duties with unreasonable delay;

3) cases involving a dispute related to a wrongful act or other liability of an administrative agency or a State official arising from the exercise of power under the law or from a law, an administrative order or any other orders, or from the neglect of official duties required by the law to be performed or the performance of such duties with unreasonable delay;

4) cases involving dispute related to an administrative contract;

5) cases prescribed by the law to be submitted to the Court by an administrative agency or a State official for mandating a person to do a particular act or refrain therefrom;

6) cases involving a matter prescribed by the law to be under the jurisdiction of the Administrative Courts.[71]

Nevertheless, any actions concerning military disciplines, actions of the Judicial Commission under the law on judicial service, rulings made by Independent Organs according to the direct exercise of their powers under the constitution[72], and cases under the jurisdiction of specialized courts are not falling within the jurisdiction of the Administrative Courts.

An Administrative Court of First Instance has the competence to try and adjudicate cases within the jurisdiction of the Administrative Courts as mention above except for cases falling within the jurisdiction of the Supreme Administrative Court[73] which are cases involving a dispute related to a decision of a quasi-judicial commission, cases involving a dispute related to the legality of a Royal Decree or by-law issued by the Council of Ministers or with the approval of the Council

---

[71] *Id.* Section 9.

[72]The Constitution of the Kingdom of Thailand B.E.2560 (2017) section197 paragraph 3.

[73] Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), section 10.

of Ministers, cases prescribed by the law to be within the jurisdiction of the court, and cases in which an appeal is made against a judgment or order of an Administrative Court of First Instance.[74]

2.2.4 Administrative Courts Procedure

The Administrative Court procedure is based upon the inquisitorial system.[75] The Courts may request any kind of evidence other than the evidence adduced by the parties, as is appropriate for examine and inquire into facts in the trial and adjudication.[76] The law requires the court to carry out and complete the cases expediently. However, the parties shall have the reasonable opportunities to give explanations, present evidence and have the right to examine evidence presented by each party in the case unless it is prohibited to disclose by law or the courts' opinion as preventing loss to state affairs, but such undisclosed evidence may not be admissible by the courts in their trial and adjudication.[77]

For trail and adjudication, at least five Supreme Administrative Court judges make a quorum, while the Administrative Court of First instance required three judges of the Administrative court to make a quorum.[78]

The administrative cases filed with the Administrative Courts will be contributed to a chamber in the court by the President of such court, according to the chamber's specialization, respective area. Then the President of the chamber will appoint an administrative judge in the chamber as the "judge-rapporteur" to collecting facts from the plaint, explanations from the parties,

---

[74] *Id.* section 11.

[75] Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure, B.E. 2543 (2000), clause 5, *available at* http://www.admincourt.go.th/admincourt/upload/webcmsen/The%20Institution/The_Institution_100118_144832.pdf.

[76] Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), section 55.

[77] *id.*

[78] *Id.* section 54.

and relevant evidence, with the assistance of entrusted administrative case officials.[79] The parties will be offered a chance to know allegation or contentions of the other party and present evidence to support their claim in the time-limited by the judge-rapporteur. Judge-rapporteur's opinion will be presented to the chamber after he or she considers that the issue of facts and law of the case has been sufficiently collected to carries out the trail and adjudication.

Another essential position in administrative court procedure is the "judge-commissioner of justice" who is appointed by the President of the court from a judge in that court who is not a judge in the chamber carrying out the trial and adjudication of the case. The judge-commissioner of justice shall receive the case file from the judge-rapporteur before the hearing day to consider and prepare a summary of issues of facts, law, and opinion to submit to the chamber and shall give the oral statement to the chamber on the hearing day. If the judge-commissioner of justice considers that the facts for trial and adjudication of the case have changed, the judge shall prepare the summary of the changes and submit to the responsible chamber for further consideration.[80] (Satur

2.3 The Constitutional Court

2.3.1 Brief History of the Constitutional Court

In 1932, There was a change in Thailand's governance from absolute monarchy to a democratic regime government with the King as head of State where the sovereign power shall exercise through legislative, executive, and judicial branches. The government during the beginning of the change had the supreme powers over legislation and administration instead of royal monarchy. The Constitutional review was not an easy thing for people to access. Even though some Constitutions prescribed that there shall be the Constitution Tribunal to responsible for the constitutional review, the tribunal was appointed from the Member of the National Assembly and

[79] *Id.* section 56.

[80] *Id.* section 58.

government officials. Thailand's political reform took place in 1997 under the Constitution of the Kingdom of Thailand, B.E.2540. Besides the changes in political bodies, the Constitution B.E.2540 reformed Thai judicial system as well. The Constitution Court was established to replace the Constitution Tribunal to play a role in constitutional review followed the Federal Constitutional Court of the Federal Republic of Germany model. [81]

2.3.2 The Components of the Constitutional Court

According to the Constitution of the Kingdom of Thailand B.E.2560 (2017) chapter XI, the Constitutional Court consists of nine judges of the Constitutional Court appointed by the King after the constitutional selection and the approval of the Senate. This components consist of three judges in the Supreme Court who hold a position not lower than Presiding Justice of the Supreme Court for not less than three years which elected by the plenary meeting of the Supreme Court; two Supreme Administrative Court judges elected by a plenary meeting of the Supreme Administrative Court; one Professor in Law and one Professor in political science or public administration selection from persons holding or having held a position of Professor of a university in Thailand for not less than five years and currently having renowned academic work; and two qualified persons obtained by selection from persons holding or having held a position not lower than Director-General or a position equivalent to a head of government agency, or a position not lower than Deputy Attorney-General, for not less than five years.[82] After the approval from more than half of the existing members of the Senate the selected or elected persons shall elect one amongst themselves to be the President of the Constitutional Court. The report shall be made by the

[81] *The Constitutional Court: Protector of the rule of law,* Academic Seminar for 20th Anniversary of the Constitution Court of Thailand on 9th-10th April 2018, Bangkok Thailand, *available at* http://www.constitutionalcourt.or.th/occ_web/download/article/article_20180411200439.pdf.

[82] The Constitution of the Kingdom of Thailand B.E.2560 (2017) Section 200.

President of the Senate to the King for appointment and countersign the Royal Command.[83] The judge of the Constitutional Court shall hold office for only one term of seven years from the date of appointment by the King.[84]

2.3.3 Duties and Powers of the Constitutional Court

The Constitution of the Kingdom of Thailand B.E.2560 (2017) stipulates that the Constitutional Court has the powers and duties to consider and adjudicate on the constitutionality of a law or bill, and on a question regarding duties and powers of the House of Representative, the Senate, the National Assembly, the Council of Ministers or Independent Organs. [85] The Constitutional Court also has other powers and duties prescribed under the constitution. For instance, considering and ordering the cessation of the Treason-Felony act[86], ruling in the membership or qualifications of member of the National Assembly[87], Minister[88] and Election Commissioners, recommend the Council of Ministers on introducing an organic law bill[89], ruling on whether or not a member of the House of Representative, senator or committee member has committed an act which results in a direct or indirect interest in the use of budgetary appropriation[90], constitutionality reviewing of the conditions for enacting an Emergency Decree to

---

[83] *Id.* section 204.

[84] *Id.* section 207.

[85] *Id.* section 210.

[86] *Id.* section 49 "No person shall exercise the rights or liberties to overthrow the democratic regime of government with the King as Head of State. Any person who has knowledge of an act under paragraph one shall have the right to petition to the Attorney-General to request the Constitutional Court for ordering the cessation of such act…"

[87] *Id.* section 82.

[88] *Id.* section 170.

[89] *id.* section 131.

[90] *Id.* section 144.

avoid any contrariness or inconsistencies with the Constitution[91], to rule on whether a treaty must be approved by the National Assembly[92].

To hear and render a decision, there shall be at least seven judges of the Constitutional Court to make a panel. The decision of the Constitutional Court shall be made by a majority votes. The decision of the Court is final and binding on the National Assembly, the Council of Ministers, Courts, Independent Organs, and State agencies.[93]

During any court's trails if the court has an opinion or the parties of the case raises an objection with reason that the provision of law applying to the case contradict to the constitution, and there is no decision of the Constitutional Court pertaining to such provision, the court shall submit its opinion to the Constitutional Court for decision. The decision of the Constitutional Court concerning the objection on the unconstitutional provision of law shall apply to all cases, but it will not affect the judgment of the courts, which are final with some exception for the criminal case.[94] Other than raising the objection to the court as a party of the case, a person has the right the directly submit a petition to the Constitutional Court when his or her rights or liberties guaranteed by the Constitution are violated for a decision whether such action is contrary to or inconsistent with the Constitution.[95]

2.4 Military Courts

2.4.1 Brief History of the Military Courts

---

[91] *Id.* section 173.

[92] *Id.* section 178.

[93] *Id.* section 211.

[94] *Id.* section 212 In the criminal case where the Constitutional Court has considered that the provision of law that the person convicted is unconstitutional, that person will deem as never committed such offence, and shall be released if he or she is still serving the sentence. No damages or compensation could be claim for serving the sentence under this circumstance.

[95] *Id.* section 213.

Thai Military Courts have a long history, which can be trackback to the beginning of Rattanakosin period. The Defense Court was the court that had jurisdiction over all military personnel and could be considered as the first Thai military court. Before the region of King Rama V, courts were divided into various named and being under different departments. As being under the Ministry of Defense which has responsibility over both military and civilian during the period of wars, the Defense Court had jurisdiction over civilians as well.[96]

The significant change in the Thai Military Court system occurred in 1891 when the Ministry of Justice was established, and all courts were placed under the Ministry of Justice, except the Defense Court, which remained under the authority of the Ministry of Defense. Due to such reason Thai Courts were separated into civilian courts and military courts. Before the reestablished of Thai Military Courts system by the Act of Military Court B.E.2498 (1955) the Military courts were divided into Army Courts and Navy Courts at the beginning of 1900.

The reasons of existence of the Thai Military Court System are; allowing the commander an opportunity to jointly participate in the trial of criminal offenses committed by military members; to process the trail speedier and more productive; the authority of the court to try and adjudicate the troops while on combat duty aboard is necessary; maintaining the commander's disciplinary power at the fullest capacity.[97]

2.4.2 The Military Court System and Jurisdiction

[96] Suthee Charoonbara, *The Organizaton of Military Courts in Thailand*, 93/25-93/56, Military Law Reviwe (MIL.L.REV)Vol 93. (1981). available at https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/276C8B~1.pdf.

[97] *Id.* 28-29.

Thai Military Courts are under the jurisdiction of the Ministry of Defense. The minister of Defense is responsible for the administrative work of the Military Courts.[98] However, the court's proceedings, including the courts' discretionary power in rendering judgments or orders are under the courts' independent discretion.[99] As same as the civilian court, the proceedings of the Military Court are conducted on behalf of His Majesty the King.

Thai Military Courts are divided into three classes; the Military Courts of First Instance, the Military Appeal Court, and the Military Supreme Court.[100] There are four types of Military Court of First Instance: 1) provincial military courts, 2) circle military courts, 3) the Bangkok Military Court, and 4) unit military courts.[101] The Military Courts of First Instance are the court to begin cases. Cases can be respectively appealed to the Military Appeal Court and the Military Supreme Court. The organization of military courts can be considered by situations as military courts in regular periods, military courts in abnormal periods such as wartime, time of fighting or when martial law is enforced, and courts-martial.[102]

Persons who are subject to the jurisdiction of military courts can classified into eight groups that are:

(1) commissioned officers on active duty;

(2) commissioned officer not on active duty, but only when they violate any order or regulation under the Military Criminal Law;

---

[98] The Act on the Organization of Military Courts B.E.2498 (1955), Section 5.

[99] *id*.

[100] *id.* section 6.

[101] *Id.* section 7.

[102] *supra note* 96. Suthee Charoonbara, at 32.

(3) non-commissioned officers and servicemen on active duty or in regular forces, or persons serving under military service laws;

(4) military cadets as designated by the Ministry of Defense;

(5) coscripts placed in active service and received by the military authorities for the purpose of transferring them to active duty in a military unit;

(6) civilians in military service, when they commit offense in the performance of official military duty, or certain offenses on military premises or at the location of any military unit, resting place, camp, vessel, aircraft or vehicle under the control of military authorities;

(7) persons lawfully detained by or kept in the custody of military authorities; and

(8) prisoners of war or enemy aliens in the custody of military authorities.

The Military Courts have jurisdiction over the offenses committed against military law or other criminal law by the persons who is subjected to the Military Courts jurisdiction at the time of the offense and penalize any persons who committed the contempt of the court according to the Civil Procedure Code.[103] However, there are some exceptions to the cases where;

(1) the offense was committed together by the person who is under the jurisdiction of the Military Court and who is not.

(2) an offense involved with another case within the jurisdiction of a civilian court;

(3) an offense which must be tried in the juvenile court; and

(4) An offense held by a military court to be outside its jurisdiction.[104]

In the cases where the civilian court has accepted the cases which able to be tried by the Military Courts, such court can continue its procedure without dismissing the case to the Military Courts.[105]

---

[103] The Act on the Organization of Military Courts B.E.2498 (1955), section 13.

[104] *Id.* section 14.

[105] *Id.* section 15.

Even though the Military Courts have their criminal procedure under the laws, rules, and regulations of military law, in the circumstance that no military law prescribes over any issue, the Criminal Procedure Code will apply *mutatis mutandis*. In the same way as the Court of Justice, when there is no provision cover any point by the Criminal Procedure Code, the Civil Procedure Code shall be applied as able to.[106]

3. Judicial Appointments and Perception

The regulation of the Judicial Service Act B.E. 2543 (2000) is the law governing the appointment of career judge in Thailand. To become a career judge, the law requires that a person must hold a judge trainee position and successfully completed a judicial training program of the Judicial Training Institution.[107] The qualified candidate must pass a qualifying examination both in written and oral forms. The examination separated into three levels divided by the particular qualification of the candidates. All level requires the candidate to at least holding a Bachelor of Laws degree and Thai Bar also has at least two years of experience in the legal profession.[108] The first level is called the Open Examination. The candidate must have all the essential requirements. The second level is the Knowledge Examination; besides the essential requirements the candidate must holding one or more foreign law degrees higher than a Bachelor of Laws or a Master of Laws from a Thai University with a required minimum duration of study or a specific level of professional experience. The "special appointment examination" is the highest level, where the candidate must have a particular profession extra for the basic requirements.

All candidates in every level of the examination must pass the written test before the proceeding to the oral test to be appointed as a judicial trainee. The examination for judge

[106] *Id.* section 45.

[107] Regulation of the Judicial Service Act B.E.2543 (2000), section 11.

[108] *Id.* section 14.

recruitment is one of the most competitive exams in the country. In the Open Examination of 2018, only 114 from 6,490 candidates (1.75%) passed the test and were appointed as judge trainees. While the number of cases received in court increasing every year, the low rate of recruitment cannot be the resolution for Thai judiciary system. Due to the high standard of recruitment and the strict code of conduct, the Courts of Justice are still perceived as the most trusted of all governmental bodies system in Thailand.[109]

4. Thai Courts and Alternative Dispute Resolution

According to the annual report of the Court of Justice 2018, there are 1,957,562 cases enter into 266 Court of Justice nationwide.[110] The number of cases increased by approximately 8% compared to the statistic in 2017. While the number of career judges in the Court of Justice is at 4,771 in November 2018, the number of recruiting judges is remaining low, as mention above (3). This imbalance capacity of adjudicators and the number of claims in their hands has always been causing the problem of pending cases in courts and the delay of procedural. Notably, during the time that the country was facing economic crises or unexpected changes in social or political conditions, the number of cases will increase dramatically.

Besides other schemes to solve the problem, Thai Courts have been relying on the Alternative Dispute Resolution (ADR). Over time, the ADR has proved itself as the best mechanism for the Court to keep the disputes from entrancing and to speed the time that the cases in to be in courts.

---

[109] National Institute for Development Administration (NIDA), *The public opinion towards the constitutional court, available at* www.nidapoll.nida.ac.th/main/index.php/en/2012-08-06-13-57-45/412-39-56.

[110] Annual Judicial Statistic, Thailand 2018, *available at* https://oppb.coj.go.th/th/file/get/file/201909029a4098509a261a475d91b012ae144cf6150853.pdf.

Court-Annexed mediation has used as case management tool in the Court of Justice since 1994. The Civil Procedure Code of Thailand provides the Court power to encourage the parties of the case to settle their dispute by conciliation/mediation in court at any time before the judgment is granted. The established of the mediation centers in the Court of Justice to support in-court mediation, where the judge can refer the case to the mediate by a mediator to reduce the judge's duty. The settlement agreement by the court or court's mediation center will be issue as a judgment if it is not contrary to the law. Recently the Office of Judicial Affairs just introduced the pre-litigation mediation program provided by the mediation centers of the Court of Justices around the country to reduce the claim for entering into the Courts. The detail of Court-Annexed mediation is described in the next chapter of this work.

Likewise, arbitration has been used as a tool to reduce the case from entering the Courts. The government and other organizations related to dispute resolution try to promote arbitration. For example, the establishment of the Arbitration Institute (TAI) Office of the Judiciary and the Thailand Arbitration Center (THAC) to provide arbitration service for the public, and the government allowed government agencies to include arbitration clauses in the contract between them and private enterprise (however, this policy change from time to time the detail can be found in Chapter 5 on the topic of arbitration in administrative contract). Even though there are court-annexed arbitration precisions in the Code of Civil Procedure, the use of in-court arbitration is very limited. However, the Court has many significant roles in assistance arbitration and enforcing arbitration awards. Thai Court's attitude toward arbitration has changed overtime with a better trend, which could be seen throughout this study.

5. Conclusion

The Judiciary System of Thailand has a long history. Thai Court has changed the form, reorganized, and improved the way of adjudication until reaching the global standard today. Thai

Court is the primary organization that provides justice to all people in the country. To support the changes in social, business, and way of living in today's world, many specialized courts have been established. For example, the Central Court of Intellectual Property and International Trade was established to handle the cases related to IP and international trade, where the quorum of judges consists of career judges and lay judges who specialized in IP and international trade issues. However, the imbalance between the cases lode and the number of judges, alternative dispute resolution has been promoted to support the work of the Court and ensure the people choice injustice.

Chapter 3

Mediation in Thailand

1. History

Meditation has been a part of Thailand's culture for aged. In the past, mediation was in many forms and practices unsystematic organized. Its usage was in both forms of in-court mediation and out-of-court mediation. However, there were rapid changes and developments in the past 20 years as a result of the economic crisis of 1997.[111] Mediation has been chosen and used as an alternative dispute resolution to reduce an enormous number of cases in courts. Recently, in May 2019, the Mediation Act B.E. 2562 (2019) has come into force as the first mediation law of Thailand. This change will lead to the systematic development and employment of mediation in the country.

1.1 Out-of-Court Mediation

Since 1895, Law of Province Court Organization Rattanakosin Era 114 (B.E. 2438) prescript about out-of-court mediation inside the jurisdiction of the courts. Under this law, the small civil dispute with the amount in dispute does not exceed 20 Baht and other small criminal disputes without the criminal punishments where the accused has his domicile in the subdistrict could be mediate by subdistrict headman (*Kam-nan*). Where the dispute could not be settled under the mediation by subdistrict headman or the amount of the dispute was between 20 to 40 Baht, the district headman had the power to mediate such dispute according to the parties' request. [112] Later,

---

[111] Sorawit Limparangsri and Montri Sillapamahabundit, *Mediation Practice: Thailand's Experience (The 11th General Assembly of the ASEAN Law Association, Bali, Indonesia, 2012), available at* https://www.aseanlawassociation.org/11GAdocs/workshop5-thai.pdf.

[112] Tawan Manakul, *The proceeding of Mediation in Thailand*, [กระบวนการไกล่เกลี่ยข้อพิพาทในประเทศไทย], Report of the Survey of Knowledge for Thailand Reform Project, National Public Health

in 1914, under local Administration Act B.E.2457, the role in mediating the dispute was transferred to Chief District Officers. According to section 108 of the act, the chief district officer had the power to mediate civil disputes with the disputed amount lower than 20,000 Baht where the defendants domiciled inside the district or the matter of the dispute occurred within.[113] By 1975 the Interior Ministry Regulation about civil dispute settlement under the authority of the Chief District Officer of B.E.2528 was enacted for being the mediation guideline of district officer. In 1987, the Interior Ministry enacted the Interior Ministry Regulation on the conciliation of the village committee of B.E.2530 (1987). Under the Regulation the village committee in distance area can act as the mediator to mediate civil and some particular criminal disputes between villagers supported by the Attorney-General Office and Administration Department. [114]

In 1987, the Ministry of Justice established the Alternative Dispute Resolution Office to provide out-of-court dispute settlement through the Arbitration Office and the Center for Mediation. The Center provided expert mediators for the parties who prefer to settle their dispute amicably, whether after or before filing the dispute to the courts.[115] However, after the separation of the Court of Justice and the Office of Judicial Affairs from the Ministry of Justice in 1997, the

---

Foundation, [รายงานประกอบโครงการสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย มูลนิธิสาธารณสุขแห่งชาติ], (2014), available at http://v-reform.org/wp-content/uploads/2014/06/%E0%B8%81%E0%B8%A3%E0%B8%B0%E0%B8%9A%E0%B8%A7%E0%B8%99%E0%B8%81%E0%B8%B2%E0%B8%A3%E0%B9%84%E0%B8%81%E0%B8%A5%E0%B9%88%E0%B9%80%E0%B8%81%E0%B8%A5%E0%B8%B5%E0%B9%88%E0%B8%A2%E0%B8%82%E0%B9%89%E0%B8%AD%E0%B8%9E%E0%B8%B4%E0%B8%9E%E0%B8%B2%E0%B8%97%E0%B9%83%E0%B8%99%E0%B8%9B%E0%B8%A3%E0%B8%B0%E0%B9%80%E0%B8%97%E0%B8%A8%E0%B9%84%E0%B8%97%E0%B8%A2_%E0%B8%95%E0%B8%B0%E0%B8%A7%E0%B8%B1%E0%B8%99-%E0%B8%A1%E0%B8%B2%E0%B8%99%E0%B8%B0%E0%B8%81%E0%B8%B8%E0%B8%A5.pdf.

[113] *Id.*

[114] Institute of Developing Economies, *Alternative Dispute Resolution in Thailand - IDE Asian Law Series No.19*, 8 (March 30, 2019), *available at* https://www.ide.go.jp/English/Publish/Download/Als/19.html.

[115] *Id.*

work of the Alternative Dispute Resolution Office was transferred to the responsibility of the Office of the Judiciary. The Center for Mediation had changed the name to the Thai Meditation Center. Since then the Thai Meditation Center has played an essential role in providing mediation service and supporting the courts of justice throughout Thailand.

Not only the Ministry of Justice that has been supporting the use of mediation to the people in various forms, other ministries of Thailand also encourage and establish the mediation organizations to settle the disputes regarding conflict under the supervision of the ministries. For example, Department of Intellectual Property, Ministry of Commerce has provided dispute resolution services for the all kinds of intellectual property conflicts by mediation and arbitration, and Center for Peace in Healthcare, Ministry of Public Health handling and managing complaints arising healthcare provision in public hospital in order to relieve and settle the problem as soon as possible.

Even though Mediation has played an important role in dispute resolution in Thailand for a long time and there were many laws and regulations concerning mediation, the remarkable change to mediation law make another big step for mediation in Thailand. In May 2019, the Mediation Act B.E.2562 (2019) comes into force. This law aims to govern the mediation both in civil and criminal disputes that servicing by the state agency and public organizations in Thailand. According to this law, the settlements which conducting from the mediation procedure under the provisions of this law will have the same legal status as arbitration award governed by the Arbitration Act B.E.2545 (2002). It means that the settlement the parties have made is binding them. In the case where one party to such settlement fails to comply with any term or condition, the other party of the settlement agreement can request the competent court to enforce the settlement without going through all procedures required in the typical lawsuit as it used to be. It can be said that under the new mediation law, the enforcement of settlement agreements from mediation is identical with the

enforcement of arbitral awards with some specific criteria for refusal. The detail of the Mediation Act B.E.2562 (2019) will be described in the following part of this chapter.

2.2 court-annexed mediation

The Court of Justice of Thailand has been playing an important role to incorporate mediation into its working process. Since 1896 when the Civil Procedure Act B.E.2478 was enacted, the law required the judge to try to compromise to the parties of the dispute for the settlement. If the parties could agree on the settlement, the court would dismiss the case and write down the settlement agreement. The parties could not bring such an issue to court again. In 1912 under the amendment of the Civil Procedure Act, the law did not request the judges to try to settle the dispute as their duty but remain the power for the judges to do so.[116]

In 1934 when the Civil Procedure Code B.E.2478 came into force, Courts had the power to order the parties of the dispute to come to courts themselves to try to arrange the settlement.[117] Since then, Court-annexed mediation has been prescribed in the Civil Procedure Code; however, the temptation for the judges to mediate was depended on the policy of court executives in particular period. In 1992 was the time when mediation was picked as the primary policy to manage the problem of over caseload and trial delay. [118] Judges used to hesitate to mediate the cases in front of them in court since they afraid of the loose of impartiality when the settlement not meet, and the dispute has to go back to the regular trail. To solve those problems, Chief Justice of Civil Court recruited judges who have experience in mediation to work with cases where the parties agreed to

[116] supra note 112, at 4.

[117] Thailand's Civil Procedure Code B.E.2478, section 20 "The Court shall, at any stage of the trail have power to try to bring about an agreement or a compromise as to the matters in dispute."

[118] Institute of Developing Economies, *Alternative Dispute Resolution in Thailand - IDE Asian Law Series No.19*, (March 30, 2019), available at https://www.ide.go.jp/English/Publish/Download/Als/19.html.

mediate. The judges who took care of the meditation were not the judge in the quorum who adjudicated the case. After this measure was used, the number of cases that be able to settle by mediation in Civil Court rapidly raised.[119] In 1994, Civil Court Regulation on Mediation for Leading to Dispute Settlement B.E.2537 was pronounced by the Chief Justice under his capacity of court management as a guideline for mediation in court. The special division was established to take care of mediation process. After the used of regulation for one year, the project showed its effective result in case management and case settlement with significant satisfaction. This model was followed by courts around the country to manage their cases in the dockets.[120]

After the project of mediation in the Civil Court had started for two years, the President of the Supreme Court issued the Practice Guidance on court-annexed conciliation and arbitration to guide judges on how to deal with conciliation and arbitration in their cases. Under this Practice Guidance; the presiding judge shall initiate the mediation process when foreseeing the opportunity of amicable settlement between the parties; with the approval of the parties the court may appoint an arbitrator to assist with any technical point fact to speed the resolution of the case, such arbitral award if approved by the court shall be incorporated in the final judgment; the conciliation may conduct in the particular room in the informal atmosphere, judges and lawyers shall not put on their gowns; the court may consider returning the parties' court fee when the settlement is speedy reached.[121]

Since 2001, mediation was practiced by the courts of justice throughout Thailand. Even at the appellate level, cases can be settled by mediation.[122] Mediation has been using as an

---

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] supra note 112, at 5.

[123]alternative mechanism supporting the Thai Court of Justice until now. The detail about the laws and regulations concerning court-annexed mediation will be described later in this chapter.

2. Mediation Legal Framework in Thailand

Since mediation has been using as an alternative dispute resolution for both private parties and by many state agencies, there are many regulations and statutes regarding mediation. Recently, in May 2019 the Mediation Act B.E.2562 (2019), the first mediation act of Thailand was enacted. This law aims to use the general laws for state agencies and the community mediation center. However, this new act will not immediately affect the mediation procedures which are processing by state agencies under other laws or regulation. It is an opt-in option for any state agencies that would like to mediate under the provision of the Mediation Act B.E.2562 which can be done by notifying the Ministry of Justice. Therefore, the laws and regulations regarding mediation under the supervision of each state agencies are still effective.

2.1 Code of Civil Procedure

One of the earliest laws concerning mediation in Thailand is the Code of Civil Procedure. Since 1934 the Code has empowered judges to try to bring the parties to compromise settlements in any state of trails. At the outset, the Civil Procedure Code has the purpose of encouraging in-court-mediation to be done by judges. Later in 1999 Civil Procedure Code amendment enables judges to appoint outsiders to be mediators. Furthermore, to make in-court mediations more effective, the amendment prescribes that the mediation in conclave session with or without the presence of the parties' attorneys.[124] With the parties' request the court may render

[123] According to section 5 of Local Administration Act of B.E.2457 (1914), administrative officer has the duty to provide justice to people.

[124] Code of Civil Procedure B.E.2477 (1934) Section 20 bis (Act Amending Civil Procedure Code (No.17) B.E.2542) For the benefit of mediation, when the judge seem appropriate or the party

a judgment according to the settlement terms after reviewing the agreement and see that the agreement is not contrary to the laws. There are only some limit grounds to appealed such judgment.[125]

2.2 Civil and Commercial Code

Civil and Commercial Code is the law defining the meaning of compromises. According to section 850 of the Code, a compromise is a contract whereby parties settle their existing dispute by mutual concessions. The law requires that to be able to request enforcement orders from courts, compromise contracts have to have written evidence and signed by the liable party or his agent. The effect of the compromise is the extinguish the claims parties gave up and secure to each party the rights which are declared to belong to him subject to the compromise.

2.3 Act on Governmental Administration (No.7) B.E.2550 (2007)

The Act on Governmental Administration (N0.7) B.E.2550 (2007) provide a mechanism for settling disputes regarding land, probate estate and other civil dispute with the dispute's amount not exceed 200,000 Baht (6,250 USD at the exchange rate on May 21, 2019) by mediation. The statute of limitation relating to the disputes mediated under the Act will be paused from the date on which the disputed is submitted to mediation until the mediation process is terminated, or the parties reach a settlement agreement. The settlement agreement under the Act will have the same legal effect as an arbitration award. In the case when a party does not follow the obligation under the

requesting, the judge may order the mediation to be done in conclave session in front of one side of the parties or all parties with or without parties' attorneys.

[125] *Id.* Section 138 paragraph 2, judgments according to in-court settlement are prohibited, except there are these following grounds, (1) when one side of the parties is alleged to be fraudulent, (2) when the judgment is alleged to be violated the law concerning public policy, or (3) the judgment is alleged to be inconsistent with the settlement agreement.

settlement agreement, the other party can request the public attorney to make the request the competent court to enforce the agreement.

2.4 Act on Procedure of Consumer Case B.E.2551 (2008)

According to the Act on Procedure of Consumer Case B.E.2551 (2008), after the case is filed with the court, the proceeding date will be scheduled, and the defendant will be summoned to attend the proceeding.[126] The procedure will start with the mediation by a Case Official or a mediator who appointed by the court or select by the parties. The Case Official thinks fit, or a party request the mediation may be done in a private session with either one side of the parties or all of them.[127] During the mediation, the statute of limitations related to the dispute will be tolled until the mediation is terminated.[128] If the settlement agreement is reached, the parties can request the court to render a judgment on the agreed term.

2.5 Act on Unsafe Product B.E. 2551 (2008)

This Act facilitates the parties of the disputes related to an injury caused by an unsafe product by pausing the statute of limitations when a consumer and an entrepreneur are negotiating the dispute until a party terminated the negotiation.[129] The procedure of the dispute related to unsafe products under this Act is under the Act on Procedure of Consumer Case mutatis mutandis.

---

[126] The Act on Procedure of Consumer Case B.E.2551 (2008) Section 24.

[127] *Id.* Section 25.

[128] *Id.* Section 14.

[129] Act on Unsafe Product B.E.2551 (2008) Section 13.

2.6 Act on Protection of Victims in Domestic Violence B.E.2550 (2007)

Under the Act on Protection of Victims in Domestic Violence B.E.2550, the court is asked to try to amicably settle the dispute between the victim and the accused.[130] The mediation can be done by the court or a responsible official. The mediator has to report to the official or the court after the mediation is completed. When the official of the court has considered that the settlement agreement is not against the laws or any public order or good morals, the competent official or the court shall proceed by the agreement term. [131]

2.7 Act of Juvenile and Family Courts and Juvenile and Family Procedural B.E. 2553 (2010)

As same as other civil and commercial trails, the Act of Juvenile and Family Courts and Juvenile and Family Procedural B.E. 2553 section 146 asking the court to try to encourage the parties to amicably settle the dispute or compromise regardless of where the trial concerning peace and coexistence in the family. Furthermore, before beginning the trial of non-argument family cases, the court shall appoint a family-case conciliator to conciliate the case according to the Regulation of Chief of Supreme Court.

3. First Mediation Act of Thailand (Mediation Act B.E.2562 (2019))

3.1 Back Ground of Mediation Act

Although Thailand has adopted a mediation method for dispute resolution for a long time, there was no central law that defined details about the process of mediation by state agencies.

---

[130] Act on Protection of Victims in Domestic Violence B.E.2550 (2007) Section 14.

[131] *Id.* Section 16 To reach the settlement in domestic violence case, the competent official or court (depend on who is responsible to the case) may appoint a mediator or mediators consisting of a person or a group of persons who are parents, relatives of the parties or other appropriate person for advice or help in mediation, or may assign a social worker, social work unit or any other person to help the parties to compromise.

Mediation was used and governed by the internal regulations or rules of each organization, and the legal effect of settlement agreements was different depending on the organization or state agencies who control the mediation. Therefore, in order to promote and support the mediation by state agencies, the Mediation Act B.E.2562 (2019) was drafted.

The draft of Mediation Act B.E…. was initially proposed in 2015 by the Office of Judiciary with the provisions covered mediation proceeding and enforcement simulating arbitration laws under the Arbitration Act B.E.2545 (2002). The draft of this law was considered and integrated with the draft of laws concerning community mediation center (proposed by the Rights and Liberties Protection Department) and the draft law about mediation of criminal dispute during inquiry.[132] After the draft law of Mediation Act was considered by the Council of State and the Extraordinary Committee Considering the Mediation Act of National Legislative Assembly, the law has been approved by the Parliament and announced in Government Gazette in May 19, 2019.

According to section 2 of the Mediation Act B.E.2562 (2019), the provisions regarding mediation proceeding will not come into force until the middle of November 2019. (after 180 days from the days that the law is announced in government gazette) The provisions of the law which will be enforced immediately are the provisions regarding qualifications, ethics, duties, appointing, challenging, removal from the office, termination, remuneration, and penalty of mediators under the act. This is due to the need for all the involved agencies and organizations to have time to conduct the recruitment of mediators and preparing in other aspects before beginning mediation proceeding under the law.[133]

---

[132] The streaming lecture by Dr. Pornpat Tantikulananta Judge of the Office of the President of the Supreme Court and Executive Director of the TAI regarding Mediation system of the New Mediation Act hosted by the Court of Justice on May 27, 2019.

[133] *Id*.

3.2 Scope and purposes of Mediation Act

As a result, the number of civil and criminal cases in courts has always increased. The courts are facing the challenge of delivering justice to all needed people in a reasonable time. Alternative dispute resolution has been used to manage the cases in courts and to reduce the number of cases in courts. Many state organizations and public organizations also believe that mediation can reduce conflicts and result in reconciliation in society. Therefore, Mediation Act B.E 2562 (2019) was enacted with the aims to be central law for state agencies, inquiry official and public dispute mediation center and empower them to employ mediation as a tool to solve the conflict in civil disputes which had little capital and some types of criminal disputes according to the parties' consent.

According to section 3 of the Mediation Act, Mediation means a process for the parties to attempt to reach an amicable settlement of their civil or criminal disputes without imposing the solution to the dispute; however, it does not include the mediation processing in courts and mediation in execution proceeding.

The Act will govern the mediations that be done by the State agencies, which include central government, the provincial government, office of the judiciary, Office of the Attorney General, and other Government agencies as determined by the Minister of Justice in the Ministerial Regulations. However, the Act will not affect any mediation conducted by state agencies according to their duties and powers by laws. Any state agencies which want to process mediation under the Act shall inform their intension to the Ministry of Justice.

According to section 8 of the Act, this Act will not govern any criminal disputes which are under the jurisdiction of Juvenile and Family Court as prescribed in the Law on Juvenile and Family Court and Juvenile and Family Court Procedure.

3.3 Mediator under the Mediation Act

Another significant change to the mediation in Thailand due to the enforcement of the new Mediation Act is the provisions regarding mediator. Subject to section 3 of the Mediation Act "mediator" mean a person who has been registered and appointed to proceed with the mediation. This means that any person who wants to act as the mediator to the dispute under the Mediation Act must register himself with the state agencies or organization which operate the mediation. Furthermore, the Mediation Act also prescribes the qualifications, duties, ethics, and liability of mediators who are performing under the act.

1) The registration of mediator

The registration of mediators who was performing under the Mediation Act will be responsible by the registrar of each state agency or organization which proceeds the mediations. According to section 3 of the Act, the "registrar" means the head of the state agency that performs mediation. A person who wants to be a mediator has to submit the application to the registrar of the mediation organization according to the rules of such organization. The registrar has the power to recruit qualified persons to be mediators with the consent of those persons.[134]

2) The mediators must pass the training

In the past, there is no rules or regulations required that a person who is performing as a mediator has to pass any training. Only some curtain years of experience and some knowledge related to the dispute meter are required in some rules or regulations of government agencies provided mediation service.

However, section 10 of the Mediation Act clearly prescribes that the registered mediators have to past certified training, which was approved by the Committee of National Justice Administration Development and must have some experience that will benefit the mediation.

---

[134] The Mediation Act B.E.2562 (2019) Section 9.

3) Mediators' Roles

Mediators have the roles under the Mediation Act to; plane and arrange the mediation, assist, facilitate, and suggest the parties to find the ways to a solution of the dispute; proceed with the mediation with neutrality and record the settlement agreement according to a result of the mediation.[135]

4) Mediator's Liability

Mediators who conduct their roles under the act with good faith will get protection and would not be liable in both civil and criminal matters.[136] A mediator who wrongfully demands accepts or agrees to accept property or any other benefit for himself or another person in order to exercise or not to exercise any of his functions shall be punished with imprisonment not exceeding five years or a fine not exceeding one hundred thousand baht, or both.[137]

The liability of mediators under the Mediation Act is similar to the liability of arbitrator under the Arbitration Act B.E.2545 (2002). However, the arbitrator will not have any protection from civil liability for carrying out his function as the arbitrator if he willfully acts or with gross negligence acts, resulting in a party suffering damage. Also, the punishment of arbitrators for calling or receiving a bribe is severer, as they may be imprisoned for up to 10 years.

5) Ethics of mediators

The Mediation Act 2019 clearly defined the ethics for mediators who mediate under the Act as follows.

(1) perform mediator's duty with neutrality, independence, fairness, and non-discrimination.

---

[135] *Id.* section 11.

[136] *Id.* section 12.

[137] *Id.* section 71.

(2) attend all mediate meeting, inform mediation provider in advance if when cannot attend any session with reasons and necessity,

(3) perform mediator's duties with speed, not causing a delay in a mediation proceeding,

(4) perform with good faith, honesty and do not request any property or other benefits from the parties or other persons involved in the dispute,

(5) perform the duties with courtesy.'

(6) maintain confidentiality regarding the dispute,

(7) do not adjudicate the dispute or compel any party to sign the settlement agreement,

(8) others ethics as prescribed by the Minister of Justice in the Ministerial Regulations

A mediator who does not comply with the ethics may be removed from performing as a mediator by the party or the mediation service provider. [138] Further, then the ethics that are clearly described in section 12, as mentioned above, the Mediation Act requires mediators to disclose to the parties any circumstances that raise justifiable doubts as to the mediator's impartiality or independence, especially the circumstances related to the parties. The Mediation Act prescribes some curtain relationship that mediators must disclose to the parties if the mediator has a close relationship to any party of the dispute such as being fiancé, spouse, parent, descendant, sibling, cousin, relative by marriage, creditor, debtor, employee, employer, legal representative or used to be party's legal representative. Disregard of the duty to disclose such circumstances to parties may lead to the removal of such mediators from mediations.

[138] *Id.* Section 15(3).

In the case where a mediator is subjected to a severe objection which may cause bias or non-impartial in performing his or her duties, the mediator may be removed from the mediation. However, if the objection party side has more than one person on that side, such challenging must be agreed by every person on that side.[139]

(6) Terminations of mediators

The mandate of a mediator terminates when he or she is dead, withdraws from his office or being removed from the position, or does not qualify under the laws. In the case where a mediator was removed or terminated from the position, the parties may agree to appoint the new mediator and continue using documents that have been in the case as the parties, and the new mediator thinks fit.[140]

(7) Remuneration

In performing the duties, the mediator in mediation service provider under the Mediation Act will receive remuneration and other necessary expenses according to the regulations of the Ministry of Justice under the approval of the Ministry of Finance.[141]

3.4 Important Provisions

The Mediation Act B.E.2562 (2019) consists of 6 chapters: Chapter 1 Mediator, Chapter 2 Civil Dispute Mediation, Chapter 3 Criminal Dispute Mediation, Chapter 4 Criminal Dispute Mediation during Inquiry, Chapter 5 Public Dispute Mediation, and Chapter 6 Penalty. This part of the study will describe only on some essential provisions by focusing on the mediation in a civil dispute, mediation in criminal dispute, and public dispute mediation as these kinds of

---

[139] *Id.* Section 14.

[140] *Id*, Section 18.

[141] *Id*, Section 19.

mediation shared most of the principles and proceedings, while the mediation of criminal dispute during inquiry has a set specific rules and principles

1) Statute of Limitation

Under Thai laws, the claims will be enforceable in courts only if the parties have initiated an action in court within the period of timed prescribe by law. The limitation period will stop running only in some specific condition prescribes. According to Civil and Commercial Code section 193/14, the prescription is interrupted if the creditor applies for receiving a debt to arbitration, the creditor submits the dispute to arbitration or the enters an action for establishment of the claim or for requiring performance, meanwhile, the claimant will not get any privilege if the dispute was taken to mediation. Therefore, the parties who desire to negotiate or mediate their disputes will have no choice to preserve their right, but file the claim in court to stop the limitation period.

However, under the Mediation Act B.E.2562 (2019), the parties who choose to mediate under the mediation governing by the act will enjoy the same result regarding the limitation period as the parties who are arbitrating as describe in Civil and Commercial Code. According to section 6 of the Act, in the case where the mediation is terminated without a successful settlement, if the limitation period of the claim fixed by law has lapsed or will lapse in 60 days from the termination date, the prescription shall be extended for 60 days since the termination of such mediation. This provision shall apply mutatis mutandis, in the case where the court refuses to enforce mediation settlement agreements; in such case, the period of sixty days will be counted from the date the court passes a final order.

Considering mediation as another interruption of a prescription can encourage the parties of the dispute to attempt to mediate and take some time to try to settle the dispute amicably without the worries that the claim will be barred by prescription. This change will make mediation more acceptance and effectively reduce the number of cases in courts.

2) Scope of Civil Dispute Mediation

According to section 20 of the Mediation Act B.E.2562 (2019), civil disputes that can be mediated under the Act are:

(1) Disputes regarded land that is not related to ownership

(2) Disputes between heirs about inheritance

(3) Other disputes prescribe in the decree

(4) Disputes other than the disputes mentioned in (1), (2), and (3) which has dispute amount not exceed five million baht (160,085 USD based on the currency exchange rate on June 18, 2019) or not exceed the amount prescribed in decree.

However, the dispute concerning an individual's legal status rights, rights in family, and real estate ownership cannot be mediated under this act.

3) Mediation Proceeding

A party who prefers to mediate under the Mediation Act 2019 shall submit a request to state agency or organization that will conduct the mediation. Then such a state agency or organization will contact another party (parties) of the dispute to ask for that party's voluntary participation in mediation according to the rules and terms of that agency or organization.[142]

The parties who consent to mediate their dispute will have to select one or more mediators from the list provided by the agency or organization. Parties may seek the assistance of state agencies or organizations that mediate with the appointment of mediators when they cannot agree on the appointment.[143] Party has the right to challenge the mediator who is doubted about his or her

[142] The Mediation Act B.E.2562 (2019) Section 21.

[143] *Id.* Section 22.

impartial or independent. The mediator has to stop the mediation until the head of the mediation agency makes a consideration on that issue.[144]

Mediation has to be done continually and complete in no time. The mediator may decide together with the parties about the proceeding time frame and plane. During mediation proceedings, the mediator may allow parties to have their lawyers or persons they trust to attend the session.[145] In general, mediation has to be done in front of all parties, except in the case where the mediator believes that it will be more beneficial to the mediation if meet the party separately. In such a case, the mediator has to let the other party who is not in the meeting know about the arrangement of the session.[146]

Due to the reason that mediation is the dispute resolution based on parties' voluntary consent which means it cannot be done if one side of the parties does not want to, so, the mediation act clearly prescribe that party has rights to withdraw himself or herself from mediation at any time by submitting writing notice to the mediator.[147] That situation is one of the conditions that lead to the termination of mediation under section 31 of the Act.

4) Settlement Agreement

Under the Mediation Act B.E.2562 (2019), the parties are free to negotiate to find out mutual agreements; however, such agreements cannot be expressly prohibited by law or impossible, or contrary to public order or good morals.[148]

When the parties have concluded their agreement, the mediator shall make the record or arrange for the recording of such agreement in writing with the signature of the mediator and the

---

[144] *Id.* Section 23.

[145] *Id.* Section 25.

[146] *Id.* Section 26.

[147] *Id.* Section 27.

[148] *Id.* Section 28.

parties. The Act also requires that settlement agreement at least has to have names and addresses of the parties, the dispute according to the laws, statement showing that the parties are voluntary to mediate, and the essence of the agreement resulting from mediation.[149]

The settlement agreement that was correctly recorded will not become invalid even if it appears later that the mediator failed to disclose to the parties the circumstance that raises justifiable doubts as to the mediator's impartiality or independence, or the appointment of the mediator is not according to the law. However, the party is not deprived of the right to raise this issue to courts to refuse to enforce such a settlement agreement.[150]

5) Admissibility of Evidence in other proceedings

According to the Mediation Act section 29, the following information and evidence arise from mediation is inadmissible in the judicial, arbitral proceeding or similar proceedings, except for the enforcement of settlement agreements:

(1) Willing or volunteer consents of the parties to participate in mediation proceedings;

(2) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(3) Admission or statements made by the party in the course of the mediation proceedings;

(4) Proposals made by the mediator;

(5) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(6) A document prepared solely for purposes of the mediation proceedings.

---

[149] *Id.* Section 30, there are some examples of the essence of the settlement agreement prescribe in this section which are compensation for damages, conditions that the parties must comply with or refrain from performing, processing time, or the agreement not to receiving any compensation for damages.

[150] *Id.* Section 24.

Pieces of evidence or facts that is exist or can be attested in arbitral or judicial or similar proceedings do not become inadmissible as a consequence of having been used in a mediation.

6) Termination of Mediation Proceedings

The mediation proceedings under the Mediation Act are terminated:

(1) By the conclusion of a settlement agreement by the parties,

(2) When the party withdraw himself or herself from the mediation by declared his intention to the mediator,

(3) When the mediator has an opinion that further efforts at mediation are no longer justified and declare to terminate the mediation.[151]

Even though the Act does not clearly say about the date that the mediation was terminate, it can be presumed that the termination date is the date that the settlement agreement was concluded in the form prescribed by law, on the date of declaration of party's withdrawal from mediation to the mediator, or on the date the mediator declared to the party to terminate the mediation proceedings.

7) Enforcement of Settlement Agreements

The most significant change that the Mediation Act B.E.2562 (2019) contributes to mediation in Thailand is the provision regarding enforcement of settlement agreements. Before the Act enters into force, all settlement agreements resulted from mediation would be treated as general civil or commercial contracts. If a party of the settlement fails to comply with any terms or conditions, the other party will have to enforce the agreement by taking the claim to court, except that there is already a judgment on agreed-terms or a consent arbitral award regarding such agreement. That would entail another cumbersome process. To reduce the burden and encourage more dispute to mediation, the mediation act has streamlined the enforcement process of settlement

[151] *Id.* Section 31.

agreement by emulating the process of enforcement of arbitration awards with clear and specific criteria for refusal of enforcement of the agreement.

According to section 32, When one party has asked the other party to perform duties under the settlement agreement, but the party who was requested does not comply with the agreement, the claimant may make a petition to the competent court within three years from the date of the enforceability of the agreement. If the time address above has passed, the obligations under such a settlement agreement shall be extinguished. This provision is similar to the Arbitration Act B.E.2545(2002) section 42 about the enforcement of arbitration awards.

a) Limitation Period: The time limitation to make a request of enforcement from competent courts is three years from the date of the enforceability of the awards and settlement agreement, which are the same. However, the arbitration act does not mention about the consequence of the case where the limitation period has lapsed, while the mediation act prescribes that the obligation under the agreement shall be extinguished.

Notwithstanding, considering from the text and context of the laws, if the party does not file the petition to enforce the award or settlement agreement within the time required by laws, which is three years, the party will lose the right to enforce the award or settlement agreement. Moreover, when the court receives such a request for enforcement, the court must dispose of the petition or complaint since the expiration of the limitation period, which considers as the law regarding public order where the court can raise this issue itself without another party claim.[152]

Before the Mediation Act enter into force, the prescription of the settlement agreement was ten years, which means that the parties had right to bring any settlement agreement that was breached to courts within ten years. However, such petition or case will be treated as another kind of contract dispute which requires long and complicated procedures in courts.

---

[152] Saowanee Audsawaroj, *Commentary of Commercial Dispute Resolution by Arbitration*, 190-191 (2011).

b) Competent Courts: The petition for enforcement of settlement agreement must be filed to the competent courts within the time-limited which is three years. Under the mediation act, some justice courts have the power to consider this kind of petition. First is the justice court, which has jurisdiction over where the mediation was made. Second, are justice courts which have jurisdiction over where either side of the parties have domiciles. Alternatively, justice courts which have jurisdiction over the dispute that was mediated.

Comparing to the arbitration act, there is an observation that should make here is that the competent courts under the mediation act are all justice courts, while the competent courts can be both justice court and administrative court depending on nature of the disputes.

c) Enforcement Petition Fees: The Mediation Act clearly prescribes that fees of a petition for enforcement settlement agreement conducted under the act shall be equal to the fees of the petition for enforcement of domestic arbitration award according to Civil Procedure Code.[153]

Section 34 of the Mediation Act empower the president of the Supreme Court with the approval of the Supreme Court General Assembly to issue any regulations related to filing the petition to enforce and enforcing the settlement agreement. In addition to provisions provided in this Act, shall apply the provisions in Civil Procedure Code mutatis mutandis.

8) Grounds for refusing settlement agreement enforcement

Under the Mediation Act, the court shall enforce the settlement agreement when it was correctly requested by the means prescribed under the act. However, the court may refuse to grant the enforcement if it finds by itself, or at the request of the party against whom the relief is sought if the party furnishes to the court proof that:

---

[153] According to Justice Court Fees recently checked in June 2019, the fee of petition for enforcement of domestic arbitration award which has the dispute amount not exceed fifty million baht (1,626,525 USD based on currency exchange rate on June 22,2019) is 0.5% of the amount that requesting the court to enforce but not exceed fifty thousand baht (1626.52 USD). The fee for dispute amount exceeding fifty million baht will be calculated as one percent of the amount requested the court to enforce.

(1) a party to the settlement agreement was under some incapacity to conduct the settlement agreement;

(2) the disputed ground or the settlement agreement is illegal, or incapable of being performed, or against public policy or good morals;

(3) the settlement agreement is the result of a fraudulent act, intimidation or any wrongful acts;

(4) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence or the mediator appointment was against the laws and such failure the disclose or such appointment had a material impact on the recording of the settlement agreement;

9) Appealing against Court's order Related to Settlement Agreement Enforcement

According to section 33 Appealing against the court's order regarding enforcement or refusing enforcement of settlement agreement is not allowed, except;

(1) the court refused to enforce the settlement agreement;

(2) the court's order is not following the settlement agreement;

(3) the court's order to enforce the settlement agreement was contrary to the refusing grounds prescribed in the Act.

The appealing of the court's order above must submit to the Court of Appeal. Then the Court of Appeal's judgment or order will be final. The appealing principle under this Mediation Act is similar to the appealing principle under Arbitration Act B.E.2545 with different wording. However, the most different proceeding is that the appealing of court's order regarding settlement agreement enforcement shall be field to Appeal Court and will be final, while the appeal court's order or judgment regarding arbitral award enforcement have to directly submit to the Supreme Court.

10) Criminal Dispute Mediation

According to the Mediation Act B.E.2562 (2019), chapter 3, criminal dispute mediation could be proceeded by state agencies or public mediation centers authorized by the act. The mediation proceeds of criminal dispute can begin before or during the time that the dispute is under the inquiry of inquiry official, criminal prosecution process or court's trial. Any mediation proceeding of criminal dispute which does not prescribe in the Act shall be applied with the provision relating to the mediation of civil dispute of under this Act mutatis mutandis.[154]

a) Scope of application: The criminal disputes that can be mediated under this act are;

(1) compoundable offenses: (2) petty offenses under the Criminal Code section 390[155], section 391[156], section 393[157], section 394[158], section 395[159], section 397 [160], and other petty offenses that do not affect the public as prescribed in the Royal Decree.

Compoundable offenses are the offenses that are less serious in nature, which has personal rights of private persons as legal morals where the victim's intention should be considered, and the

---

[154] The Mediation Act B.E.2562 (2019) Section 38.

[155] Criminal Code Section 390 "Whoever, causing bodily or mental harm to the other person by negligence, shall be imprisoned not more than one month or fined not more than one thousand Baht, or both."

[156] *Id.* Section 391 "Whoever, commits an act of violence not amounting to bodily or mental harm to the other person, shall be punished with imprisonment not more than one month or fined not more than one thousand Baht, or both."

[157]*Id.* Section 393 "Whoever, insulting other person in his presence or by publication, shall be imprisoned not exceed one month or fined not exceed one thousand Baht, or both."

[158] *Id.* Section 394 "Whoever, chases, drives away or allows any animal to enter a garden, field or farm of other person, which is prepared, sown or covered with crop, or which contains a produce, shall be punished with imprisonment not more than one month or fined not more than one thousand Baht, or both.

[159] Section 395 Whoever, having in his care any animal, allows it to enter a garden, field or farm of the other person, which is prepared, sown or covered with crop, or which contains a produce, shall be punished with fined not more than five hundred Baht."

[160] Criminal Code section 397 Whoever, in a public place or before the public does by any means to annoy or bully other person, or causes other person to be ashamed or troubled, shall be punished with imprisonment not more than one month or fined not more than one thousand Baht, or both,

laws aim to mostly protect private persons, not the society.[161] Only offenses that are prescribed in the Criminal Code as compoundable offenses can be considered as compoundable offenses. According to section 95 of Criminal Code, if the injured person does not lodge a complaint within three mounts as from the date of offense and offender to be known by the injured person, the criminal prosecution is precluded by prescription.

Under the Criminal Procedure Code of Thailand, the parties of the compoundable offense disputes can settle their dispute by withdrawing the complaints from prosecution proceeding, or withdraw or settle at any time before they become final. [162] The injured persons in the compoundable offense who withdraw the complaints from court or prosecution or compromise the dispute legally will lose the right to institute a criminal prosecution. [163] According to these provisions, we can see that compoundable offenses have been able to mediate under Thai criminal before the Mediation Act enter into force and also having the same legal outcome. However, laws do not require that the settlement agreement of compoundable offense has to be done in writing or any other forms.

Otherwise, the petty offences which are the offences that have very limit punishment (not more than one mount imprisoned or one thousand Baht fined or both), the compromise of petty offences has never been permitted by law in the past which means that they cannot be compromises

---

[161] Kanit Na Nakorn, *Criminal Law General Part,* [กฎหมายอาญาภาคทั่วไป] 98-99 (2000).

[162] The Criminal Procedure Code of Thailand, section 35 "A motion for leave to withdrawn a criminal prosecution may be filed at any time before judgement by the Court of First Instance. The Court my issue an order granting or refusing such leave as it thinks fit. If the motion is filed after the accused has submitted his refence, he shall be asked if he has any objections, and the Court shall write down his statement. In case of the accused objects to the withdrawal, the Court shall dismiss the motion. Cases concerning a compoundable offence may be withdraw or settles at any time before they become final. But if the accused objects, the Court shall dismiss the motion for leave to withdraw the prosecution."

[163] *Id.* Section 39

to acquit the offender without going through any trail. That is why the Mediation Act has to clearly prescribe allowing the mediation to govern some petty offenses.

b) Mediation of Criminal disputes during other proceeding: In the case that the mediation of the criminal disputes is proceeding while the case is under the care of inquiry official, prosecutor, or court, the mediation organization (or the Liberties and Right Protection Department, when the mediation is proceeding by Community Mediation Center) who taking care of mediating have to inform such inquiry official, prosecutor, or the court which proceeding the case about the beginning of mediation. The inquiry official, the prosecutor, or the court may make an order staying the proceeding until knowing the result of the mediation.[164]

When the mediation proceeding is closed, the mediate organization (or the Liberties and Right Protection Department, when the mediation is proceeding by Community Mediation Center) has to inform the inquiry official, the prosecutor, or the court again. If the parties could agree to settle the criminal dispute, the copy of the settlement agreement shall be sent with the informing. However, the inquiry official, the prosecutor, or the court shall resume its procedure in the case where the mediation is not a success.

c) The legal result of a successful criminal dispute mediation: The mediation of criminal dispute related to the offenses allowed to be mediated by the Mediation Act is binding only the party of the dispute, which has agreed to resolve their dispute by mediation. The injured party's right to institute a criminal prosecution is extinguished by the settlement of the offenses under the Act.[165]

In the case of criminal offense settlement which one side of the parties entitled to file of civil case in connection with such offense under the Criminal Procedure Code, the party's right to

[164] The Mediation Act B.E.2562 (2019) section 36.

[165] *Id.* Section 35 paragraph two.

institute a criminal prosecution is extinguished when the parties have already performed their duties under the settlement agreement of the civil dispute. If any party does not comply with the civil settlement agreement, the other party may file the petition to the competent court for enforcing the settlement agreement.[166]

11) Public Mediation

The Mediation Act B.E.2019 requires the Rights and Liberties Protection Department Ministry of Justice to promote and encourage people in communities around the country to gather as public mediation centers to carry out public mediation. [167] The Rights and Liberties Protection Department is also responsible for supervising the mediation service of public mediation centers, mediators' registration and provide financial support for a public meditation center.

The mediators who work for the center have to pass the qualification training approved by the National Committee of Justice Administration, have some experiences which can contribute to the settlements and register with the Director-General of the Rights and Liberties Protection Department.[168] This means that they have to be under the same requirements and standards with mediators in other mediation service providers under the act.

Under section 20 of the Mediation Act B.E.2562 (2019), public mediation centers are able to mediate civil disputes concerning the rights in real estate other than ownerships, the disputes between heir regard heritages and others civil disputes which has the conflict amount not exceeding 500,000 Thai Bath (15,965 USD, exchange rate on June 3, 2019). Public mediation centers under the act also have the power to settle compoundable offenses, some petty offenses which are not violent the public under the scope of criminal dispute mediation of the act.[169]

---

[166] *Id.* Section 37.

[167] *Id.* Section 68.

[168] *Id.* Section 68 and Section 10.

[169] *Id.* Section 69.

Further than the limited of conflict amount of civil dispute, the legal consequence of settlement agreements from mediations proceeded by public mediation centers is different from settlement agreements of other mediation providers under the mediation act because they are required to be verified by the Rights and Liberties Protection Department to be enforceable. According to section 69, in the case where the Rights and Liberties Protection Department see that the mediation of public mediation center has done under the Mediation Act, the department will issue a certification then the settlement agreement will be enforceable or the right of the parties of criminal dispute settlement agreement to bring such criminal cases to courts are suspended.[170]

4. Mediation Organizations and Institutions in Thailand

Mediation has been supported to use as an alternative dispute resolution by both public sections and private sections in Thailand. Also, Mediation is used as a dispute settlement scheme to solve internal problems between people in some institutions such as educational institutions for the students' conflicts, healthcare provider institutions for the dispute between patients and providers, and incorporations for the dispute between employees and employers. However, this part of the study will only demonstrate mediation service providers who are state agencies or are under the supervision of the governments.

Since, the Mediation Act B.E.2562 (2019), the first mediation act of Thailand is recently enacted and will fully come into force in the middle of November 2019, most of the state agencies that providing mediation service to the public will be governed by the Act according to the scope and application provisions. However, the Mediation Act 2019 will not apply to court-annex mediation, and post-judicial mediation proceeded by the Legal Execution Department. All the rules and regulations describe here in this section are currently affective until they will be changed in the coming future as the implementation of Mediation Act 2019.

---

[170] *Id.* Section 69 paragraph 2.

4.1 The Interior Ministry

Besides other's duty of the administrative officers under the government of the Interior Ministry, facilitating justice to people is another task of them. Mediation is the dispute resolution mechanism that has been using as a tool for administrative officers to provide justice to the people. There are two administrative bodies which provide dispute settlement service under the control of the Interior Ministry.

1) Village Committee

Village Committee is established by the Local Administration Act B.E.2457 (1914). The committee consists with the head of the village, the deputy of the village, member of local government organizations who has his or her domicile in the village and other members who were elected by the villagers. The Village Committee is empowered to perform as mediators in the village to settle the dispute among the villagers according to the Interior Ministry Regulation pertaining to the Conciliation of the village committee B.E.2530 (1987). This mediation work of the committee was created by the project of dispute settlement by way of mediation in the level of the village, supported by the Attorney -General Office and Administration Department.

When a civil dispute or personal criminal dispute has arisen, and one of the parties is the member of the village, or the dispute has arisen within the village, one party or the parties may declare his or their attention to settle the dispute to the head of the village. Then the village committee has to inform all parties about the request of settlement. If all parties agree to settle their dispute by the village committee, the mediation has to commit in no time. The village committee may appoint at least two committee members to take care of the mediation and may ask for assistant or consultant from chief district officer, assistant district officer, state-attorney, or Police in the area, which is at least a police sub-lieutenant. The mediation shall do in front of all parties according to the law or local custom as long as such local custom is not against any laws. In a case where the

parties are able to make an agreement, the settlement contract will be made. Otherwise, the committee has to stop the mediation and make a report to the chief of the district.

2) The Chief District Officer

According to the Act on Governmental Administration (No. 7) B.E.2550 (2007), chief district officers have the authority to mediate civil disputes related to land, probate estate, civil dispute with the amount in the dispute not exceed 200,000 Baht (6,250 USD at the exchange rate on May 21,2019) in the case where one of the party's lives in the district and the personal criminal case occurred in the district except the offenses relating to sexuality. The statute of limitations relating to the disputes mediated under the Act are tolled from the dispute are submitted to mediation until the mediation process is terminated, or the parties reach a settlement agreement.

The guideline for the Chief District officer for civil settlement is the Interior Ministry Regulation about civil dispute settlement under the authority of the Chief District Officer B.E.2553 (2010). Under the Regulation, the party can submit the request to settle the civil dispute to Chief District Officer in the area where they live. Then the Chief District Officer will send a letter asking other parties of the dispute for their intension to mediate. The mediation will begin if all the parties of the dispute agree to mediate the dispute under the help of the Chief District Officer.[171] Each side of the parties will choose one mediator from the list provided. Every party needs to decide together whether they want the Chief District Officer, assistant district officer, or a provincial prosecutor to be the chairman in mediation procedure. The Chief District Officer will be the chairman if the parties' agreement is not met.[172]

---

[171] The Interior Ministry Regulation pertaining to civil dispute settlement under the authority of the Chief District Officer B.E.2553 (2010), section 11.

[172] *Id.* Section 14.

The settlement contract will be made according to the parties' agreement. Later, if any parties deny or refuse to follow the settlement, other parties can submit the request to the public prosecutor of such an area to file the petition to the court for ordering the party to comply with the settlement. However, the prosecutor has to file the petition to the court within three years since the date that the settlement can comply.[173]

Further, then the practical result of the settlement under the support of the Chief District Officer, the Regulation about civil dispute settlement under the authority of the Chief District Officer B.E.2553 (2010) also limit the time for mediation to make sure that the dispute can be settled by the reasonable time. Section 17 and 20 of the Regulation prescripts that the mediation shall be finish in three months from the date the Chief District Officer registered it. The extension can be granted where all the parties of the dispute consent to do so. However, all mediate procedure and the settlement have to be done within one year.

4.2 The Ministry of Justice

The Ministry of Justice has the obligation to provide the active justice service to all the people as being accessible to fair justice is one of the citizen's fundamental rights. The Ministry of Justice has taken many measures to support the community around the country to get involved in the alternative dispute resolution with the goal of reducing the number of disputes that exceeding the ability of the courts to provide fair justice without delay.

1) Community Center for Reconciling

Since the establishment of the Rights and Liberties Protection Department in 2002, the department has encouraged people in the communities to be volunteers to protecting the right and liability of their people and participation in resolving their own dispute by local intellectuals of people in the community in peaceful ways. With the support of the Rights and Liberties Protection

[173] *Id*. section 25.

Department, currently, 354 community centers for reconciling have been establishing around the country by communities' volunteers. Between 2015 to 2018, 1,396 disputes were successfully settled by the community center for reconciling, which can decrease the expense that needed for filing the disputes to the courts for around thirteen billion Baht (130.8750 million Bath or 4,098,808 USD, exchange currency on May 23, 2019).[174]

Currently, there are no certain rules to cover the mediation procedure conducting by the Community Center. However, the mediation under the care of the Community Center for Conflict Reconciliation will be governed by the Mediation Act B.E.2562 (2019) under the provisions regarding Public Mediation in 180 days after the act enters into force.[175] According to the new law, the Community Center for Conflict Reconciliations will able to mediate civil disputes and criminal dispute which are in the scope of public mediation center as mention in with the conflict amount not exceed 500,000 Thai Baht (15,965 USD, exchange rate on June 3, 2019), and criminal disputes under the scope of Mediation Act. Besides other legal requirements, the persons who are the mediator have to pass the required training courses and have some experience that will be useful for mediations.

Under the Mediation Act 2019, the Community Center for Conflict Reconciliation will continue to get supervision and financial support from the Rights and Liberties Protection Department, Ministry of Justice.

2) The Legal Execution Department

---

[174] Ministry of Justice, *Rights and Liberties Protection Department, Ministry of Justice 2018 annual report*, (May 21, 2019), available at http://www.rlpd.go.th/rlpdnew/images/rlpd_6/2560/awareness_for_people/15.3.2562.pdf

[175] Thailand Mediation Act B.E.2562 (2019) Section 2 This Act shall come into force as from the day following the date of its publication in the Government Gazette except the provisions in Chapter 2 Civil Dispute Mediation, Chapter 3 Criminal Dispute Mediation, Chapter 4 Criminal Dispute Mediation in inquiry procedure, and Chapter 5 Public Mediation.

The Legal Execution Department has primary responsibilities in enforcing the civil and bankruptcy cases, business reorganization, and deposit of property. In 2005 the Mediation Center, under the Legal Execution Department, was established to responsible for mediating disputes after the court decision has been passed. This kind of mediation is called as Post-Judicial Mediation. Post-judicial mediation can be done before or after the legal execution process takes place.

The Mediation Center of Legal Execution Department was established to solve the problems in execution procedures, which generally take a very long time and cause some difficulties to the judgment creditor and executing officers. In general execution procedures, judgment creditors have to submit the related documents of the debtors' assets in order to sale to collect their debts; concerned party may request for a withdrawal of sale by auction which will pause the proceed until the issuing of final judgment of such request; Judgment creditors are required to pay legal execution expenses in advance and will be reimbursed only when the seized assets are sold and sometimes receives less than what they granted by judgments; the seized properties would temporary loss of economic values as the debtors are not allowed to conduct any legal transaction. Moreover, the executive officers are at risk when the debtors obstruct the proceeding, and many of them were accused in civil and criminal cases.

There are two types of post-judicial mediation. First, the pre-legal execution mediation, where the parties agree to mediate to end the legal execution by filed a request to the Mediation Center at the Legal Execution Department or any Legal Execution Offices nationwide. Second, post-legal execution mediation where the parties agree to mediate before a sale by auction or after the property attachment. The mediator can be an executing officer or outsider whom the parties agree with. The post-judicial mediation generally takes one to three months with no service

expense. The post-judicial mediations undertake by the legal execution department are not be governed by the Mediation Act B.E.2562 (2019).[176]

The post-mediation proceeds begin with the request of the parties indicating their willing to mediation to the Mediation Center with a copy of the judgment and other supporting documents. The Mediation Center will prepare mediation briefs and contact the parties, their lawyers, and a mediator to arrange the meeting time and place. Then the mediator will go through all the evidence and gather information and facts for the parties to identified parties' real needs. The mediation may be in the form of joint negotiation, all separate meetings with each party.

In case of a successful mediation, the settlement agreement will be made and sign by parties in front of the mediator. The settlement agreement will lead to a stay of legal execution, revocation of property seized, and legal execution according to the relevant laws. The settlement agreement was binding the parties and deemed in existence as a result of the judgment. Without the consent of all parties, the settlement agreement cannot be terminated or perform differently.

The judgment will remain in effect if parties cannot reach the settlement agreement, and the execution procedure will be continuing accordingly. If the mediation is partially successful, the executive officer will continue to proceed in the part where no agreement is made. If the mediation is unsuccessful, the legal execution will be processed as usual. The right of parties to proceed through legal execution process has remained until the settlement agreement is performed.

Mediation Centers of the Legal Execution Department are now covering every province around the country to provide post-judicial mediation to the parties of the judgments. This type of mediation helps to solve the problem of execution proceeding that has been a big issue in Thailand.

[176] *Id.* section 3 paragraph one.

4.3 Public Prosecutors

The State Attorney Organ is an institution under the Constitution that has the duties and powers as provided in Constitution and Laws.[177] To follow the Cabinet Resolutions regarding guidelines for reducing the volume of cases rendered to courts, Office of the Attorney General, therefore, providing conciliation service to the people according to the regulation of the Prosecutor's Departments on Public Legal Aid B.E.2533 (Amendment No.3 2004).

In 2012, the Office of the Attorney General issued the regulations concerning the conciliation of criminal disputes during prosecutors' proceeding B.E.2555 (2012). These regulations stipulate that the prosecutor who responsible for the criminal case after receive the criminal file from inquiry official and considers that the alleged offender is not under any prohibited characteristics due to being a professional criminal, habitual offense or there is a fact that the prosecutor will terminate the proceeding for other reasons, shall send the notice to the Office of Public Legal Right Protecting and Assistance to proceed the conciliation.

The conciliation proceeding by the Office of Public Legal Right Protecting and Assistance will begin right away after the prosecutors receive the case from inquiry official without parties' requests and will be proceeded by a prosecutor (prosecutors) who responsible the works of the Office of Public Legal Right Protecting and Assistance. However, before beginning the conciliation, the prosecutor has to explain to parties that they have the right to choose to conciliate their dispute or deny it. Also, describe all the proceedings and legal consequences if the parties decide to conciliate their dispute.

However, due to the reason that the Mediation Act B.E. 2562 (2019) is also applied to the prosecutor's mediation service. Therefore, after the new law comes into force, the conciliation

[177] The Constitution of Thailand B.E.2560 (2017) Section 248, State attorneys are independent in considering and making orders incases and in performing duties expeditiously and justly and without any prejudice, and act shall not be deemed and administrative order.

proceeding by the prosecutor under the provisions concerning criminal dispute mediation of the Act will be governed by this law.

4.4 Office of Judicial Affairs

4.4.1. Brief History

In the term of organizational structure, the Office of Judicial Affairs is within Office of the Judiciary. Office of Judicial Affairs used to be under the name of the Thai Meditation Center, which was a part of the Alternative Dispute Resolution Office, the office that responsible for in-court and out-of-court mediation and arbitration. In April 2016, the Office of Judicial Affairs was established due to an internal reorganization of Office of Judicial which separates the works regarding arbitration from the Alternative Dispute Resolution Office.

4.4.2 Responsible and Duties

According to the Announcement of Court of Justice Administrative regarding internal division and authority and duties of government agencies under Office of the Judiciary B.E.2559 (2016), the Office of Judicial Affairs has duties to provide mediation service and support administrative work in judicial procedural for the Court of Justice. The Office of Judicial Affairs is responsible for promoting, supporting, and coordinating court-annex mediation and mediation center of the courts of justice throughout the country by developing the system, regulations, rule, and methods of mediation. One of the most important roles of office of Judicial Affairs that has been doing since being a part of Alternative Dispute Resolution Office is recruiting and training mediators for courts and the mediation center of courts of justice.[178]

4.4.3. New Technology System

[178] *Office of Judicial Affairs Annual Report 2018*, (July 26, 2019), *available at* https://oja.coj.go.th/th/content/category/detail/id/22/iid/125173.

In 2019, the Office of Judicial Affairs has developed a new guideline and technology system to use with Pre-Litigation Mediation proceeding. By the middle of 2019, all Court of Justices in Thailand began to use the QR Code as a mean for the parties to request and accept mediation service from the court of justice and meditation center. This technology aims to reduce time and cost for parties who prefer to use mediation services provided by the Court of Justice before entering their disputes to courts.

4.4.4. Summary of the Guideline for Pre-Litigation Mediation Proceeding

The Guideline for Pre-Litigation Mediation Proceeding was published in February 2019 to uniform and manage the process of mediation for mediation centers of justice courts throughout the county.[179] The Pre-Litigation Mediation service under the care of the Justice Courts is providing to the parties free of charge to reduce the number of cases in courts and promote the amicable relationship between the parties.

1) Beginning of mediation proceeding: The mediation by mediation centers of justice courts are based on parties' consent. Parties of a dispute can request mediation service from the mediation center of court of justice before filing their case to court by submitting the request to the court or the office of Judicial Affairs or make the request through QR Code. In the case that both sides of the dispute agreed to mediate their case, the mediation center of the court or the Office of Judiciary Affairs will arrange the meeting between parties and appoint a mediator to the case and begin the mediation process. If the request for mediation service is done by one side of the parties, the mediation center will contact the other party and wait for 15 days for him or her to respond to the request. If the other party denies mediating the dispute or does not response to the request within 15 days, there will not affect any further proceedings.

---

[179] *Guideline for mediation proceeding before suing*, (last visit July 29, 2019), *available at* https://oja.coj.go.th/th/content/category/detail/id/8/cid/7997/iid/128172.

2) Mediator Appointment: After the parties agree to mediate their dispute by mediation center of the court, they have to sign a mediation agreement to agree that they consent to be bind by the procedural and the outcome of the mediation. Then the meditation center will appoint a mediator to the case subject to the parties' consent. Mediators who can mediate in the justice court mediation center have to be registered with the court and have to perform their duties according to the guideline. In general, only one mediator will be appointed in the case, however if the parties prefer to have more than one mediator they have to make a special request for it. The mediator has the duties of preparing the proceeding, assist the parties to settle their dispute, and cannot make any opinions related to adjudication, except the parties request to do so. The mediator will not have any liability to the parties in his performing to mediate or settle the dispute, except such mediator performing with intention, or with gross-negligent, or not following the guideline and that causing damage to the parties.

3) Proceeding Time: The mediation proceeding has to be done within 45 days since the date that the mediator has been appointed to the case. The extension of the proceeding time may be requested to the court administrator or the head of the Office of Judicial Affairs but limited to two times for 15 days of each extension. The mediator of any complex case which seems to be settleable may request other extensions; however, it cannot exceed 45 days from the date general extension ended.

4) Mediation Proceeding: The parties of the dispute have to attend the mediation meeting by themselves unless, with any force majeure or other necessary circumstances, the parties may appoint an agent who authorized to make a decision and enter into a compromise agreement to attend a mediation meeting on behalf of the parties. The mediation proceeding has to be done in secret without any recording unless the parties agree to record the whole or part of the proceeding. In mediation, if the mediator sees that other person's disputes are related to the mediating dispute and the consolidation of the disputes into the mediation will benefit the parties and that third person

with the consent of all parties and the third party may arrange for mediation all dispute at the same time. This procedure is similar to the case consolidation in court of justice procedure.

5) Making compromise agreement: The compromise agreement (settlement agreement) may be made by the mediator of the case, the party's lawyer, court officer, or the official of the Office of Judicial Affairs. In the case that a compromise agreement was not made by a court officer or official of the Office of Judicial Affairs, the mediator may request the compromise agreement to be reviewed, whether it is violating the laws by the said officer. Contacts between the parties, including any information or comments or suggestions which have been disclosed or displayed during the mediation, will not be able to use as reference in arbitration or court proceedings unless the parties agree otherwise. Also, all information in mediation is confidential, unless it is used as necessary to perform or enforce compliance with the compromise agreement.

6) Legal effect of compromise agreement: The guideline for Pre-Litigation Mediation Proceeding does not mention any special legal effect of the compromise agreement make from the proceeding; therefore, it will have the same legal effect as a normal compromise agreement. This means that if the parties of the agreement fail to comply with the agreement, the other party has to bring the issue to the courts as the general breach of contract case. However, the pre-litigation mediation by mediation center of the court of Justice is qualified as the mediation under the service of the Office of Judiciary, which is one of the state agencies according to the Mediation Act B.E.2562 (2019).[180] Therefore, if the disputes which were meditated are under the scope for the Mediation Act and were proceeded according the provisions of the act, the compromise agreements

[180] The Mediation Act B.E.2562 (2019) Section 3 paragraph four "agencies that conduct mediation" means state agencies that proceeding dispute settlement by mediation., Section 3 paragraph five "state agencies" means central government agencies, provincial state agencies, office of the judiciary, the Attorney General, or other government agencies as determined by the Minister of Justice in the Ministerial Regulations.

or the settlement agreements of such mediations will have the same legal result and can be enforced by the courts according to section 32 and 33 of the Act.[181]

4.4.5 Current Situation

Between 2017 to 2018, the Office of Judiciary by the Office of Judicial Affairs had 12 cases of pre-litigation mediations. Moreover, some Justice Courts have provided the pre-litigation mediation program by court registered mediators to Financial Institution. For example, in 2018, in the pre-litigation mediation program for Government Saving Bank, there were 6,984 participants with almost 80% successful cases.[182] According to the announcement of the Office of Judiciary on mediators' roster of 2018-2019, 2351 mediators have been registered with the Courts of Justice around the country to provide the pre-litigation mediation service and support the Courts of Justice in court-annex mediation.[183]

4.5 Thailand Arbitration Center (THAC)

4.5.1 Brief History

Thailand Arbitration Center (THAC) was established by the Act of Arbitration Center B.E.2550 (2007). THAC started to provide arbitration and mediation services in 2015. The purpose of THAC is supporting and promoting ADR system in Thailand. Also, developing the ADR system of Thailand to reach international standards and becoming the center of ADR center in Asia. THAC

---

[181] Refer back to the Mediation Act B.E.2562 (2019), importance provision, sub-topic: scope of civil dispute, scope of criminal dispute and enforcement of settlement agreement.

[182] Office of Judicial Affairs, *Memo by Office of Judicial Affairs to the Secretary of Office of Judiciary about "the development of Pre-Litigation Mediation Proceeding,* (January 31, 2019), *available at* https://oja.coj.go.th/th/content/category/detail/id/8/cid/7997/iid/128172.

[183] Office of Judiciary, The *Office of Judiciary announcement of Roster of Mediators 2018-2019* [ประกาศสำนักงานศาลยุติธรรม เรื่อง ทะเบียนผู้ประนีประนอมประจำปี พ.ศ. ๒๕๖๒-๒๕๖๓] *available at* https://oja.coj.go.th/th/content/category/detail/id/8/cid/85/iid/121545.

is a non-profit organization with budget supported by the government. The institution is managed by the Managing Director under THAC's legislation, rules, regulations and committee's decision.[184]

4.5.2 Mediators

Thailand Arbitration Center (THAC) has a regulation regarding registration of mediators, which was issued under the Arbitration Institution Act B.C.2550 (2007). According to the regulation, THAC has to provide a list of mediator names subject to the need of the institution and the parties. The following features are the qualification requirements for applicants to be mediator under THAC regulation; 1) age between 30 and 75, 2) has work experience more than 5 years in the applicant's field of expertise which will be useful for mediations, 3) passed mediator training certified by THAC, 4) not being a misbehave person or lacking of good moral, 5) not being a career or profession which may affect his performing as an mediator of the institution, 6) not being under court order to be incompetent person or to be quasi-incompetent person, 7) not being withdraw from the roster, except voluntary resigned.

The mediator roster of THAC will be terminated in every other year. A mediator who was on the above list may apply himself to the new list. The institution will consider the applicant's performance in the past, whether he or she should be registered in the roster. In 2018, THAC had two lists of mediators. One is the list of Thai mediators with 92 mediators in the different fields of a specialist. Another roster is the list of 38 foreign mediators with verity of nationality and field.

4.5.3 Summary of THAC Mediation Regulations

---

[184] THAC Executive Committee comprised of Permanent Secretary for Justice as the chairperson, the Attorney General, the Secretary-General of the Office of the Judiciary, the President of Thai Chamber of Commerce, the President of the Federation of Thailand Industries, the President of the Thai Bankers' Association, the President of the Lawyers Council of Thailand, President of the Council of Engineers and President of the Architect Council of Thailand and 5 experts appointed by the Cabinet.

According to the Regulation of Thailand Arbitration Center regarding Mediation B.E.2557 (2014), the mediation proceeding administration by the institution has to be under THAC Mediation Regulation. However, the parties may agree to exclude or vary any of the provisions proceed their mediation of THAC regulation as long as that proceeding is not contradicted to the laws.[185] THAC Mediation Regulation has most of general grounds based on UNCITRAL Model Law on International Commercial Conciliation 2002[186] with some slight differences and additional details.

Under THAC regulation, mediation means a process whereby parties voluntary request the third person or persons to assist them in their attempt to reach an amicable settlement of their dispute.[187] In the case where any provisions are vague, or no rules are governing any matter in mediation, THAC and the mediator shall proceed the mediation as they consider appropriate, take into account the aims to amicably settle the dispute and advantage of all parties.[188]

1) Commencement of Mediation: The mediation under the administration of THAC will begin when all parties agree to engage in a mediation proceeding. Alternatively, when another party accepts the invitation to mediate, which was initiated by one party.[189] A writing request to mediate shall consist of; names and contact information of the requester and all parties who may be relevant in the mediation; brief of fact and requests of the dispute; the agreement to mediate (if available); agreement on the place of mediation (if available); other supporting documents that will be useful for the mediation.[190] An oral request to mediate may be accepted if appropriate and necessary. Then

---

[185] Regulation of Thailand Arbitration Center regarding Mediation B.E.2557 (2014) Article 2.

[186] UNCITRAL Model Law on International Commercial Conciliation, 2002, *available at,* https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

[187] Regulation of Thailand Arbitration Center regarding Mediation B.E.2557 (2014) Article 3 (4).

[188] *Id.* Article 44.

[189] *Id.* Article 4.

[190] *Id.* Article 5.

THAC will record such request in writing as evidence that the party has summited the oral request to mediate.[191] The request is terminated when the other party denies mediating or does not accept the request within 30 days after receiving the offer.[192]

2) The appointment of the mediator(s): under THAC, mediation regulation is based on parties' consent and preference. The institution will appoint mediator(s) for the parties only when the parties request or the consensus agreement to appoint mediator(s) between parties in not meet.[193] The parties may appoint mediator(s) outside THAC rosters with their responsibility for any extra expense. Parties may ask THAC to make a list of mediator recommendations. In the case that there is no agreement, the parties together have to appoint one mediator to mediate their dispute. If the parties prefer more than one mediator, the appointed mediators have to mediate the case together.[194] In the case, the parties agree to have two mediators, each side of the parties has to select and appoint one. If three mediators are appointed, all parties have to choose and appoint the third mediator together.[195]

The appointment of the mediator(s) under THAC regulations comparing to other mediation institutions such as Singapore Mediation Centre, which the center will select and appoint a person in its view will be best serve as the mediator. According to Singapore Mediation Procedure Rule, the party with a valid reason can object to the choice of mediator the center made; another person will be appointed.[196]

---

[191] *Id*. Article 6.

[192] *Id*. Article 9.

[193] *Id*. Article 15.

[194] *Id*. Article 13.

[195] *Id*. Article 14.

[196] Singapore Mediation Centre, Mediation Procedure Rules Section 4 *available at*, http://www.mediation.com.sg/assets/downloads/commercial-mediation/CMS-Mediation-Procedure-Rules-with-Annexes-1Apr18.pdf.

A person appointed as a mediator will disclose any circumstance likely to give rise to justifiable doubts as to his or her impartiality or independence. Unless such circumstances have been informed to the parties, the mediator shall promptly report any change that may affect his impartiality or independence throughout the mediation proceeding.

3) Conduct of Mediation: After appointed, the mediator, together with the parties shall discuss the manner which proceeding and process of mediation should be conducted. The conduct of mediation shall maintain fair treatment, and speed for the amicable settlement.[197] The parties may appoint their representatives or assistance to his case. Where the mediator considers appropriate, and the parties agree, the mediator's assistance may be appointed to assist him or she administrates the mediation. Place and language of mediation will be selected by THAC, otherwise agreed by differently by the parties.

THAC regulation empowers the mediator in requesting the parties to give him or her the explanations or oral statements of facts, excuse, arguments, claims, as well as any documents relating to the dispute in the specified period.

The mediation will be conducted in confidence. No record of the mediation detail should be made unless the parties request to transcript or record all or part of the mediation. The mediator may conduct joint meetings with all parties or the separate meeting with each of the parties as he considers appropriate. The representative or assistance of the parties or the mediator assistance may be allowed to attend the meeting as the mediator considers appropriate.

The mediator may disclose the substance of information received from one party to the other party unless the party who gave the information has conveyed the mediator that it does not want to disclose to the other party. These instructions must be in writing. The communication

---

[197] Regulation of Thailand Arbitration Center regarding Mediation B.E.2557 (2014) Article 20.

between parties and mediators in mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

The parties have to attend all meetings in person and submit all documents requested by the mediator and conduct the mediation in good faith.

4) Resort to arbitration or judicial proceeding: During mediation proceeding, the parties shall not submit their dispute to courts or arbitration tribunal, except where it is necessary to preserve his or her legal right.

Under Thai Civil Procedure Law, being in mediation proceed is not one of the grounds for courts to restrain party's right to sue the same dispute to the court. Furthermore, according to the Mediation Act B.E.2562 (2019), civil disputes under the scope of the Act which were mediated by THAC[198], even if the settlement between the parties were failed, and the prescription of the disputes were ended before the termination of the mediations or will end within 60 from the termination date, the prescription shall be extended for 60 days from the day the mediations were terminated.[199] The Mediation Act 2019 also promise to enforce the mediation settlement agreements, proceeded under its scope. By giving the parties a period of three years since the settlement agreement was denied to follow by obligated party to request the court's enforcement.[200] If the grounds to refuse

[198] Thailand Mediation Act B.E.2562 (2019) Section 20, civil disputes that can be mediate under the Act are; (1) Disputes regarded land that is not related to ownership,(2) Disputes between heirs about inheritance, (3) Other disputes prescribe in decree, (4) Disputes other than the disputes mentioned in (1), (2), and (3) which has dispute amount not exceed five million baht (160,085 USD based on the currency exchange rate on June 18, 2019) or not exceed the amount prescribe in decree. However, the dispute concerning individual's legal status rights, rights in family, and real estate ownership cannot be mediate under this act.

[199] Thailand Mediation Act B.E.2562 (2019) section 6.

[200] *Id.* section 33.

to enforce are found, and the request to enforce the settlement agreement was rejected, the prescription will be extended for 60 days from the day the court issued final order or judgment.[201]

5) Making Compromise or Settlement Agreements: Under THAC regulation article 30, anytime during mediation, the party himself or by request of the mediator may make any suggestion that can lead to the settlement of the dispute. Also, the mediator when consider appropriate propose a guideline to settle the dispute to the parties without providing the reason.

In the case where the mediator sees the way to settle the dispute, the mediator may draft a settlement agreement for the parties to consider and giving feedback to the mediator within a specific time. Taking into consideration of parties' opinions, the mediator may revise the draft settlement agreement and propose to the parties for settlement.

Where the parties can agree to settle their dispute, they shall make the settlement agreement in writing and sign. The parties may request help from mediator in making the settlement agreement. There is no requirement for the mediator to sign his or her name in the settlement agreement.

6) Termination of mediation proceeding: Article 34 of THAC mediation proceeding regulation, asking the mediation proceeding to be completed in 60 days since the day the mediator(s) was appointed to the case, or within the time agreed by the parties which cannot exceed 90 days. These periods of time may be extended for the purpose of amicable settlement between the parties if the mediator considers appropriate but shall not exceed 30 days from the end of the said periods.

The mediation proceedings are terminated when: (1) the parties sign the settlement agreement, (2) the settlement agreement cannot be reached by the end of the mediation period, (3) a party withdraw from the mediation by giving notice of withdrawal in writing to mediator and the

[201] *Id.* section 6 paragraph 2.

other party, (4) All parties give notice of withdrawal in writing to the mediator, (5) After consulting with all parties, the mediator decides that continued mediation is unlikely to result in settlement, (6) Any party initiate arbitral or judicial proceeding with respect to the dispute and the mediator decides that continued mediation is unlikely to result in settlement.

7) Admissibility of evidence in other proceedings: The parties to the mediation proceeding, the mediator any third person involved in the administration of the mediation proceeding, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following; (1) An invitation by a party to engage in mediation proceedings ort eh fact that a party was willing to participate in mediation proceedings, (2) Statements or admissions made by a party in the course of the mediation proceedings, (3) Party's views expressed or suggestions in respect of conditions or measure of a possible settlement of the dispute, (4) Proposals of the mediator(s), (5) The fact that a party had indicated its willingness to accept the proposal to settle the dispute, (6) A document prepared solely for the purposes of the conciliation proceedings.

The provision regarding of admissibility of evidence in the other proceedings of THAC regulations is based on UNCITRAL Model Law on International Commercial Conciliations 2002. However, THAC regulations do not mention the form of evidence or how they will be treated if they were used in other proceedings.

8) Mediator acting as arbitrator, representative, or counsel: THAC Mediation regulation prohibits the mediator for acting as arbitrator, representative, or counsel in arbitral or judicial proceeding in respect of the dispute that he or she performed as the mediator. Furthermore, the regulation also requires the parties to promise not to refer the mediator as the witness of such arbitral and judicial proceedings.

THAC rule does not give the parties a chance to make a different agreement from the rule which different from UNCITRAL Model Law where the parties may otherwise agree in the other

way.[202] It also focuses on the acting of the mediator itself and does not cover the act of members of his firm or company like the rule of other meditation centers.[203] However, according to article 1 THAC Mediation Regulation, the parties are free to exclude or vary any of the provisions under the regulation as long as that agreement is not contradicted to the laws. It means that the mediator may later perform as an arbitrator, a representative, or the counsel for any parties if all the parties agreed not to apply this rule to their mediation.

9) Waiver of Liability: THAC, the director, staff, and the mediator will not be liable to the parties for an act or omission in connection with the mediation service provided according to THAC Regulation for Mediation Proceedings.

10) Fees: THAC recently changes its mediation service fees on November 23rd, 2018 by enacted of the THAC Regulation of Mediation (No.2) B.E. 2561 (2018). This new regulation considerably reduces all of the fees related to mediation. For instance, the filing fees, which will collect from the party within three days of the request for mediation and from the party who accept the invitation to mediation, is reduced from 5,000 Thai Baht (163.83 USD) to 1,000 Thai Baht (32.77 USD). The mediation fees are the fees that cover mediator's fee and other fees for the administration of THAC, which collected from all parties according to quantum of claim and counterclaim. The calculation of mediation fees in the old charge start from the dispute with claim

---

[202] UNCITRAL Model Law in International Commercial Conciliations Article 12, "Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship."

[203] Singapore Mediation Centre Mediation Procedure Section 4.5 "The Mediator(s) (or any member of his firm or company) should not act for any of the parties at any time in connection with the subject matter of the mediation. The Mediator(s) and SMC are not agents of, or acting in any capacity for, any of the parties… ", *available at* http://www.mediation.com.sg/assets/downloads/commercial-mediation/CMS-Mediation-Procedure-Rules-with-Annexes-1Apr18.pdf.

amount not exceed 2,500,000 Thai Baht (81,913.75 UDS) with the mediation fees of 30,000 Thai Baht (982.97 USD) per party, per day (6 hours), the claim amount above 2,500,000 up to 5,000,000 Thai Baht cost 40,000 Thai Baht fees. On average, the institution's mediation fees reduced by fifty to sixty percentage under the amendment regulation. The mediation's fees increased respectively, according to the amount of money claimed from 3,000 Thai Baht (114.49 USD) to 50,000 Thai Baht (1635.59 USD), with the limit of 300,000 Thai Baht (9813.54 USD) per party per day. [204]

Comparing to other mediation centers in the region, THAC mediation fees are reasonable and affordable to the parties. This new rate is considerably lower than the Singapore Mediation Centre's[205], higher than Malaysian Mediation Centre's[206], and at a similar rate with Hong Kong Mediation Centre's fees.[207]

4.5.4 Current Situation of THAC

Between 2015 to 2019, THAC has provided mediation services for public agencies and privates parties for 23 cases. THAC has introduced several training courses in arbitration and mediation for the public. The institution has built relationship and become partner to many public and private domestic organizations and international ADR institutions around the world.

---

[204] THAC Regulation on Mediation (No.2) B.E.2561 (2018) article 3.

[205] The mediation fees of Singapore Mediation Centre which including the mediator's fee, rental of premises and food and beverage charges is between 700 USD to 3,636,400 USD per party per day. With the filling fee of 195 USD per party for the center's provision of administrative and support services., *available at* http://www.mediation.com.sg/assets/downloads/commercial-mediation/CMS-Mediation-Procedure-Rules-with-Annexes-1Apr18.pdf.

[206] The mediation fees of Malaysian Mediation Centre begin with 100 RM (around 24 USD) for the filling fee, and 300 RM (72 USD) for the mediation Fees per session., *available at* http://www.malaysianmediationcentre.org/mediation-process/how/.

[207] Hong Kong Mediation Centre has Administrative Fee for the application of mediation services for HK$2,000 (225 USD) and Mediator Fee between HK$1,000- HK$3,000 (127.77 USD – 383.32 USD) per hour, varies based on the mediator's request, qualifications and complexity of the case.

The establishment of Mediation Act B.E.2563 (2019) shall be one factor that supporting the THAC mediation service as THAC is considered as a mediation provider under the Act. Due to the enforceability of the settlement agreement which is under the scope of the Mediation Act and resulted from the mediation provided by THAC, there should be more parties consider mediating with the settlement agreement. The recent change of Mediation's Fees may be able to encourage more parties to consider using THAC mediation service, while this change may not attract profound Thai and foreigner mediators as before.

5. Court-Annexed Mediation

Thailand's Courts of Justice has been facing the problem of case backlog for decades. One old scheme to solved this problem is recruiting more judges and established more courts. However, such a scheme requires high budget and cannot provide sustainable resolutions as Thai Judges' salaries are very high compared to the courts' fees and international standard.[208] Therefore, case management and Alternative Dispute Resolution have been considered as a better choice for backlog problem. Mediation is an Alternative Dispute Resolution that has been used and developed in Thailand's Court of Justices more than others ADR.

Mediation was introduced to Thai Courts of Justice in1994 when Justice Boonsin Tulagan was the Chief Justice of the Civil Court invited Justice John Clifford Wallace of the US Court of

[208] Wichit Chaitrong, *Researcher pushed for revamp of pay system at Thai courts,* The Nation Thailand (Aug. 19,2018) *available at* https://www.nationthailand.com/Economy/30352484.

Appeals for the Ninth Circuit to present an introductory of mediation lecture in Thailand.[209] Mediation has been including in the strategy of the Court of Justice and has proved its success.[210]

5.1 Law and regulations regarding Court-Annexed Mediation

5.1.1 Civil Procedure Code

According to Civil Procedure Code, the courts of justice have the power to order the parties or a party of the case to come to the court in person, even if that party has an attorney to present the case if the court believes that doing so will lead to the settlement of the dispute.[211] No matter stage of the cases before the final judgment, courts can consider to settle the dispute or mediate the cases. The Civil Procedure Code empowers the courts to try to mediate the cases whenever they foresee the possibility to settle the disputes between parties, not only during the trial of the Court of First Instance but also in Appeal and the Supreme Court.[212]

For the effective of in-court mediation, when the court thinks appropriate or by the party's request, the court may consider proceeding the mediation in private sessions with one side of the parties with or without its attorney. The court itself can proceed with the mediation or it can appoint a person or a group of persons to assist the court in mediating.[213]

Besides other benefits of court-annexed mediation is the legal effect of the settlement agreement from the mediation. In the case where the parties can reach a settlement agreement, the parties can request the court to enter a judgment on the term of such agreement.

---

[209] A. Jitdhamm, *The development of mediation system in the court of justice,* 70 (2009), *available at* http://elib.coj.go.th/Article/d56_2_9.pdf.

[210] Sorawit Limparangsi, *Developin mediation work in the Court of Justice, Journal of the Ministry of Justice,* 113-114 (May, 2007), available *at* http://elib.coj.go.th/Article/50_5_9.pdf.

[211] Thailand's Civil Procedure Code Section 19.

[212] *Id,* section 20.

[213] *Id,* section 21.

After reviewing that the settlement agreement is not contrary to the laws, the court may render a judgment on agreed terms. The ground to appeal this judgment is very limit.

5.1.2 The President of the Supreme Court's Rule of Mediation B.E.2554

The President of the Supreme Court's Rule of Mediation B.E.2554 (2011) is the set of rules provided the detail of court-annexed mediation proceedings. This rule applies to the mediation, which proceeds within the courts of justice after the case is submitted to the court. On June 30th, 2017, the was an issue of the President of the Supreme Court's Rule of Mediation B.E.2554 No.2 containing some minor changes to the rule as the results of the establishment of the Specialized Appeal Court and the internal reorganization of the Court of Justice administration. Since April 2016, the work relates to court-annexed mediation is under care and support of the Office of Judicial Affairs, Office of Judiciary.

5.2 General Principles of Court-Annexed Mediation

5.2.1 Court-Annexed Mediation is based on parties' consent

Even though the court is empowered to try to settle the dispute between the parties, the case will not get into the mediation process until both parties agreed to mediate their dispute. The parties always reserve the right to dismiss itself from the mediation and resume to their judicial proceeding anytime.

5.2.2 The mediation proceeding is supervised and controlled by the court

According to the Civil Procedure Code and the President of the Supreme Court Rule of Mediation, Chief of the Court (the President of the Supreme Court, the President of the Court of Appeal, the President of the Regional Courts of Appeal, the President of the Specialized Appeal Court, and the Chief Justice of the Courts of First Instance, the Chief Judge of Provincial Court, or the person designated by such persons for execution of these rules), or judged in quorum who in charge of the case may make the consideration whether such dispute should be mediated, beside

the request of the parties. The court panel has the power to try the mediation or to refer the case to the mediation center of the court by giving some instructions and time limitation to the parties and mediator to follow.

The appointment of mediator of court-annexed mediation relies on the court's consideration. In the case where the court prefers the mediation to be assisted by a mediator or a group of mediators, the court may appoint the mediator(s) in the list registered with the court or the may appoint judicial service officer, court officer or court staff in the account of appropriation and parties' satisfaction. The court may continue its procedural at the same time while the mediation is proceeding if the mediation causes unduly delay.

The mediator appointed in court-annexed mediation has to report the Chief of the Court or the judges in quorum about mediation proceedings and follow the instruction and time limitation given. When the mediation is complete, the mediator has to report to the court for proceeding the following process promptly.

5.2.3 Scope of Court-Annexed Mediation

All kinds of Civil disputes can be mediate in-court, while only compoundable criminal cases may be mediated. These scopes of cases are different from mediation proceedings by other state agencies, which are governed by Mediation Act.[214] Each Court of Justice may establish a mediation administrative committee consisting of five to nine judicial service officers to plan court's mediation strategy and prescribe the type of dispute that should be encouraged to mediate. Without the mediation administrative committee, the Chief of the Courts may specify the nature and type of the case that the mediation center of the court should invite the parties to mediation. However, this does not affect the type of disputes that can be mediated by-laws

[214] Refer to section 3.4 (2) and. 3.4 (11)

5.2.4 Mediators in Court-Annexed Mediation

Qualifications of Court-Annexed mediators are stipulated in the President of the Supreme Court's Rule of Mediation B.E.2554 and Civil Procedure Code.

1) **Judges in Quorum:** According to Civil Procedure Code, when the court sees the possibility for the parties to settle their dispute, the court may proceed mediation and request the parties to attend the trial in person. Under section 10 of the President of the Supreme Court's Rule of Mediation B.E.2554, in the case where a party is requesting judges in the quorum for mediation during the court trial, the quorum shall ask another party for its agreement. When all parties agree to mediate their case in court, the judges' panel may process the mediation forum itself or refer the case to the mediation center of that court. In the case of non-referring, the panel may assign the case to a judge or judges in the panel to take care of the mediation proceeding. Furthermore, under section 17 of the rule, the case can be referred to other courts for the benefit of the mediation.

The judge who mediated the case would be assigned to be in the quorum, which has the authority to decide the case only when the mediation was terminated because the parties can settle their dispute or the parties agreed to withdraw the case from court. This provision assures that the judge will decide the case which was not settled in mediation without prejudice.

2) Registered Mediators: After the judges in quorum with the consent of all parties, considers processing the case by mediation. The quorum may continue the mediation proceeding itself or refer the case to the mediation center of that court. Under the administration of the mediation center, the chief justice of the court or the panel will appoint a mediator who was registered his or her name with the court to assist the court with mediation.

The mediator list register with the court of justice will be updated every two years. The number of mediators each court needs will be announced by the Secretary-General of Office of the Judiciary, according to the request from each court. The qualifications of the mediator of court-annexed mediation are prescribed in the President of the Supreme Court's Rule of Mediation

B.E.2554, section 51, The applicant who want to enroll to the list of court's mediators must have these following qualifications;

(1) being not less than 30 years of age,

(2) having an educational background not lower than bachelor degree and having working experience not lease than five years or having experience in the fields that may be beneficial to mediation for not less ten years,

(3) having attended the mediation training course regarding techniques or methodologies provided or certified by the Office of the Judiciary,

(4) having experience in mediation proceedings in courts or in the Office of Judicial Affairs, not less than ten cases,

(5) available to devote time to perform as a mediator,

(6) not being a misbehave person or lacking good moral,

(7) not working in any career or profession that will affect the performing as court's mediator or may spoil the Court of Justice reputation,

(8) not being a bankrupted person,

9) not being under the court's order to be an incompetent person or quazi-incompetent person, or being insanity,

10) not having been sentenced to imprisonment by a final judgment except for negligence or petty offenses,

11) not being a Judiciary Officer under the law on the judicial service of the Court of Justice;

12) not being a lay judge.

According to the President of the Supreme Court's Rules of Mediation amendment in 2017, the applicant who was a judge, beside the qualification above he or she must have experience in adjudication not less than five years but does not require to attend a mediation training course or

have experience in mediation in court or the Office of Judicial Affairs. These requirements also apply to the applicant, who was a judicial service officer who had experience in mediation not less than ten years.

The register of mediators shall expire at the end of every two years. Mediators may be re-registered if they had performed their mediation's duties well, had been available, and had mediated not less than 20 disputes each year. The mediator shall discharge his or her duties following the regulations, notifications, ethics, or other guideline issued by the Court of Justice. A registered mediator who is appointed as a mediator in the case shall be entitled to remuneration and expenses under the rules and procedures prescribed by the Secretary-General of the Office of the Judiciary.

3) Judicial Service Officer: The Chief of the Court or the judges in quorum may appoint one or more Judicial Service Officer, Court Officer, Court Staff, to be a mediator(s) of in-court mediation. The appointment of a Judicial Service Officer, Court Officer or Court Staff in other courts to be a mediator in court, can do only with the consent of that person and with the approval of the Chief of the Court where that person is in permanent service. However, the mediator who is in the said positions is not entitled to remuneration and expenses for performing in mediation.

4) Third Person: The appointment of the third person who is not registered mediator of the Court can is permitted if the parties of the dispute agreed and promised to responsible for the mediator's remuneration and expenses. It should be observed here that this kind of mediator is not required by the President of the Supreme Court Mediation Rules to have any specific qualifications which are different from the registered mediator. However, all mediators in court-annexed mediation must perform their proceeding under the other rules, and ethics prescribed by the Courts of Justice.

5.2.5 The result of Court-Annexed Mediation

One of the best benefits of Court-Annex Mediation is its regal result. After mediation proceedings, in the case where the parties of the dispute can agree to settle their dispute, they can

either request the court to render the judgment on agreed terms or withdraw the case from the court. While other settlement agreements from out-of-court mediation are treated as general contracts, which will be in the form of court's judgment only when the deal was breached, and the party brings the dispute to court to enforce. In such circumstances, the court will process all procedures all over again unless the settlement agreement is under the Mediation Act 2019.

5.3 Court-Annexed Mediation Procedures

1) Commencement of mediation proceeding: Court-Annexed mediation can be initiated in three ways. First, when the Chief of the Court or the judges in quorum has an opinion that the dispute between parties can be settled by mediation. Secondly, when all parties in the case agreed to mediate their dispute and inform the judges in quorum their intention. The other way is when a party in the case notifies the court's mediation center that he or she wants the dispute to be mediated. However, in all cases, the mediation in-court can begin just when all the parties in the dispute agree to do so. The judge in quorum has to ask all parties for their volunteer to mediate. In the case where one party notifies its preference for mediation to the court's mediation center, the center has to ask other parties of the dispute for their consent then inform the court's panel before beginning the mediation.

After all parties agreed the mediate their dispute in court, the judges in quorum may mediate the case itself or assign the case to a judge or judges in the quorum to process the mediation.[215] Alternatively, they may refer the case to the mediation center of the court and appoint a registered mediator to mediate the dispute. Otherwise, the panel can appoint a judicial service officer or a staff of the court whom the Chief of the Court assigned to be a mediator in that court to assist the court mediating the case.

[215] The President of the Supreme Court's Rule of Mediation B.E.2554 section 11.

2) Mediator Disclosure: The mediator is required to disclose any circumstance that may give rise to justifiable doubts regarding the mediator's impartiality or independence from the time of his or her appointment and throughout the mediation proceeding.[216] The party may challenge the mediator if he or she found the fact that can lead to the mediator's partiality within seven days after his or her awareness. However, the challenge must be done before the end of the mediation. The judges who in charge of the case will make the consideration whether the removal should be made. The court may terminate the mediation or appoint another mediator to continue the mediation.

3) Conduct of Mediation: The mediator may discuss with the disputing parties for the determination of ground rules before the commencement of the mediation process. When Court-Annexed mediation is processed by a mediator, he or she will be the one who controls the proceedings with the assistance from the court's mediation center and supervision of the court. The mediator is allowed to review and study the case before beginning the process. Prior to the commencement of mediation, the mediator shall notify the parties that all of the offers and the facts giving in the mediation are confidential and do not bind the parties or the court. The parties cannot raise those facts as evidence in court. Also, in the case that the settlement is not meet, all facts and offers that used in the mediation proceeding will not have any effect on the court consideration and judgment.[217]

The mediator may request the disputing parties to provide the factual account or preliminary information of the dispute, as well as the proposal for the dispute resolution, to propose that such information be shared between the disputing parties for the benefit of mediation. The

[216] *Id.* Section 19.

[217] *Id.* Section 26.

parties may request the mediator to take any of those actions. In such case, it is under the consideration of the mediator to follow the request or not.[218]

The dispute parties should attend the mediation by themselves. If the party is a justice person, it may appoint a representative authorized to make a decision to be in the mediation process where the appointment in writing must be summited to the mediator.[219] The mediation process shall be conducted in camera, with no record of detail except under the request of the parties agreed to record the full or part of the process at their own expenses. For the benefit of the mediation, the mediator can request all parties or any party to be in the meeting with or without their counsel.

4) Conducting of the settlement agreement: In making a compromise agreement (settlement agreement), the mediator may consider conducting the agreement itself or let the parties' counsel or staff of the court's mediation center to do so. The mediator may request the staff of the mediation center to review the settlement agreement, whether it was against the laws when the mediation center did not prepare the agreement. The parties may ask the court's opinion regarding the appropriate counsel's fee to prescribe in the agreement. Where conducting the settlement contract may cause the parties any expense, the mediator can do it only when the parties agreed with and promise to be responsible for the cost.

5) Proceeding Time: The mediator shall process the mediation within the timeline given by the judges in quorum or the Chief Judge of the Court. The extension of the proceeding time, which will benefit the parties and do not cause undue delay may happen when the court thinks appropriate or when the mediator makes the request to the court. The mediator shall report the court in no time when notices that any parties of the dispute are trying to delay the mediation proceeding.

---

[218] *Id.* Section 27.

[219] *Id.* Section 15.

6) Termination of Mediation proceeding: The termination of mediation process happens when; 1) the disputing parties have settled the dispute by withdrawing the case or request the court to render a judgment on agreed terms; 2) any of the disputing parties have withdrawn himself or herself from the mediation process; 3) the mediator could not successfully complete the mediation process within the given time frame; 4) the mediator considers that the dispute could not be settled by mediation; 5) the Court considers that the dispute could not be settled by mediation or the mediation is no longer beneficial for the case. [220] The mediator has to report the Court about the termination and the result of the mediation without delay for further proceedings.

7) Confidentiality: Notably, the disputing parties in court-annexed mediation have the rights the agree on the confidentiality of the fact and other information that was used in mediation. According to section 37 of the President of the Supreme Court Rules regarding Court-Annexed mediation, unless otherwise agreed by the disputing parties, all information relating to mediation shall be kept confidential, except necessary for implementation or enforcement of a settlement agreement. Furthermore, in the case where the parties can agree to settle just some part of the disputes in their case or agreed on some facts and consent to allow the Court to rely on such agreement, the mediator shall record the agreement according to the parties intent and report to the Chief Judge of the Court or judges in the quorum.

8) Admissibility of evidence in other proceedings: It is prohibited for a party, the mediator, any third person, or any person involved in the mediation to rely on, introduce as evidence or give testimony or evidence the confidential information relating to mediation in arbitral proceedings, judicial proceedings, or other proceedings irrespective of the form of information or the evidence. The information which considered to be confidential are; 1) the fact that a party was willing to participate in mediation proceedings; 2) party's opinion or suggestion regarding the

[220] *Id.* Section 35.

mediation proceeding or a possible settlement of the dispute; 3) party's admission or statement made in mediation proceeding; 4) Any proposal made by mediator; 5) The fact that the party had shown its willingness to accept mediator's proposal for settlement; 6) a document specifically made for mediation proceedings. The evidence that is admissible in arbitral, court, or other proceedings does not become inadmissible as it was used in a mediation.[221] Requesting the Court to issue the warrant or summon which consider as credential information, or evidence is forbidding, except for implementation or enforcement of the settlement agreement.

9) Remuneration and Expenses: The disputing parties do not bear any cost for using the service of the Court's mediation Center or the registered mediator. The registered mediator who is appointed to a case is entitled to remuneration and expense under rules prescribed by the Secretary-General. However, in the case where the parties appointed the mediator, who is not the court's registered mediator, each party is equally responsible for the remuneration and expenses unless the parties agreed otherwise.

When the mediator considers that the service of a third party is required for the benefit of the mediation, it is acquired only when the parties have agreed to be responsible for such service cost. The Court Mediation Center has to make a record in writing for the parties to sign that they will be responsible for the third party's service expense. The parties have to deposit the guarantee with the Mediation Center. Without the deposit of the right amount requested, the service of the third party will be postponed, but it will not be the cause for terminating the mediation proceedings.

10) Mediation in the Appeal Courts: According to the President of the Supreme Court Rules of Mediation, the Appeal Courts and the Courts of First Instance may persuade the dispute parties to settle their dispute by mediation in the Appellate level. The parties who prefer the mediate their case can inform their willingness to the Mediation Center of the Appeal Court. The mediation

[221] *Id.* Section 38.

in the appellate level can be done at the Court of First Instance or the Court of Appeal. The mediation proceedings in the Appeal Court are under the same rules of the mediation proceeding in the Court of First Instance. In the case where the mediation conducted in the Court of First Instance and the dispute was settled if the parties want the Appeal Court to make a judgment according to the settlement agreement, the rules require that the parties sign their names in front of the judge who responsible for the case, then the judge shall sign the in the agreement and conduct the report of the mediation procedure and sent both documents to the appeal court in no time for the further proceedings.[222] The communication and handing off the documents between the Court of First Instance and the Appeal Court can be done electronically.[223]

5.4 Current Situation of Court-Annexed Mediation

Court-Annexed Mediation has been proving its success in court case management for more than 30 years. The number and percentages of in-court cases that were referred to in-court mediation by the judge quorum sand court mediation centers are increasing every year. According to the annual judicial statistics report of Thailand in 2016 that illustrate the number of cases that using court-annexed mediation in the court of justice nationwide there were a total of 388,900 cases law that went through in-court mediation proceeding consisted of 318,709 customer cases, 53,344 civil cases, 16,839 criminal cases, and eight environmental cases. The report also presents the successful rate of settlement of 88.19% in customer dispute, 64.65% in civil dispute, 49.08% in criminal dispute and 87.50% in environmental dispute.[224]

---

[222] *Id.* Section 47.

[223] *Id.* Section 48.

[224] Statistical Summary of Cases under the Court of Justice of Thailand in 2016, *available at* https://www.coj.go.th/th/page/item/index/id/9.

The reasons behind the success of Court-Annexed Mediation are the system of regulations, the enforceability of the settlement agreement as it can be recorded in the form of judgment, time-saving, and free of charge other than the general court fees. The court-annexed mediation also does not have any limit in the amount of claim. However, it may not make an excellent contribution to the international commercial cases since all procedure is processed in Thai Courts with all Thai staff and rules and regulations which can cause a considerable barrier to the foreign parties.

5. Conclusion

Meditation has been a part of Thailand Judicial system for a long time as its characteristics and natures conform to the country's culture. Many government agencies and organizations have been using meditation as a primary dispute resolution mechanism. Notably, promoting the use of mediation from the Court of Justice to solve their overload cases problem is very successful.

Interestingly, during the time of this study, mediation has made its significant development in Thailand. In May 2019 the first Mediation Law of Thailand was enacted under the name of "The Mediation Act B.E.2562". This law aims to manage and organize the rules and regulations regarding mediation that were issued and applied by various government agencies and provide the provisions on the qualification and registration of mediators. The robust contribution of this Mediation Act is the provisions regarding the enforcement of the settlement agreement conducted from mediation. The parties of the settlement agreement can request the court to enforce the agreement when the other parties deny to comply the obligations under the agreement without going through the whole judiciary proceeding and with a very limit ground of refusal. However, this law is governing only the mediation that process by the government agencies and organizations with a registered mediator under the Act and limit the amount of claim not to exceed five million baht. Due to the said limitation of the application of the Mediation Act 2019, this law may not provide much benefit to international commercial disputes.

Chapter 4

Introduction to Arbitration in Thailand

This chapter aims to reveal the characteristics and provide the general perspectives of arbitration in Thailand. It will demonstrate the change and development of laws and practices in this field from the past to the present. It can rely on primary information for those who may come across the arbitration in Thailand.

1. History

1.1 Before the Establishment of the Arbitration Act

Arbitration had existed in Thailand since antiquity before Thai law was first recorded in writing. The arbitration concept in the said law was similar to modern practice nowadays. According to such law an arbitrator was clearly defined as a person who was appointed by the parties to settle the dispute, and the parties agreed to be bound by his decision. The parties of the dispute could not bring an action against the arbitrator for liability due to an erroneous decision. An arbitrator's decision was final and could not be challenged. This law remained and later appeared in the Code of the Three Great Seals (Komai tra sam duang), which was promulgated in 1805 during the beginning of the Chakri Dynasty in the reign of King Rama I.

Later in the era of King Rama V, legal reforms were first adopted from western legal institutions. In that time, the Civil Procedure Act of 1896 was promulgated instead of the Code of the Three Great Seals. There was a chapter in the Civil Procedure Act that laid out the rules for in-court arbitration. According to the Act, the parties could agree on their pending case in the Court of First instance to be decided by arbitration. The court would appoint a person or several persons whom the parties chose to settle their dispute to be arbitrator, and this arbitration would be closely

supervised by the court. The arbitral tribunal has to decide the dispute under the law and could request court assistance for any order above its power, such as the issuing of a witness summons. An in-court arbitral award would not bind the parties or be enforceable until it had been filed with the court, then the court would deliver the judgment followed the award unless there are some erroneous in such an award. The judgment would be final and could not be appealed unless the judgment was inconsistent with the arbitral award. Even though, there was not any provision in the 1896 Civil Procedure Act mentioned about extrajudicial arbitration, Deeka no. 242 Ror. Sor.118, judgment of the Supreme Court laid out that it was parties' former right before the Act to refer their dispute to arbitration without court permission. Also, there was no explicit prohibition in the law.

After that, in 1908, the Code of Civil Procedure was promulgated. This Code contained all the same provisions as the Civil Procedure Act of 1896 but had another ground of appealing. Besides the appealing ground due to inconsistent arbitral award judgment, the parties also had the right to appeal the judgment in the case that there was a dishonest act of arbitrator, and the award was conducted without good faith.

In 1935, the 1986 Civil Procedure Act was replaced and repealed by the Code of Civil Procedure of 1934. With occasional amendments, the Code of Civil Procedure of 1934 has been in force since. There are both in-court and extrajudicial arbitration provisions in this code. However, most of them are about in-court arbitration. The Code gives more detail about the in-court arbitral procedure (i.e. With the permission of the court during proceeding of the court of first instance parties can agree to settle all or some of their disputes in the case by arbitration, appointment of arbitrators, arbitrators challenge, conduct of arbitral proceeding, fee and commission, award and award detail, termination of arbitration agreement, settlement of the dispute concerning arbitration agreement, and the appeal of in-court and extrajudicial arbitration award). The sole provision about extrajudicial (out-of-court) arbitration was about the enforcement of the award, while other

provisions related to procedures of in-court arbitration. These reflected the 'ousting-of-court' concept of the Thai court by 1935. Whereas the validity of arbitration agreement was recognized, the court did not entirely enforce it, as the Supreme Court judgment in 1975 indicated that arbitration agreement could not bar the parties for bringing legal action before a court. However, in the case that parties already arbitrated their dispute and the debtor did not voluntarily follow the award, the winning party could not bring the award to a court for enforcement. The Thai court at that time would consider an arbitral award as evidence of the debt of the lawsuit the winning party brought to court, then a full trial of the case with the original dispute would be conducted all over again. However, this provision was replaced and repealed in 1987 due to the enactment of the Arbitration Act B.E.2530 (1987).

1.2 The First Modern Arbitration Law

It is appropriate to say that the Arbitration Act B.E.2530 (1987) was the first modern arbitration law of Thailand governing out-of-court arbitration. This Arbitration Act was enacted to ensure that the country had met its obligation under the international conventions that it had joined. As a result of supporting the use of arbitration and creating an international business-friendly environment, Thailand joined the 1923 Geneva Protocol on Arbitration Clauses in 1930, continually with the 1927 Geneva Convention for the Execution of Foreign Arbitration Awards in the following year, and became a Contracting State of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 in 1959. While the Civil Procedure Code still governs in-court arbitration, the Arbitration Act B.E.2530 (1987) thoroughly described the out-of-court arbitration proceeding. The Act introduced some principles that advanced the development of arbitration in Thailand for the first time. For instance, the Act ensured the parties that the court would recognize and enforce arbitral awards subject to some conditions. In fact, the recognition and enforcement of arbitral awards have long been a core problem of arbitration law in

Thailand. Also, the court never recognizes this principle before the application of the Arbitration Act B.E.2530 (1987).

1.3 Establishment of the Arbitration Institution

Besides the promulgated of the 1987 Act, the establishment of the Thai Arbitration Institute ("TAI") in 1990 under the supervision of the Ministry of Justice was another factor in promoting arbitration in Thailand. Due to the lack of understanding about its benefit and the limited service, arbitration was rarely used in Thailand. To support the uses and understanding of arbitrations, several schemes were organized and promoted by TAI, such as meetings, seminars, training programs, round-table discussions, publishing about arbitration, and joining with academic institutions to incorporate arbitration in their curricula. To avoid reproaches about its independence and neutrality as it was administered and supervised by the Ministry of Justice, which was a government organization, TAI reformed its administrative structure following the legal reform of Thailand's Constitution in 1997. Since 2000, TAI has been a constitutionally independent entity, as a part of the Alternative Dispute Resolution Office of the Judiciary. In April 2016, due to the internal reorganization of the Office of the Judiciary, which separates the administration of mediation work and arbitration work from, TAI became an independent institute under Office of the Judiciary.

Although there were many advantages in the 1987 Arbitration Act, various drawbacks and ambiguous provisions still existed. As a result, international commercial arbitration was rarely used in Thailand. For example, no provision gave a specific principle about the arbitrability of the cases, the separability of the arbitration agreement, and the Competence-Competence doctrine. Also, the separation provisions between the enforcement of domestic arbitral awards and the enforcement of foreign awards led to double standards that had caused many problems in classification.

Furthermore, too much court assistance and supervisory authority toward arbitration proceedings also caused negative attitude to foreign parties.

1.4 The Current Arbitration Law

After the use of the 1987 Arbitration Act for fifteen years together with the consideration of international trends, Thailand tried to reach the international standard by improving its arbitration law. The Arbitration Act B.E.2530 (2002) is the country's current arbitration law, which became effective since April 30, 2002. This Arbitration Act does not distinguish between domestic and international cases and awards. Besides some minor divergences, this law is substantially based on the UNCITRAL Model Law 1985. The Arbitration Act B.E.2545 (2002) gives precedence to "party autonomy," as in most situations, the parties can design and choose their own choice in arbitrations, and when the parties fail to agree on some procedure the arbitral tribunal will have the power to decide for the parties. Besides, this law has limited courts' supervisory authority over arbitration proceedings. Furthermore, this Arbitration Act has introduced many new doctrines to Thailand arbitration law, such as Competence-Competence, separability, and interim measure.

On the 13 April 2019, the Arbitration Act (No.2) B.E.2562 enter into force. This Act aims to facilitate and eliminate the restriction for the work of foreign arbitrators and lawyers in arbitrations that process in Thailand. This Act introduces the new chapter on Foreign Arbitrator to the Arbitration Act B.E.2545 (2009).

Now, arbitration in Thailand is in a state of developing. Even though litigation is still being the primary means of dispute resolving domestic disputes, arbitration is gaining more acceptance and popularity among domestic and foreign people in the business. Although, it has been 13 years since the 2002 Arbitration Act was promulgated and applied in Thailand. Still, there are some gaps and problems both in the text of the law, its application, and also interpretation.

2. Arbitration Legal Frameworks

2.1 International Convention and Treaties

1) The Geneva Protocol on Arbitration Clauses of 1923

Thailand became a Contracting State of the 1923 Geneva Protocol on Arbitration Clauses in 1930. The Geneva Protocol 1923 is an International Convention signed at Geneva, Switzerland, regarding the recognition and enforcement of arbitration agreement. Thailand enacted the Act regarding the enforcement of arbitration agreement B.E.2473 (1930) to implement the Convention to national law.

2) The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927

Thailand became a Contracting state of the 1927 Geneva Convention on the Execution of Foreign Arbitral Award in 1930. The Geneva Convention is the convention that requires the Contracting State to recognize and enforce arbitral awards making in other Contracting State jurisdictions.

3) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

In 1959, Thailand becomes a Contracting State of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention 1958). The New York Convention is the most accepted Convention regarding the recognition and enforcement of arbitration agreements and arbitral awards. This Convention requires the member states to recognize and enforce the arbitral agreement and arbitral awards that rendered outside its territory. Due to some debate as to whether the Code of Civil Procedure adequately implemented Thailand's obligations under the Geneva Convention and the New York Convention, the country enacted the Arbitration Act B.E.2530 (1987) to ensure that it met its international obligation.

As a result that Thailand did not declare any reservations at the time, it ratified the New York Convention according to Article I(3) of the Convention; it has an obligation to recognize and enforce foreign arbitration agreements and arbitration regardless of the country where it was rendered and no limit to the commercial disputes.

4)Bilateral Treaties

To promote the investment climate of the country, Thailand enters into several Bilateral Treaties. To be exact at the time of the study, there are 42 Bilateral Treaties that the country concludes. However, the Treaty on International Arbitration between Siam and the United Kingdom 1925 is the only treaty that directly regards international arbitration. While other BITs are investment agreements that include in arbitration clauses.[225]

5) Others International Agreements regarding Arbitration

Although Thailand signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention), the country has not ratified it. Experiencing several high-profile cases in which state agencies are ordered to pay an impressively large amount of damages to private parties, Thailand might need more consideration before becoming a contracting state of ICISID.[226]

In 1994 and 1997 Thailand signed the Agreement on Judicial Assistance in Civil and Commercial Matter and Co-Operation in Arbitration between the Kingdom of Thailand and the People's Republic of China and Agreement on Judicial Assistance in Civil and Commercial Matter and Co-Operation in Arbitration between the Kingdom of Thailand and Australia, respectively.

---

[225] The list of Bileteral Treaties which Thailand is party of, *available at,* https://investmentpolicy.unctad.org/international-investment-agreements/countries/207/thailand#.

[226] Sorawit Limparangsri, *Alternative Dispute Resolution in ASEAN: A Contemporary Thai Perspective*, 2 TAI Journal of Arbitration, 13, 29-30 (2007), *available at* http://www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf

According to these agreements, the Contracting Parties agree to co-operate with each other in serving judicial documents and obtaining evidence in civil and commercial matters. The judicial assistance is requested and rendered through the Central Authorities of the Contracting Parties. The office of Judicial Affairs, Ministry of Justice is the Central Authority of Thailand. Both agreements contain similar provisions related to judicial assistance. For example, the Court of either country can request the Competent Authority of another country to obtain evidence in civil or commercial matters for use in judicial proceedings and request another country's extracts from judicial records and legislation concerning the cases in which the nationals of the requesting party are involved. However, in the scope of co-operation in arbitration, there are some differences between these two agreements. While the agreement between Thailand and China the Contracting Parties agree to promote arbitration as a means for the settlement of commercial and maritime disputes, the agreement with Australia mentions only commercial disputes. Furthermore, in both agreements, the Contracting Parties agree to encourage the arbitration organization in their respective territories to provide each other, on request, with information, a list of arbitrators, facilities, and convenience for arbitration proceedings.

In addition, a 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, which applies to disputes concerning interpretation or application of the ASEAN Charter and other ASEAN instruments, arbitration is also one of the means of settlement.

2.2 Arbitration Act B.E.2545 (2002)

The Arbitration Act B.E.2545 (2002) entered into force on 30 April 2002. This law was enacted to replace the Arbitration Act B.E.2530 (1987). The Arbitration Act 2002 is the current arbitration law if Thailand deals with the out-of-court arbitration. This law was drafted mostly based on the UNCITRAL Model Law on International Commercial Arbitration 1985

before its amendment in 2006. However, this Act does not distinguish between domestic arbitration and international arbitration, as well as does not limit only to commercial disputes.

The Arbitration Act 2002 introduces many new concepts and doctrines concerning arbitration to Thai arbitration law. The Act provides parties the freedom to determine the applicable law, the place of arbitration, the language used in arbitration proceedings and the arbitral proceedings in their agreement or later. The Competence-Competence and Separability of arbitration agreements also included in the law.

Furthermore, the Arbitration provides the arbitral tribunal more power in controlling the arbitration proceeding, and limited court intervenes in arbitration proceedings comparing to the old arbitration law (the Arbitration Act 1987). For instance, the provision provided court assistance to extend the time to submit the dispute to arbitration and the time for an arbitral tribunal to render the awards. However, the Act 2002 still remains court power in rendering interim measure, requesting evidence, appointing an arbitrator and enforcing arbitral awards.

2.4 The Amended of Arbitration Act

On 13 April 2019, the Arbitration Act No.2 B.E. 2562 (2019) enters into force. This law amendment of the Arbitration Act B.E. 2545 (2002) by adding a chapter regarding Foreign Arbitrators. The Arbitration Act No. has the primary purpose of facilitating and eliminating the restriction on the work of foreign arbitrators and foreigner representatives who enter the country for arbitration proceedings conducted in Thailand. According to the new arbitration law, the foreigner who enters the country to work as an arbitrator or representative of the parties of the arbitration that administrates by the arbitration institutions in Thailand can request the certificate from the arbitration institutions to process their VISA and work permit. During the proceedings

of the work permit by authority agency, the arbitrator or representative is allowed to process their work according to the certification. [227]

The draft law was proposed to the Cabinet in 2017 by the Thai Arbitration Institute, Office of the Judiciary (TAI). During the drafting process of the new arbitration act, besides the goal to facilitate foreign arbitrator and foreign representative for arbitration that seat in Thailand, the issue regarding the separation of arbitration law for domestic arbitration and international arbitration was raised. The draft include the definition of international arbitration and the separation of application of the Arbitration Act 2002 by limit its scope of application of the Act to domestic arbitration, except the provisions regarding the enforcement of arbitration agreement (section 14), the interim measure of protection (section 16), the enforcement of arbitral award (section 41,42) and the refusal of arbitral award enforcement (section 43,44). However, after a long determination of the draft by government bodies, the idea, and provisions to separate the application of law between domestic arbitration and international arbitration were eliminated.

3. In-Court Arbitration and Out-of-Court Arbitration

Under Thai laws, arbitration can be classified into two types which are Arbitration in Court (Annex Arbitration) and Arbitration out-off court. The Annex arbitration is the arbitration that controlled by the Civil Procedure Code B.E.2477 (1934), Division II, Title II Chapter 3, Section 210 to Section 222. While the Out of Court Arbitration is governed This law deals with in-court arbitration or court-annexed arbitration.

Under the Thai Code of Procedure, in-court arbitration is voluntary in nature. The parties in any civil case pending in the court can agree to refer all or any disputed issues to arbitration. This can be done by filing a joint motion to the court. In-court arbitration will be supervised jointly

[227] The detail regarding foreign arbitrator and representative can be found in Chapter 6 on the topic of foreign arbitrator.

by the court. The arbitral award from in-court arbitration has to be submitted to the court for entry as the court's judgment. However, in-court arbitration is not actually used in practice.

Another arbitration law in Thailand is the Arbitration Act B.E.2545 (2002). This Arbitration Act is an out-of-court arbitration law that commonly used in most commercial arbitration in practice both domestic and international disputes. The Arbitration Act B.E.2545 (2002) is the primary source of Thai arbitration law involving international commercial arbitration cases. This law was promulgated to replace the Arbitration Act B.E. 2530, which had been used for a long time but became obsolete due to the social and economic changes of the country. Furthermore, there were many provisions in the old Act that ran contrary to the arbitral principles of other countries. The drafted of 2002 Act was prepared by the Thai Arbitration Institute (TAI) before going through the legislative process and came into force on April 30, 2002. The Arbitration Act B.E.2545 (2002) does not distinguish between domestic and international cases and awards. The 2002 Act was promulgated to support the development of arbitration in Thailand, especially international commercial arbitration, and to decrease the number of commercial cases that come to courts. Therefore, it is substantively based on the UNCITRAL Model Law on International Commercial Arbitration. While UNCITRAL Model Law is wholly about international commercial arbitration, the Arbitration Act B.E.2545 (2002) applied to both domestic and international arbitration, so there are some differences in this law, that evolve from Thai experience.

4. Competent Courts

Thailand has several courts around the country to facilitate and offer judiciary service for the people. Therefore, laws governing the jurisdiction of each court are needed. There are many laws concerning courts' jurisdictions and procedures, such as the Act on Judicial Administration of the Court of Justice, B.E.2543 (2000), the Act on Establishment of Administrative Courts and

Administrative Court Procedure, B.E.2542 (1999), and the Act on the Establishment of and Procedure for Intellectual Property and International Trade Court, B.E. 2539 (1996).

Under the Arbitration Act B.E.2545 (2002), courts play many substantive roles in arbitration. For instance, before or during the arbitration proceeding, the party may request the competent court to issue order imposing a provisional measure to protect his interest; in the case where an appointment of arbitrators is not successful, either party may file a motion with the competent court to appoint the arbitrator as it deems appropriate; the party may challenge the arbitrator and the arbitral award with the competent court; also, the competent court has the essential role in recognizing and enforcing of the award.

According to section 9 of the Arbitration Act B.E.2545 (2002), ***"The competent court under the Act shall be the Central Intellectual Property and International Trade Court, or the regional intellectual property and international trade court, or a court where the arbitration proceeding is conducted, or a court in which either party is domiciled, or a court which has jurisdiction over the dispute submitted to arbitration as case may be."*** However, this section does not concern the law regarding courts' jurisdiction. It concerns just the law that offers the parties choices in court, while the jurisdiction of each court has to follow the establishment act of that court. Consequently, to consider the competent court of the case, the parties must take both section 9 of the Arbitration Act and establishment acts of courts into account. Above all, to be considered as a competent court, courts must have both territorial jurisdiction and jurisdiction (the sphere of activities) over the case. Therefore, the competent court of international commercial arbitration cases must be the court that has jurisdiction over international commercial disputes in Thailand.

The Central Intellectual Property and International Court are one of the specialized courts of Thailand. It was inaugurated in December 1997 by the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E.2539 (1996). Due to

differences from ordinary criminal and civil cases, this court is serviced by judges and associate judges who are specialized in intellectual property and international trade matter.[228] To guarantee specialization, it requires the panel of three judges with expertise in intellectual property or international matters to constitute a quorum, which consists of two career judges and one associate judge who is a layperson.[229]

According to the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E.2539 (1996), the Central Intellectual Property and International Trade Court have the territorial jurisdiction to cover the whole Bangkok Metropolis and other six provinces around Bangkok. However, today, the territorial jurisdiction of the Central Intellectual Property and International Trade Court extends throughout the country, since the regional Intellectual Property and International Trade Courts are not yet established. Therefore, the Central Intellectual Property and International Trade Court currently have exclusive jurisdiction both in civil and criminal matters concerning intellectual property rights and international trade. Civil cases regarding international trade are covered by jurisdiction of the Court, namely:

- civil cases regarding the international sale, exchange of goods or financial instruments, international services, international carriage, insurance, and other related transactions,
- civil cases regarding a letter of credit, trust receipt,
- civil cases regarding the arrest of ships, dumping, and subsidization of goods or services from abroad,

[228] The Central Intellectual Property and International Trade Court, (last visited March. 3, 2015), *available at* http://www.ipitc.coj.go.th/info.php?cid=1&pm=1.

[229] Vichai Ariyanuntaka, *Intellectual Property and International Trade Court: A New Dimension for IP Rights Enforcement in Thailand*, 54 Bod Pundit 9, 9-13 (1998).

- civil cases regarding disputes over layout-designs of the integrated circuits, scientific discoveries, trade names, geographical indication, trade secrets, and plant varieties protection.

Considering from this provision, the Act gives a broad scope of international trade cases that is similar to the meaning of the term "commercial" in the UNCITRAL Model Law.

In addition, section 7(11) of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E.2539 (1996) also indicates that the Central Intellectual Property and International Trade Court has the jurisdiction over civil cases regarding arbitration to settle all disputes stated above. To harmonize the interpretation and application of the laws is the primary reason that enforcement of foreign arbitral awards is deemed to be one of the cases relating to international trade and falling under the jurisdiction of the Court.[230]

As a consequence, it can be concluded that the Central Intellectual Property and International Trade Court is a court that has exclusive jurisdiction of cases involving arbitration regarding intellectual property and international trade matters of Thailand.[231]

In the case of an international commercial dispute that has its arbitration place in Thailand, the Court that has jurisdiction over the area where the arbitration takes place can be considered as one of the competent courts for the parties of the case. For example, if an international commercial arbitration proceeding at the Thai Arbitration Institute (TAI), the Central Civil Court will be one of the courts that jurisdiction over the case, as well as the Intellectual Property and International Trade Court.

---

[230] Sorawit Limparangsri, *Improving on enforcement of International Commercial Arbitral Award in ASEAN; A Thai Perspective*, (2009). *Available at* http://www.aseanlawassociation.org/10GAdocs/Thailand6.pdf

[231] *Id.* 20.

However, if the dispute in arbitration is regarding the administrative contract, the Administrative Court will be the court that has jurisdiction over the case. According to the Act regarding the establishment of the Administrative Court and Procedure of Administrative Cases B.E.2542.

5. Arbitration Institutions

Nowadays, many organizations in Thailand included arbitration as the primary dispute resolution mechanism. To apply to disputes arising on matters under the supervision of the organizations. For instance, the Security and Exchange Commission applies arbitration to the claims between securities companies and private clients; the Office of Arbitration of Department of Insurance applies arbitration to the claims under insurance policies; and Department of Intellectual Property of disputes involving intellectual property.

However, there are 3 active arbitration institutions that deal with the dispute regarding international commercial arbitration, which will be described as followed.

5.1 Thai Arbitration Institute, Office of the Judiciary (TAI)

(1) Brief Background: Thai Arbitration Institute, Office of the Judiciary (TAI) was established in 1990 under the Ministry of Justice to promote and provide arbitration as an alternative dispute resolution to the public. According to the reform of government organizations under the establishment of the Constitution B.E.2540 (1997), Courts was separated from the Ministry of Justice. Since then TAI is a part of the Office of Dispute Settlement under the Office of Judiciary of the Court of Justice. Recently in April 2016, due to the internal reorganization of the Court of Justice, the Office of Dispute Settlement was reform to the Office of Judicial Affairs to take care of Mediation and the Thai Arbitration Institute, Office of the Judiciary which in charge of arbitration.

In the past ten years, 1,368 arbitral awards were issued under the administration of TAI with the total of claim amount over 50 billion Thai Baht. TAI receives approximately 100 new arbitration cases each year.[232]

(2) TAI Arbitration Rules 2017

To respond to the current development in international arbitration, TAI enacts the new set of arbitration rules (the TAI Arbitration Rules 2017) to replace its 2003 Rules.[233] Rules 2017 introduces many changes to meet the international standard and support international commercial arbitration. Some significant changes should be noted as followed;

- The new rule empowers TAI to dispose of a case of it finds there is no *prima facie* evidence of an arbitration agreement between the parties, upon the request of a party. However, it does not eliminate the arbitral tribunal's power to rule on the validity of an arbitration agreement or the scope of its own jurisdiction.
- The TAI reserve the power to consolidate the proceeding for convenience
- Instead of challenging an arbitrator to the Court as mention in the old rules, under the new rules, the challenge of an arbitrator shall decide by the tribunal, or one or more independent adjudicators in the case TAI think appropriate.
- The new rules request the arbitral tribunal to make a preliminary timetable for the proceedings within 30 days from the date where the tribunal was

---

[232] The Thai Arbitration Institute, Office of Judiciary, *Statistical Report of arbitration cases of TAI from 1990 to 2017* [สถิติข้อพิพาทที่รับใหม่และข้อพิพาทที่ดำเนินการแล้วเสร็จตั้งแต่ปี พ.ศ.2533 ถึง พ.ศ. 2561 ของสถาบันอนุญาโตตุลาการ สำนักงานศาลยุติธรรม], *available at* https://tai.coj.go.th/th/content/page/index/id/135844.

[233] The Thai Arbitration Institute, Office of Judiciary, Arbitration Rules 2017, *available at* https://tai.coj.go.th/th/content/page/index/id/18875.

instituted. The rule also provides that the tribunal shall render an arbitral award within 30 days after the date of closing proceedings was declared, and the proceedings must take no longer than 180 days.

- The rules regarding confidentiality are also improved as the parties, arbitrators, and TAI staff are subject to keep arbitral proceedings, pleadings, documents, evidence, hearing, order, and award confident while the old rules required only arbitrators and director of TAI from disclosing an arbitral award to the public without the parties' consent.
- The arbitral tribunal is empowered to render an interim measure of protection upon the request of a party when it deemed appropriate. However, the party's right to request the interim measure order from the court remains.

Even though the Arbitration Rules 2017 of TAI presents the changes that will support to flow of arbitration proceedings, to facilitate the parties and reduce the time of proceedings, some changes are questionable to be a conflict with the Arbitration Act 2002. For example, the power of the tribunal to grant an interim measure and the challenge of the arbitrator.

(3) The Current Situation

TAI has announced the new rules regarding the registration of the arbitrator. Under these rules the applicant must meet the qualifications requested from TAI and has some specialize that will benefit the arbitration. Furthermore, to ensure the transparency of arbitrator's register, the applicant's qualification will be considered by the Committee of arbitrator registration.

Currently, there are 276 Thai arbitrators; the roster consists of former judges, prosecutors, attorneys and experts in many fields, and 21 foreign arbitrators with 18 different nationalities in

TAI Roster of Arbitrators.[234] However, the parties are free to select a person outside the list to be arbitrator under the administration of TAI.

In 2018, TAI prescribed the Announcement of the Office of the Judiciary of the Arbitrator's Fee on the Thai Arbitration Institute Roster of Arbitrators. The rule provides a new set of arbitrator fees to match the current situation. It enters into force on 2 April 2018. The rate is as provides below. [235]

Arbitrator's Fee

Disputed Amount (Baht)	**Sole Arbitrator**
No dispute amounts.	6,000 Baht/ Session
Not exceeding 2,000,000 Baht	30,000 Baht
2,000,001 – 5,000,000 Baht	30,000 Baht + 1% of amount exceeding 2 million.
5,000,001 – 10,000,000 Baht	60,000 Baht + 0.8% of amount exceeding 5 million.
10,000,001 – 20,000,000 Baht	100,000 Baht + 0.6% of amount exceeding 10 million.
20,000,001 – 35,000,000 Baht	160,000 Baht + 0.4% of amount exceeding 20 million.
35,000,001 – 50,000,000 Baht	220,000 Baht + 0.2% of amount exceeding 35 million.

[234] TAI Roster of Arbitrators, *available at* https://tai.coj.go.th/th/content/page/index/id/141186.

[235] The Announcement of the Office of Judiciary (Arbitrator's Fee), *available at* https://tai.coj.go.th/th/file/get/file/201907247cf14e608b60ba91914a47c20bb5700f131553.pdf

50,000,001 – 100,000,000 Baht	250,000 Baht + 0.1% of amount exceeding 50 million.
100,000,001 – 500,000,000 Baht	300,000 Baht + 0.05% of amount exceeding 100 million.
500,000,001 – 1,000,000,000 Baht	500,000 Baht + 0.04% of amount exceeding 500 million.
1,000,000,001 – 2,000,000,000 Baht	700,000 Baht + 0.03% of amount exceeding 1,000 million.
Exceeding 2,000,000,001 Baht	1,000,000 Baht + 0.02% of amount exceeding 2,000 million.

Disputed Amount (Baht)	**More than One Arbitrator**
No dispute amount.	30,000 Baht/ Session
Not exceeding 2,000,000 Baht	60,000 Baht
2,000,001 – 5,000,000 Baht	60,000 Baht + 2% of amount exceeding 2 million.
5,000,001 – 10,000,000 Baht	120,000 Baht + 1.6% of amount exceeding 5 million.
10,000,001 – 20,000,000 Baht	200,000 Baht + 1.2% of amount exceeding 10 million.
20,000,001 – 35,000,000 Baht	320,000 Baht + 0.8% of amount exceeding 20 million.

35,000,001 – 50,000,000 Baht	440,000 Baht + 0.4% of amount exceeding 35 million.
50,000,001 – 100,000,000 Baht	500,000 Baht + 0.2% of amount exceeding 50 million.
100,000,001 – 500,000,000 Baht	600,000 Baht + 0.1% of amount exceeding 100 million.
500,000,001 – 1,000,000,000 Baht	1,000,000 Baht + 0.08% of amount exceeding 500 million.

Arbitrator's fee in the case of rendering an award on agreed Terms or so Called consent Award it different from the rate in general arbitration.

(1) In the case of rendering awards on agreed terms, the parties shall place the arbitrator's fee on the date of Rendering such awards, in the amount determined by the Executive Director of TAI, which will be in the range of 4,500 to 30,000 Baht.

(2) In the case of rendering awards on agreed terms when arbitral proceedings have been already conducted, the parties shall place the arbitrator's fee on the date of rendering such awards, in the amount determined by the Executive Director of TAI, which will bein the following rates:

Dispute amount not exceeding 10,000,000 Baht	4,500 – 15,000 Baht/ time
Dispute amount exceeding 10,000,001 Baht	15,000 – 45,000 Baht/ time

TAI has developed the Electronic Arbitration (E-Arbitration). Under this system, facilitate the communication and arbitral proceedings for the parties, arbitral tribunal, and TAI. After register on TAI E-Arbitration System, the parties submit the request to use the service of TAI online. The documents related to arbitration can be submitted through the online system and all documents used

in the arbitration proceedings will be collected and can be accessed online. The notification regarding arbitration proceedings will be sent to the parties and arbitration via e-mail. E-Arbitration also used in administrating the appointment and meeting regarding arbitration, calculating arbitration fees, and reporting the statistic of arbitration cases in TAI. However, E-Arbitration under TAI administration does not include the meeting and hearing of arbitration proceeding online.

The changes mentioned above can present the active of TAI in developing its service to meet international standards.

3.2 Thailand Arbitration Center (THAC)

(1) Brief History: Thailand Arbitration Center (THAC) was established by the Act of Arbitration Center B.E.2550 (2007). THAC started to provide arbitration and mediation services in 2015. The purpose of THAC is supporting and promoting the ADR system in Thailand. Also, developing ADR system of Thailand to reach international standards and becoming the center of ADR center in Asia. THAC is a non-profit organization with budget supported by the government. The Managing Director manages the institution under THAC's legislation, rules, regulations and committee's decision.[236]

(2) THAC Arbitration Rules 2015

THAC Arbitration Rules 2015 is a model based on the SIAC (Singapore International Arbitration Center) Arbitration Rules 2013. The rules consist of 10 section 90 articles, which includes some exciting matters as stated below.

[236] THAC Executive Committee comprised of Permanent Secretary for Justice as the chairperson, the Attorney General, the Secretary-General of the Office of the Judiciary, the President of Thai Chamber of Commerce, the President of the Federation of Thailand Industries, the President of the Thai Bankers' Association, the President of the Lawyers Council of Thailand, President of the Council of Engineers and President of the Architect Council of Thailand and 5 experts appointed by the Cabinet.

According to the rule, in the case where there is no agreement of the parties on a number of arbitrators, the arbitral tribunal shall consist of the sole arbitrator unless the parties agree otherwise. If the parties cannot agree on one arbitrator within 30 days the President of the Arbitrator Committee of THAC will use its power to appoint the sole arbitrator for the case.

Beyond the Arbitration Rule of TAI, THAC rule provides the provisions for Expedited Arbitration Proceedings for the arbitration that has the amount in dispute less than 100 million Thai Baht, or under the agreement of the parties, and in emergency cases. In expedited arbitration proceedings, sole arbitrator will be appointed and the award must be rendered within 60 from the day the tribunal was instituted. The parties can agree for the tribunal to decide the dispute based on documentary evidence only. Furthermore, the award under this proceeding can be in summary form, and the parties can agree that the reasons for the award do not need to be given.

The challenge of an arbitration by the party is considered by the Committee of THAC and is decision is final. This provision is different from the challenge procedure provided in the Arbitration Act 2002 which may constitute the question on the parties' right to challenge the arbitrator by field to motion to the competent court. However, there is no court guideline on this issue so far.

Differ from TAI rules, THAC arbitration rules do not provide the arbitral tribunal power to issue an interim measure for the parties.

Furthermore, in 2017 THAC has issued Thailand Arbitration Center (THAC) Rule on Small Claims Arbitration, B.E. 2560 (2017), to provide special provisions for an arbitral proceeding that has total of the claim and counterclaim amount not exceed 35 million Thai Baht. These rules govern arbitration conducted by the THAC starting from October 1, 2017.[237]

[237] Thailand Arbitration Center (THAC) Rule on Small Claims Arbitration, B.E. 2560 (2017), *available at* https://thac.or.th/theme/file_system/20190429083849.pdf.

To support the international commercial arbitration in practice, THAC has the specific rules allowing the application of the UNCITRAL Arbitration Rules 2010 in the arbitration proceedings referred to as Procedures of the Thailand Arbitration Center on the Administration of Arbitration under the 2010 UNCITRAL Arbitration Rules 2017. These Procedures for the administration of arbitration under the 2010 UNCITRAL will apply where the Thailand Arbitration Center is designated to administer the arbitration under an agreement to arbitrate, whether before or after the dispute has arisen. Any arbitration under these Procedures shall be administered according to the UNCITRAL Arbitration Rules along with any modifications as provides in Procedures of the THAC on the Administration of Arbitration under the 2010 UNCITRAL Arbitration Rules 2017. The administration fees and arbitrator fees are based on the general fees provide in THAC Arbitration Rules.

THAC has a similar rate of the Institutional Fees to TAI, while the Arbitrator remuneration fees are somewhat higher. Recently in 2018, THAC issues new rate for arbitration that proceeds in Thai language, which considers being approximately 75% lower than the arbitration that uses foreign language in the proceedings. [238]

(3) THAC Current Situation

THAC is considered new comparing to TAI. However, THAC is active in introducing seminars and training courses regarding arbitration and mediation to the public. The institution has built relationship and become partner to many public and private domestic organizations and international ADR institutions around the world. The location and facilities of THAC are more extractive and closer to international standards comparing to TAI. THAC Arbitration Rules, as

[238] Regulation of THAC regarding Arbitrattion Rules no.2 B.E.2562 (2019), *available at* https://thac.or.th/theme/file_system/20190402064900.PDF. (in Thai)

based on the SIAC arbitration rules, are practical and should be effective for international commercial arbitration.

Many sets of rules were introduced to extract more parties. For example, the rules regarding waiver of arbitration fees for government agencies, specific arbitration rules for e-commerce disputes, and the rules reducing arbitration fees for the arbitration that process in Thai language. The number of cases is still low. There were 11 and 17 arbitrations under the administration of THAC in 2018 and 2019 respectively.[239] The study of the performance of THAC should be made to reveal the problems and figure out how to improve the number of cases.

3.3 The Council of Arbitration of the Thai Chamber of Commerce

The Board of Trade of Thailand provides the arbitration service for its members and the public since 1968. The Thai Commercial Arbitration Rules had revised based on ECAFE Rules of International Commercial Arbitration and ECAFE standard for Conciliation and the ICC Rules of Arbitration. After the Arbitration Act 2002 come into force, TCAC revised its rules to meet the changes in the law. However, TCAC focus on the domestic, commercial dispute between its member and rarely used for international arbitration in practice.

4. Arbitration in Administrative Contract

After the Arbitration Act B.E.2530 (1987) enters into force, arbitration clauses spread in Government contract, as the model form of contract provided to the government agencies contain an arbitration clause and the government policy in promotion arbitration in the country.[240]

---

[239] Thailand Arbitration Center annual report 2018-*2019, available at https*://thac.or.th/theme/file_system/%E0%B8%AA%E0%B8%96%E0%B8%B4%E0%B8%95%E0%B8%B4%E0%B8%84%E0%B8%94%E0%B8%B5_3-9-62.pdf.

[240] Arbitration clause was contained in the Model Contract in the Annexed of the Regulation of the Office of the Prime Minister on Procurement. The Office of Attorney-General who responsible in drafting and checking contracts for government and government agency also during that time include arbitration clauses as part of the contract.

Therefore, several various sizes of disputes between government agencies and private parties were submitted to arbitration. In 2001 the Regulations of the Office of the Prime Minister Regarding Complying with Arbitration Awards B.E.2544 (2001) was enacted to guide government authorities in complying with arbitration awards. According to the regulation, the government agencies shall perform their duties according to the arbitration award, except that arbitration award is; contrary to the law; the result of the undue proceedings or the award is not in the scope of the arbitration agreement.[241] After the government sector lost some significant sums cases involved controversial or politicized projects.

In 2004 the Thai Cabinet passed a resolution restraining state agencies in ***any concession agreement***, which is one of the administrative contracts, to agree to settle disputes by arbitration without prior authorization or approval from the Cabinet.[242] As the result of the arbitration award in the dispute between a private consortium and the Expressway and Rapid Transit Authority (ETA), for which the ETA was found at fault in the construction project and had to pay 6.2 billion (150 million USD) to the consortium in 2001, the award exceeding 500 USD in favor of the ITV television channel concessionaire in January 2004, and other awards against the Government.

Later in 2009, the Cabinet passed another similar resolution resolving that ***any contract*** concluded by a public sector entity with private sectors in Thailand or overseas, whether

---

[241] The Regulations of the Office of the Prime Minister Regarding Complying with Arbitration Awards B.E.2544 (2001) section 5 (in Thai), *available at* http://www.mratchakitcha.soc.go.th/search_result.php.

[242] The Cabinet Resolution on January 27, 2004 stipulated the guideline on the concession contracts between the Government and private sector that as the concession contracts is one kind of administrative contracts under the law, therefore the dispute according to these contracts should be submitted to the Court of Justice or the Administrative Court and should no longer provide for dispute to resolve by arbitration. When it is necessary or the other party has requested to include the arbitration clause in these contracts, have to submit to the Cabinet to consider case-by-case. On July 28, 2004 the Cabinet Resolution allowed the use of arbitration with the countries under investment protection agreement and FTA which was offered by the Ministry of Foreign Affairs.

administrative contract or otherwise, should not contain an arbitration clause unless approved by the Cabinet on a case-by-case basis. Moreover, in the same year the Ministry of Justice had proposed the amendment draft of section 15 of the Arbitration Act 2002 to prohibit government agencies and private enterprises from agreeing to settle the disputes by arbitration, the reason being that the government party usually loses and has to pay a large amount of money in arbitration cases, which affect the country's budget. Even though the Cabinet resolutions do not have the effect of binding law, they can reflect the government attitude toward arbitration.

Recently, on July 17, 2015, the Thai Government changed its reaction toward arbitration, which presents a better attitude. Taking into account of the proposal from Thailand Arbitration Center (THAC) after the brainstorm and discussion amount government authorities and practitioners in the arbitration field, the Cabinet ranched out the Cabinet Resolution amended the Resolution in July 2009. The July 2015 Cabinet Resolution ***reduces the scope*** of the Cabinet Resolution 2009 which apply to ***any contracts*** between the government agencies and private parties either Thai or foreigner to ***(1) contracts which has to be performed under the Private Investment in State Undertaking Act, B.E.2556 (2013)*** or ***(2) Concession Contracts where the Government Agency grants the concession to private enterprise.***

In practice, the arbitration clauses have been granted to include administrative contracts on some occasions, especially in cases where the counterparty has sufficient bargaining power. Therefore, even with section 15 of the Arbitration Act 2002, the administrative contracts are capable of arbitration, the sphere of arbitrability of governmental and public sector contracts remains a contentious issue in Thailand.

Even though the cabinet resolution will not have any legal effect on the law regarding international commercial arbitration, it can have a considerable effect on the view of foreign investors to the uncertain and unfriendly attitude of the Thai government toward arbitration.

5. Conclusion

Arbitration has a long history in Thailand. The adjudication from private tribunal was accepted in the country from old age. Thailand is one of the active jurisdictions in considering being a contracting state of international convention regarding arbitration. However, the country will not accept the ratified its obligation under the Conventions until the provisions were implemented as the national law. The significant change of arbitration in the country occurred from the enacted of the Arbitration Act B.E.2530 (1987) and the establishment of the Thai Arbitration Institution, Office of the Judiciary, in 1989. The Arbitration Act is the first law in providing provision for out-of-court arbitration. This law included the provision regarding the recognition and enforcement of arbitration agreement and foreign arbitral awards, according to the New York Convention, which the country became a contracting state since 1859. In 2002, the new Arbitration Act B.E.2545 (2002) came into force and replaced the Act 1985. The Arbitration Act 2002 brings the country's arbitration law closer to international standard as it was drafted based on the UNCITRAL Model Law on International Commercial Arbitration. The detail of the provisions and how Thai Courts applies the law is demonstrated in Part 3 of the study.

Since 1987, Thailand is holding to the view of being the hub for arbitration in the regions. Several schemes have been used to promote arbitration in the country. Two arbitration institutions were established to promote and provide arbitration service and building public awareness regarding arbitration. Even though both TAI and THAC are state agencies and got some budget support from the government, they are independent in the management of the arbitration administration. The Arbitration institutions are the leading organizations in promoting and providing knowledge regarding arbitration to the public. Academic institutions also including the course of alternative dispute resolution to the curriculums. Nevertheless, this area of law and practice is relatively new to Thai lawyers; the interesting regarding arbitration is dramatically

change in the past ten years. The increasing number of practitioners in the field may lead to a promising future of arbitration in Thailand.

While the government policy toward arbitration in administrative contracts can affect investors' confidence to invest or building a business relationship with Thai enterprises, it recently enacted the new law, the Arbitration Act (No.2) B.E. 2562 (2019) to facilitate and eliminate the restriction for foreigners to work as arbitrators of representatives in arbitration proceedings that administrate by arbitration institutions in Thailand which can bring Thailand another step closer of being the arbitration hub of the region.

Chapter 5

International Commercial Arbitration Agreement under Thai Law

The Arbitration Act B.E.2545 (2002), referred to here as "the Arbitration Act 2002" or "the Act" is Thailand's law which governs the characteristics and requirement of international commercial arbitration agreements. The Law was draft based on the UNCITRAL Model Law on International Commercial Arbitration 1985 before it was revised in 2006. Notable, the provisions of the Arbitration Act 2002 regarding the Arbitration Agreement are slightly different from the Model Law and reflex the country's identity.

Arbitration Agreement is the fountain of arbitration. Arbitration cannot exist without the agreement to arbitrate the dispute between the parties. If the parties agreed to submit their dispute to arbitration and one of the parties brings that dispute to the court, such dispute will be disposed of from the court, according to section 14 of the Arbitration Act 2002. On the other hand, if there is no arbitration agreement between the parties, even if the arbitration procedure was complete, the award will be unenforceable.

1. Form and Content of Arbitration Agreement

1.1 Arbitration Clause and Submission Agreement

The Arbitration Act 2002 section 11 defines "arbitration agreement" as an agreement whereby the parties agree to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or the form of a separate agreement.

According to this provision, it can be seen that the Thai arbitration law accepts both an arbitration clause, the agreement to arbitrate the disputes that will arise in the future, and a submission agreement, the agreement to arbitrate after the dispute has arisen. The Act does not distinguish between the elements of arbitration clauses and submission agreements.

1.2 Form and Contents of the Agreement

Section 11 paragraph 2 provides that the arbitration agreement shall be in writing and signed by the parties. Subject to Civil and Commercial Code (CCC) this requirement is not a prescribed form of contracts under Thai law.[243] Therefore, the arbitration agreement is constituted at the time the parties agree to arbitrate, even if it is not in writing and signed by the parties. However, the law requires evidence of an arbitration agreement in writing with the parties' signature at the time it has to be recognized or enforced by courts. Without writing and signed evidence, the court will not recognize or enforce arbitration contracts.

According to the Arbitration Act 2002 section 11, a wide range of situations may satisfy the "writing" requirement. As the third paragraph of section 11 states that an arbitration clause constitutes an arbitration agreement if it is contained in an exchange using letters, facsimiles, telegrams, telex, data interchange between the parties with an electronic signature, or other means that provide a record of the agreements. Furthermore, an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other also constitutes an arbitration agreement; then the writing agreement is met.

Before the Arbitration Act, 2002 came into effect, whether an arbitration agreement can be incorporated by reference and how it must be done had been a problem in Thailand. Today, section

[243] Civil and Commercial Code, Sec. 152 provides that "an act which is not in the form prescribed by law is void".

11 paragraph 3 provides that the referenced in a contract evidenced in writing to any document containing an arbitration clause constitutes an arbitration agreement if such reference makes the clause in the other document part of the contract. In such a situation, the writing requirement is also satisfied.

Arbitration agreements are also subject to the general rules of construction and interpretation of contracts. Although the Civil and Commercial Code provides that it is the spirit of the agreement, rather than the mere wording, which will govern the construction and interpretation of a contract,[244] parties must make it clear that they have a real intent to bind each other to make use of arbitration. In one case, a court ruled that an arbitration clause, which provided that the venue would be in Bangkok "if the dispute will be referred to arbitration," did not constitute a binding obligation on the parties to refer the dispute to arbitration.[245] Even though no particular wording is required for an arbitration agreement, the parties must clearly manifest their intention to make use of arbitration.

1.3 Model Arbitration Clause

Arbitration Institutions in Thailand that currently actively provide arbitration services for international commercial arbitration are 1) Thai Arbitration Institution, Office of the Judiciary (TAI), 2) Thailand Arbitration Center (THAC), and 3) the Thai Council of Arbitration, Thai Chamber of Commerce. These arbitration Institutions provide the Model Arbitration Clause to the public as follows.

1) The Model Arbitration Clause of Thai Arbitration Institution, Office of the Judiciary:

---

[244] Civil and Commercial Code ("CCC"), Sec.171.

[245] Deeka no. 3429/2530, *I Cases And Materials on Arbitration* 375-77 (1982).

"Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or validity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary, applicable at the time of submission of dispute to arbitration, and the conduct of arbitration thereof shall be under the auspices of the Thai Arbitration Institute."[246]

2) The Model Arbitration Clause of Thailand Arbitration Center (THAC):

"Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Thailand Arbitration Center for the time being in force and the conduct of the arbitration thereof shall be under the administration of the Thailand Arbitration Center."[247]

3) The Model Arbitration Clause of the Thai Council of Arbitration, Thai Chamber of Commerce:

"Both Parties agree to accept of the Thai Chamber of Commerce Arbitration Rules to govern the resolution dispute. In the event of any disagreement or dispute concerning or arising from this contract where the parties are unable to reach an agreement, such disagreement or dispute shall be finally and exclusively settled by arbitration under the Thai Commercial Arbitration Rules."[248]

---

[246] Thai Arbitration Institution, office of the Judiciary Model Arbitration Clause, *available at* https://tai-en.coj.go.th/th/content/category/detail/id/7749/iid/125884.

[247] Thailand Arbitration Center's Model Arbitration Clause, *available at* https://thac.or.th/law/index/1.

[248] Thai Council of Arbitration, Thai Chamber of Commerce Model Arbitration Clause, *available at* https://thaichamber.org/en/home/mainpage/3/10.

The Model Arbitration Clauses providing by arbitration institutions in Thailand are based on the Model Arbitration Clause suggested in the UNCITRAL Arbitration Rules with some slightly different in wording.[249] The Model Clauses mention above contain the essential elements of the arbitration agreement, which are simple and should not lead to the defected clause. All of these Model Clause clearly described the parties' consent and agreed to submit their dispute relating to the contract to the arbitration institution according to its rules as the date of submitting. Some Arbitration Institutions (THAC and Thai Chamber of Commerce) even underline the finality of the arbitral result in their Model Arbitration Clauses.

2. Parties to Arbitration Agreement

2.1 Capacity

The Arbitration Act 2002 does not prescribe specific legal elements of the arbitration agreement; therefore, the Civil and Commercial Code of Thailand is the law governing this issue.[250] In order to warrant that the arbitration agreement will be clearly binding and enforceable, it is necessary to ensure that it meets the general requirements of a juristic act and contract law under the Civil and Commercial Code (CCC). The first issue of concern is the legal capacity of the parties. Since the arbitration agreement is a type of contract, the physical or legal person with the full legal capacity to contract can be a party to arbitration agreement.

For instance, the agent who has a general authority cannot submit a dispute to arbitration on behalf of his principal. If he enters into the arbitration agreement without the

[249] UNCITRAL Arbitration Rule (as revised in 2010) Model arbitration clause for contracts "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.", *available at* https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[250] supra note 50, at 152.

express authority from the principle, that arbitration agreement will not bind the principal unless the principle ratifies it. Even though the agent has the power to enter into the main contract, the arbitration agreement is voidable if that agent was not expressly authorized to submit the dispute to arbitration. In addition, in the case that one party of the arbitration agreement is a corporate entity, the formality of proper contract execution is significant, as it can affect the validity of the agreement. Therefore, the parties have to make sure that the agreement is signed by the correct combination of a duly authorized representative, with the company's seal where required. Otherwise, it will not bind the company unless it is later ratified. Signing requirements for Thai corporations are available online (in Thai) from the companies registration authority within the Ministry of Commerce.[251] Furthermore, according to section 62 of the Civil Procedure Code, a lawyer appointed by a party shall have power on his behalf to conduct the case and carry out all such proceedings as he thinks fit in order to safeguard the interest of such party, however, arbitration contract is deemed as a conduct involves the disposal of the party's right which a lawyer has no power to carry out without an express authority from the party appointing him.

2.2 State or State Agencies

The Arbitration Act 2002 section 15 explicitly states that a state agency and private party may agree to refer any dispute arising from their contract to arbitration and such arbitration agreement shall bind the parties.

---

[251] Alastair Henderson, *Arbitration Guide: Thailand*, (Feb.10, 2015), *available at* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64

3. Arbitrability

3.1 General Principles

There is no particular provision of Thai law concerning arbitrability. The only guidance on arbitrability under Thai law is section 11 of the Arbitration Act. This provision defines arbitration agreements in terms of disputes concerning "a defined legal relationship, whether contractual or not." However, it is generally accepted that the arbitrable disputes have to be civil matters. This concept also appeared in the Arbitration Act B.E.2530 (1987). Above all, the civil matters that can be arbitrated must be unrelated to public order or good morals of the people. [252]In fact, it is not easy to tell whether the matters are related to public order or good morals because there is no specific definition for this term in Thai law. However, most of the civil matter is able to be arbitrated, such as civil matter concerning intellectual property and trademark, employment, or professional conduct.

In the cases where the disputes are related to both civil and criminal matters such as tort claims, the parties can arbitrate the dispute over compensation which is civil in nature, but the dispute relevant to criminal behavior cannot be arbitrated as it is deemed a matter related to public order, which has to be decided by the court. Besides criminal acts, other matters such as bankruptcy, business rehabilitation, the appointment of the administrator of an estate, and divorce are not capable of being referred to arbitration.[253]

Even though the question regarding arbitrability are related to jurisdictional, which can be considered by the arbitral tribunal, it may also be reviewed in court when the claimant initiates action in court, and the respondent seeks to dismiss that action, or when the party challenges or seeks for enforcement of the arbitral award with the competent court. Furthermore, the issue of

---

[252] Asawaroj, *supra* note 27, at 65.

[253] Surapol Srangsomwong & Christopher Bailey, *Arbitration in Thailand, in* 3 International Commercial Arbitration in Asia, 537, 545 (Shahla F. Ali & Tom Ginsburg eds.,2013).

arbitrability is also a ground for setting aside and refusal to enforce the arbitral award if the court finds that the dispute was not capable of settling by arbitration under Thai law.

3.2 Administrative Contract

The validity and enforceability of the arbitration clause in administrative contracts had been an unsettled and debated issue before the promulgation of the Arbitration Act B.E.2002. Although the Administrative Court was established in 1999 in order to have the power to adjudicate a case of an administrative law dispute, the Act on Establishment of Administrative Courts and Administrative Courts Procedure, B.E. 2542 (1999) does not expressly set any rules on the capable of the administrative contract to arbitration. Some public law scholars were concerned that authorizing the arbitral tribunal to settle the dispute over an administrative contract, the parties were ousting the power of the court in administering justice in the file of public law, which was inconsistent with the authority of the administrative court.

The problem about the arbitrability of the administrative contract is resolved by section 15 of the Arbitration Act 2002 which provides that **"*In any contract made between a government agency and private enterprise, regardless of whether it is an administrative contract or not, the parties may agree to settle any dispute by arbitration. Such an arbitration agreement shall bind the parties.*"** However, the government's policy on this issue has been playing a significant influence.

The issue about whether arbitration is welcome to be the part of contracts between the public sector and private enterprise can be studied from the attitude of the government past its regulation and the Cabinet resolutions in each period.

After the Arbitration Act B.E.2530 (1987) enters into force, arbitration clauses spread in Government contract, as the model form of contract provided to the government agencies contain

an arbitration clause and the government policy in promotion arbitration in the country.[254] Therefore, several various sizes of disputes between government agencies and private parties were submitted to arbitration. In 2001 the Regulations of the Office of the Prime Minister Regarding Complying with Arbitration Awards B.E.2544 (2001) was enacted to provide guidance for government authorities in complying with arbitration awards. According to the regulation, the government agencies shall perform their duties according to the arbitration award, except that arbitration award is; contrary to the law; the result of the undue proceedings or the award is not in the scope of the arbitration agreement.[255] After the government sector lost some significant sums, cases involved controversial or politicized projects.

In 2004 the Thai Cabinet passed a resolution restraining state agencies in ***any concession agreement***, which is one of the administrative contracts, to agree to settle disputes by arbitration without prior authorization or approval from the Cabinet.[256] As the result of the arbitration award in the dispute between a private consortium and the Expressway and Rapid Transit Authority (ETA), for which the ETA was found at fault in the construction project and had to pay 6.2 billion

[254] Arbitration clause was contained in the Model Contract in the Annexed of the Regulation of the Office of the Prime Minister on Procurement. The Office of Attorney-General who responsible in drafting and checking contracts for government and government agency also during that time include arbitration clauses as part of the contract.

[255] The Regulations of the Office of the Prime Minister Regarding Complying with Arbitration Awards B.E.2544 (2001) section 5 (in Thai), *available at* http://www.mratchakitcha.soc.go.th/search_result.php.

[256] The Cabinet Resolution on January 27, 2004 stipulated the guideline on the concession contracts between the Government and private sector that as the concession contracts is one kind of administrative contracts under the law, therefore the dispute according to these contracts should be submitted to the Court of Justice or the Administrative Court and should no longer provide for dispute to resolve by arbitration. When it is necessary or the other party has requested to include the arbitration clause in these contracts, have to submit to the Cabinet to consider case-by-case. On July 28, 2004 the Cabinet Resolution allowed the use of arbitration with the countries under investment protection agreement and FTA which was offered by the Ministry of Foreign Affairs.

(150 million USD) to the consortium in 2001, the award exceeding 500 USD in favor of the ITV television channel concessionaire in January 2004, and other awards against the Government.

Later in 2009, the Cabinet passed another similar resolution resolving that ***any contract*** concluded by a public sector entity with private sectors in Thailand or overseas, whether administrative contract or otherwise, should not contain an arbitration clause unless approved by the Cabinet on a case-by-case basis. Moreover, in the same year the Ministry of Justice had proposed the amendment draft of section 15 of the Arbitration Act 2002 to prohibit government agencies and private enterprises from agreeing to settle the disputes by arbitration, the reason being that the government party usually loses and has to pay a large amount of money in arbitration cases, which affect the country's budget. Even though the Cabinet resolutions do not have the effect of binding law, they can reflect the government attitude toward arbitration.

Recently, on July 17, 2015, the Thai Government changed its reaction toward arbitration, which presents a better attitude. Took into account the proposal from Thailand Arbitration Center (THAC) after the brainstorm and discussion amount government authorities and practitioners in the arbitration field, the Cabinet ranched out the Cabinet Resolution amended the Resolution in July 2009. The July 2015 Cabinet Resolution ***reduces the scope*** of the Cabinet Resolution 2009 which apply to ***any contracts*** between the government agencies and private parties either Thai or foreigner to ***(1) contracts which has to be performed under the Private Investment in State Undertaking Act, B.E.2556 (2013)*** or ***(2) Concession Contracts where the Government Agency grants the concession to private enterprise.***

In practice, the arbitration clauses have been granted to include administrative contracts on some occasions, especially in cases where the counterparty has sufficient bargaining power. Therefore, even with section 15 of the Arbitration Act, the arbitrability of governmental and public sector contracts remains a contentious issue in Thailand.

4. Separability

The relationship between the main contract and the arbitration clause was not explicitly stated under the Arbitration Act B.E.2530 (1987). The statute of an arbitration clause included in the main contract has been another uncertain issue under Thai arbitration law. However, just like other contracts, the problem with its validity had to be construed under the Civil and Commercial Code. Accordingly, the status of arbitration clauses was depended on the interpretation on a case-by-case basis. In some cases, an arbitration clause was deemed to be an auxiliary contract to the principal contract. As a result, an arbitration clause would become null and void if the principle contract were null and void unless it may be assumed under the circumstances of the case that the parties intended to separate an arbitration clause from the main contract.

The doctrine of separability was added to the new arbitration act to resolves the uncertainty of arbitration clause status and encouraged the use of arbitration. The Arbitration Act 2002 provides that an arbitration clause shall be treated as an agreement independent from the main contract. Consequently, the validity of the arbitration clause is not affected when the main contract is null and void. This characteristic is the fundamental principle of "separability or severability." Hence, it is more easily to maintain the arbitration proceeding because the invalidity of an arbitration clause will happen only in the case where the defect is found in the clause itself.

The Supreme Court Decision No.3894/2559 confirmed the principle of separability under Thai arbitration law. In this case, the parties under the sub-contract agreed to incorporate the provisions of the main construction contract in their contract. The sub-contract deems to contain an arbitration agreement as the main contract has an arbitration clause in it. The Court ruled that the termination between the parties of the sub-contract did not make the arbitration clause void or unenforceable.

5. Interpretation of Arbitration Agreement

The arbitration agreement may need to be interpreted when the content of the contract is unclear. The question regarding who has the authority to interpret and what are the rules of interpretation of the arbitration agreement are not prescribed by the Arbitration Act 2002. In the case where the arbitration agreement itself, including interpretation rules to use with the agreement, the interpreters are bound to follow.

5.1 The Person who has the power to Interpret Arbitration Agreement

The time that the arbitration agreement has to be interpreted is the thing that will determine the person who has to do the task. If the interpretation has to be done during the arbitration procedure, the arbitral tribunal is in charge of the interpretation as the dispute is already in their hands. The Court also plays an essential role in interpretation of the arbitration agreement. These happen when; a party of the case challenge to the court that the dispute submitted to the court the adjudicated is under an arbitration agreement where the court needs to consider the validity of the arbitration agreement; or when a losing party in an arbitration award challenge the enforcement of the award relying on the ground that the arbitration agreement is invalid; or when the parties petition for setting aside the arbitration award attacked the arbitration agreement defect.

5.2 The Rule to Interpret Arbitration Agreement

As the Arbitration Act 2002 does not provide the specific rules in interpreting arbitration agreements, the general rules for the interpretation of contracts under Thai Commercial Civil and Commercial Code (CCC) will be applied by Thai Court or the arbitral tribunal who consider the arbitration agreement governing by Thai Law as follows:

(1) When a clause in a document can be interpreted in two senses, that sense is to be preferred which gives some effect rather than that which would give no effect (CCC section 10);

(2) In case of doubt, the interpretation shall be in favor of the party who incurs the obligation (CCC section 11);

(3) Whenever a document is executed in two versions, one in the Thai language, the other in another language and there are discrepancies between the two versions, and it cannot be ascertained which version was intended to govern, the document executed in the Thai language shall govern (CCC section 14);

(4) In the interpretation of a declaration of intention, the real intention is to be sought rather than the literal meaning of the words. If the intention was to express verbally and later made in writing but different, the intention appears in writing is the on that shall be relied on. However, if able to ascertain the real intention, it shall be relied on (CCC section 171);

(5) If any part of the act is void the whole act is void, unless it may be assumed under the circumstances of the case that the parties intended the valid part of the act to be separable from the invalid part (CCC section 173);

(6) In finding the spirit of the interpretation of the contract, the entire contract must be considered. Moreover, if there are multiple contracts, all contracts must be considered together. In this case, the intention can be sought from the behavior between the contract parties; it shall be interpreted accordingly.

According to the Supreme Court Judgment No. 520/2520, in normal trade practice between the petitioner and the dependence, the parties always make their sale contract in writing and sign the document. If there is no writing contract between them, the sale contract is never concluded. When the main contract is not existing, the arbitration agreement cannot be existing. Therefore, the parties are not bound to comply with the arbitration award;

(7) Contracts shall be interpreted according to the requirements of good faith; ordinary usage shall be taken into consideration. (CCC section368).

6. Effect and Enforcement of the Arbitration Agreement

The enforcement of arbitration agreement under Thai law is presenting in section 14[257] of the Arbitration Act 2002. This law is the implementation of the New York Convention Article II.[258] According to this law, the court will refer the parties of the arbitration agreement to arbitration, when the dispute which subject to arbitration agreement was brought to the court and the party who that claim is against file the request to the court to strike the case in order to proceed the arbitration, after the court's inquiry and consider that there are no grounds making that arbitration agreement void or unenforceable or impossible to perform.

After an arbitration agreement is made, its legal effect will be applicable and binding the parties to comply with the obligations in that contract, regardless of any events occurring with the parties. If the parties do not satisfy with the term in their arbitration contract, they can agree to make a change to the agreement. The amendment of the agreement contract must be done in the same ways that the contract was made. To said, the change requires to be in writing and sign by the

[257] The Arbitration Act 2002 Section 14 "in the case where any party to the arbitration agreement commences any legal proceedings in court against the other party thereto in respect of any dispute which is the subject of the arbitration agreement, the party against whom the legal proceedings are commenced may file with the competent court, no later than the date of filling the statement of defense or within the period for filing the statemen of defense prescribes by law, a motion requesting the court to issue an order striking the case, so that the parties may proceed with the arbitration proceedings. Upon the court having completed the inquiry and found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform, the court shall issue an order striking the case."

[258] The New York Convention 1958 article II 3. "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

parties; parties must have full legal capacity to enter into a contract as specified by law with a complete intention.

6.1 Obligation to Arbitrate in Good Faith and Not to Litigate Arbitration Dispute

The Arbitration Act of 2002 recognizes the existing arbitration agreements. Other than the specific provisions providing in the Arbitration Act, the Arbitration Agreements are subject to the principle of the Juristic Act and Contract Law under the Civil and Commercial Code as well.

According to the general provisions of the Civil and Commercial Code of Thailand, every person must, in the exercise of his rights and the performance of his obligations, act in good faith. The contract is formed when the offer from one party is accepted by the other party according to the time in the offer without any material change to the offer. Moreover, Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration. Arbitration Agreement is treated as other agreement under the law.

The parties who enter into arbitration agreement are bind to submit the dispute under the scope of the agreement to arbitration. When the party breaches the arbitration contract by submitting the claim under the arbitration agreement to the court, the other party has the right to challenged and proof with the court that the arbitration agreement between them exists and requests the court to refer the case to arbitration. In some case, the party who default on its obligation to arbitrate the case alleged that the claim he submitted to the court is not under the scope of the arbitration agreement, the court will have to consider its jurisdiction over the dispute.

In 2015 Thai Supreme Court held a decision reflecting how the Court interprets the broad arbitration clause between the parties where the clause states that “The parties agree that any dispute arising out of or in connection with this agreement is subject to arbitration…” The Supreme Court held that defects in the agreements as claimed by the plaintiff, such as the involvement of fraud or the agreements being contrary to the statue laws, the Civil and Commercial Code, or the Unfair

Contract Term Act, are claimed which arise or relate directly to the agreement. Therefore, the Supreme Court ordered the striking out of the plaintiff's case as the plaintiff's claims grounds were within the scope of the arbitration clause. This decision confirmed that a claim in tort, premised on certain statutory rights, if its grounds base on principle contract, it will be considered to be under the ambit of the arbitration clause, and the board arbitration clause is recognized and enforceable.[259]

Take into account of Thai Court policy of a broad interpretation of arbitration agreements. The parties have obligations to comply with their agreement under the arbitration clause by submitting the claim under the ambit to the primary contract to arbitration with good faith. Because trying to avoid the arbitration and present the claim assertion of mixed-basis claims of tort and contract in front of the court will not provide any benefit but wasting of time and expenses.

However, the parties need to keep in mind when drafting the arbitration agreements that vague and ambiguous statements in the agreement may cause the unexpected interpretation result. The Supreme Court of Thailand has stated that in the case where the agreement offer choice to adjudicate parties claim by either arbitration or litigation, it will not consider being conflict and will bind the parties; therefore, the parties have the right to choose to present the claim to the competent court.[260]

6.2Incapacity Party after the Agreement

According to section 12 of the Arbitration Act 2002, the validity of the arbitration agreement and the appointment of arbitrator shall not be prejudiced, even if any party thereto is dead, or cease to be a juristic person, or against whom a final receiving order has been issued against his property, or has been adjudged incompetent or quasi-incompetent. This provision in the

[259] The Supreme Court Decision No. 4288/2558 (2015). *See. Thailand Case Update: Arbitrating Tort Claims* www.internationalarbitrationasia.com/arbitrating-tort-claims.

[260] The Supreme Court Decision No. 115/2560.

Arbitration Act does not exist in the UNCITRAL Model Law. The purpose of this section is to confirm the validity of the arbitration agreement and the appointment of the arbitral tribunal under the law, even if the party of the agreement later has died or has a deficiency in the ability which is fair the other party. However, the Arbitration Act does not stipulate the proceeding that shall be done after the party of the arbitration agreement has become disability under the law. Therefore, general laws and principles should be applied.

In the case where the party of the arbitration agreement has become incapacity during the arbitration proceedings, the arbitration rules that govern the arbitration is the first thing to be considered. However, most of the arbitration rules do not mention the consequent of the arbitration agreement that will happen after any party becomes incapacity, also does not provide the process for the arbitral tribunals to follow. However, if consider the provision provide in section 25 of Arbitration Act 2002, the arbitral tribunal shall have the power to conduct any proceeding s in any manner, as it deems appropriate when the parties did not agree on any issue or provided by the law.

6.3 The transferee of Claim or Liability

Although finding an arbitration agreement enforceable even if its formalities are not strictly met is a current trend. The concerns about requiring a party to arbitrate when the party did not agree to do so are controversy as parties' consent is the fundamental element of the arbitration agreement. However, the party to the arbitration contract at any point may want to transfer their rights or obligation under the main contract to the third party. To avoid the problem about the status of the arbitration agreement of the transferee, section 13 of the Arbitration Act 2002 clearly states that when there is a transfer of any claim or liability, the transferee has to be bound by the existing arbitration agreement concerning such claim or liability. Even though the arbitration agreement is not deemed as an auxiliary contract to the main contract, which will transfer to the transferee of the main contract, it plays an essential role in the contract. As the transferees directly receive the

benefits from the principle contracts, they are prescribed by the law to burden arbitration agreements as well.

However, in other circumstances where the principal contract is terminated because of the novation of the parties enter into a settlement contract, the arbitration agreement will be terminated as well, unless the parties expressly agree to include the arbitration clause in their new contract.

The transferee of claim and liability in principle contract that including an arbitration agreement is different form the case where the party of the main contract file the third person over the guarantee agreement of contract. In the Supreme Court decision No. 18978/2556 (2013), the court stated that the arbitration clause in the disputed agreement is the agreement between the plaintiff and the X Corporation to settle the dispute between them by arbitration. This arbitration clause will not bind the dependences, who is the third party. The plaintiff files the dependencies as the guarantors of the X Corporation; the court has the jurisdiction to adjudicate the case.

6.4 Interim Measure

Even though Thailand arbitration law is based on UNCITRAL Model Law, it does not adopt the provisions regarding the interim measure of the Model Law article 17 that empower arbitral tribunal to order interim measures.[261] However, it adopted Model Law article 9, which provides that a party to an arbitration agreement may request from the court an interim measure of protection before or during arbitral proceedings, and the court may grant such measure. As a result, jurisdiction to grant interim relief for parties under arbitration agreements still belongs to the Thai Courts. However, some changes in the Arbitration Act B.E.2545 (2002) fills the gap in the old

[261] The UNCITRAL Model Law on International Commercial Arbitration 1985, Article 17 – Power of arbitral tribunal to order interim measures: Unless otherwise agreed by the parties, the arbitral tribunal may, at the request fo a party, order any party to take such interim measure of protection as the rribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

arbitration law as the Arbitration Act B.E.2530 (1987) where the party could request an interim measure from the court only if when the arbitration proceeding has begun, and must be done only by the arbitrator tribunal.[262]

According to the Arbitration Act 2002 section 16, the parties of the arbitration agreement can request for a provisional measure of protection from the competent court even before the arbitral proceeding is commenced. The court will consider the request using the same criteria as those used in considering cases under the Civil Procedure Code. However, in the case where a party requests for a provision measure before the proceeding of arbitration, he or she must refer the dispute regarding the arbitration agreement to arbitration within thirty days or within the period prescribe by the Court, failing to do so the Court's order will be deemed to be terminated upon the lapse of the aforesaid period.

Generally, Thai Courts will not be reluctant to grant interim relief in the case where there is clear and cogent evidence that such measures are appropriate. The interim measures available in litigation and able to be requested by the party to the arbitration agreement include:

1) deposit of money or provision of other security for the payment of costs and expenses (CPC section 253);
2) pre-judgment seizure or attachment of the property in dispute or the defendant's property, including money or property due to the defendant from a third party (CPC section 254);

[262] The Arbitration Act B.E.2530 (1987) section 18, "Where resort to the power of the court is required in regard to the summons of a witness, the administration of oath, the order for submission of any document or material, the application of provisional measures for the protection of interests of the party during arbitration proceedings, or the giving of a preliminary decision on any question of law, an arbitrator may file a petition requesting a competent court to conduct the said proceeding. If the court is of the opinion that such proceedings could have been carried out by the court if a legal action were brought, it shall proceed in compliance with the petition, provided that the provisions of the Civil Procedure Code in the part relating to such proceedings shall apply mutatis mutandis."

3) a temporary injunction restraining the defendant from repeating or continuing any wrongful act or breach of contract or other order minimizing trouble and injury which the plaintiff may after that sustain due to the defendant's action (CPC section 254);
4) a temporary injunction restraining the defendant from transferring, selling, removing, or disposing of the property in dispute or the defendant's property, or stopping or preventing the waste or damage of such property (CPC section 254);
5) an order directing public officials to register, modify, or cancel registrations relating to property (CPC section 256);
6) the defendant's provisional arrest and detention (CPC section 256).

Although the Arbitration Act does not empower the arbitral tribunal to order interim measures, where arbitration rules confer such power, the extent and nature of the available reliefs would be determined by the term of that rules. Recently, in 2017 Thai Arbitration Institute, Office of the Judiciary (TAI) ranched out the new rule, the Arbitration Rule, The Thai Arbitration Institute 2017, and empower the arbitral tribunal to grant interim measures of protection for the party as it deems appropriate at the request of a party.[263] This change will benefit the party to rely on the arbitral tribunal's order on an interim measure of protection in the country where it is enforceable

[263] The Arbitration Rules, The Thai Arbitration Institute 2017, Interim Measures Article 39 "The Arbitral Tribunal may, at the request of a party, grant interim measures of protection for the party as it deems appropriate. The Arbitral Tribunal may direct the party requesting such interim measure to provide appropriate security for any damage that may arise in connection with the measure.

The request pursuant to paragraph one shall not affect the right of the party to request the court to grant interim measures. Such request shall not be deemed to be incompatible with the arbitral proceedings under these Rules.", *available at* https://tai-en.coj.go.th/th/content/category/detail/id/7751/iid/124760.

under law. It also helps to reduce the court's work to consider and grant the party's petition. Even this new rule is not consistent with the law; the parties have the right to agree on it since it is related to the arbitral proceeding, which is under the principle of party autonomy. However, whether the Court will enforce the interim measure order of the arbitral tribunal seated inside or outside of the country, considering from the Arbitration Act, the answer should be no.

The question is, will the competent court order the interim measure of protection for the arbitration seating outside the country. As the Arbitration Act 2002 does not distingue between domestic and international arbitration, the court should not consider to reject the party petition because the seat of arbitration is not in Thailand, as long as the requesting is under the court's jurisdiction and the court would have been able to issue such order if such proceeding is conducted in the court.

According to section 45 of the Arbitration Act 2002, the court's orders concerning provisional order measures for protection under section 16 can be appealed. Nevertheless, in 2011, the Supreme of Administrative Court ruled in one of its judgement that the court's order regarding the interim measure of protection during the arbitral proceeding is deemed as an interim measure or the under the court procedure laws of the Competent Courts which means it has to be under the same rules according to the Arbitration Act 2002 section 45 and section 16. Since the Administrative Court of First Instance dismissed the motion requested the court to order an interim measure of protection for the party during the arbitral proceedings is the Court's order to dismiss the motion related to interim measure which is final and cannot be appealed according to the regulation of the assembly of the Supreme Administrative Court section 76, therefore the Administrative Court of First Instance shall dismiss the party's motion to appeal such order.[264]

[264] The Supreme Administrative Court Order No. Kor5/2554 (2011)

6.5 Periods for the Commencement of Arbitration

Under the Civil and Commercial Code of Thailand, a claim is barred by prescription if it has not been enforced within the period fixed by law. The prescription for arbitration is not mentioned in the CCC or the Arbitration Act 2002. However, the CCC section 193/14 prescribes that the prescription of claim is interrupted if the creditor submits the dispute to arbitration. Therefore, in the case where the parties to arbitration agreement submitted their dispute to the arbitral tribunal and the arbitration was terminated as the result that the arbitration agreement is null or invalid, the parties still preserve the right to take their claim to court within the prescription time according to the CCC which will refresh and begin to count after the termination of arbitration proceeding.[265]

In the old law, the Arbitration Act 1987 section 9 states that the parties may agree on the period to commencement arbitration proceeding in the arbitration contract which can be shorter than the period of claim prescription prescribed by the law, the parties shall lose their right to arbitrate if the period prescribed in the contract is not with, but the right to submit the claim to the competent court is reserved.

Furthermore, the court could assist the parties in extending the period to commencement the arbitration, which states in the arbitration agreement. However, this provision does not appear in the Arbitration Act of 2002. This change in Thai arbitration law can present the sign that it tries to limit the court's intervention in arbitration and let the parties control the arbitration agreement themselves.

As there is no probation by the law, the parties are free to agree on the period to commencement the arbitration. However, if the parties do not submit their dispute to arbitration

[265] Civil and Commercial Code section 193/15 The period of time which has elapsed before interruption does not count for prescription, paragraph 2 the fresh period of prescription begins to run form the time when the interruption ceases.

tribunal within the time requiring in the contract, will they lose the right to arbitrate or should it be considered that they have waived their right to arbitrate. The answer to this question will depend on when it is asked. If the question is raised during the arbitration proceeding, the arbitral tribunal has the authority to consider the issue according to parties' agreement, arbitration rules, or its opinion. If the question is raised to the court where a party files the dispute to the court and the other party claim that there is an arbitration agreement between them but the period to commence arbitration has lapsed, the court will have to consider whether to refer parties to the arbitration. However, no judgment from the Thai court has mentioned this issue.

6.6 Enforcement of Arbitration Agreement

Thailand has the obligation to recognize and enforce international arbitration agreements as it is the state member of the New York Convention 1958. The dispute concerning arbitration agreement validity may be presented before Thai Courts at the early stage of arbitration when one party litigating the claim to the court and the other party asking the court to refer it the arbitration, or after the arbitration is completed when a party searching for annulment of the award, or at the state of enforcement. This section will focus on the enforcement of the arbitration agreement before the arbitration proceeding begins and conclude.

According to the Arbitration Act B.E.2545 (2002), section 14, Thai Courts are responsible for enforcing arbitration agreements. In the case where the party of arbitration agreement fails to comply with the agreement by litigating their claims in court instead of submitting them to arbitral tribunal, upon the party's request the court will dismiss the case if it finds that there is a binding arbitration agreement, and the relevant matter has not been arbitrated. This provision is consistent with the New York Convention Article 2 and the UNCITRAL Model Law on International Commercial Arbitration article 8.

The law require the party to file the request to the court to dismiss the case in order to process the arbitration no later than the date of filing the statement of defense or within the period of filing the statement of defense in accordance with the law, after the court had completed the inquiry and found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform, the court will issue an order striking the case.

The study of the Supreme Court decisions regarding the enforcement of arbitration agreement can illustrate the development in Thai Court's attitude toward arbitration which may divide into two periods as follow:

1) Before the Arbitration Act B.E.2530 (1987): Even if Thailand became a member and ratified the New York Convention 1958 since 1959, the law did not request the court to enforce arbitration agreements until the Arbitration Act B.E.2530 came into force in 1987. As a result of the lacking of the law, Thai courts before 1987 recognized, however, denied enforcing the arbitration agreement. In the case that the party of arbitration agreement breached the contract by submitting the claim under the arbitration agreement to the court, the other party cannot request the court to refer the parties to the arbitration. The courts during that period denied parties' requests with the reason that a party cannot restrain another party from presenting any claim to the court but submitting to arbitration.[266] The arbitration agreements in that time seem to be the agreement that gives the parties choices in settling the dispute. If the claim under the agreement were submitted to the court, the court would consider that the party has chosen to litigate the case, which it has the right to do so. This court's view represented the influence of the "ousting-of-court" concept.

2) After the enactment of the Arbitration Act B.E. 2530 (1987): The Arbitration Act 1987 considered as the first modern arbitration law of Thailand as it implemented the New York Convention to the national law. The law provided the rule to recognize and enforce the arbitration

[266] Supreme Court Decision No.1296/2518 and 182/2521.

agreement. According to section 10 of Arbitration Act 1987, the court shall strike the case where the parties are under the arbitration agreement when in the case where any party to the arbitration agreement commences any legal proceedings in court against the other party thereto in respect of any dispute which is the subject of the arbitration agreement and the party against whom the legal proceedings are commenced files with the competent court, no later than the date of filing the statement of defense or within the period for filing the statement of defense prescribes by law, a motion requesting the court to issue an order striking the case, so that the parties may proceed with the arbitration proceedings after the court has completed the inquiry and found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform.

Later in 2002 the new Arbitration Act has confirmed the enforcement of the arbitration agreement under the Act 1987 and added that either party might commence the arbitral proceedings, or the arbitral tribunal may continue the proceeding and render an award on the dispute while the motion requesting the court to refer the claim to arbitration is pending before the court. This provision based on the UNCITRAL Model Law Article 8 paragraph 2.[267] Since 1987 arbitration agreements have gained Thai Courts, favor gradually over time.

6.6.1 Domestic Agreement

According to the Arbitration Act 2002 and the Supreme Court Decision, the Enforcement of Arbitration Agreement principles are as follow:

1) **Courts can enforce an arbitration agreement only when a party presents the claim relating arbitration agreement:**

[267] UNCITRAL Model Law on International Commercial Arbitration Article 8 paragraph 2 "Where an action furred to in paragraph (I) of this article has been brought, arbitral tribunal proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

The Court can enforce the arbitration agreement only when a party to an arbitration agreement breached the contract by presenting the claim under the arbitration agreement to the competent court instance of submitting it to arbitration. In the other cases where the party does not comply with the arbitration agreement by do not attend the arbitration proceeding, the court is not empowered to order such party to do so, even on the other party request. However, when a party to an arbitration agreement breached the contract by do not attend the arbitral proceedings, the arbitral tribunal can process the *ex parte* proceedings and make an arbitral award that will be enforceable under the law.

2) The party against whom the legal proceedings are commenced may file a motion requesting the competent court to strike the case for the parties to proceed with the arbitral proceedings:

The existing of an arbitration contract does not always bar the parties right from bringing the legal action before the court; nevertheless, it is the ground for the court to dismiss the claim to pursue the arbitral proceedings, since the arbitration agreement may become unenforceable or the party may later disregard the arbitration agreement.

In the case, where the claim regarding arbitration agreement is brought before the court the counterparty of the claim has to submit the motion requesting the court to dismiss the case as it under arbitration agreement, no later than the date of filing the statement of defense or within the period for filing the statement of defense in accordance with the law. Without doing so or the motion was filed later than the period prescribed, the parties will be deemed to disregard the arbitration agreement, as the plaintiff submitted the claim to the court instance of commencement the arbitral proceedings and the defendant did not file the motion in time, the defendant cannot rely on the arbitration agreement anymore.[268]

[268] The Supreme Court Decision No. 1425/2542 (2000)

However, according to the Supreme Court decisions, we can see that the court has been more flexible on the form that the party challenge before the court about the existence of the arbitration agreement. For example, when the party refers in the statement of defense that the claim before the court is under the arbitration agreement but fail to submit the motion to the court, the court considers such manner as the request for the court to inquire the status of the arbitration agreement in order to strike the case.[269] This change can present the excellent sing of the Thai Court's positive attitude to arbitration.

3) The motion requesting the court to issue an order striking the case is not the unilateral motion:

When the motion is requesting the court to order striking the claim as it subject to an arbitration agreement filed to the court, the court will have to send the notice letting the other party of the case know at giving chances to allege in the court's inquiry procedural. The court cannot process one side inquiry this kind of motion; otherwise, it will be contrary to the Civil Procedure Law.

4) The Court has to inquire the motion before striking the case:

The inquiry procedure must be done before the court can issue the order to strike the case or continue the procedure in order to consider the status of the arbitration agreement. In the inquiry process, the parties whom the claim against must able present to the court that there is the arbitration agreement between the parties. Then the court will consider whether that agreement is valid. After the inquiry completed and found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible the perform, the court shall issue an order striking the case. Dismiss the motion or issue an order striking the case before the inquire is contrary to the law.[270]

---

[269] The Supreme Court Decision No. 11235/2556 (2013)

[270] The Supreme Court Decision No. 2039/2550 (2007)

5) The termination of the principle contract does not affect the validity of the arbitration agreement:

According to the separability of the arbitration agreement stated in section 24, paragraph one of the Arbitration Act 2002. In consideration of the validity of an arbitration agreement, the court will focus on the defect on the arbitration agreement and disregard the status of the principal agreement. If the claim falls under the scope of the arbitration agreement, the claim will be referred to arbitration, although the principle contract was terminated.

In 2016 the Supreme Court confirmed this principle of Thai arbitration law. In this case, the parties under the sub-contract agreed to incorporate the provisions of the main construction contract in their contract. The sub-contract deems to contain an arbitration agreement as the main contract has an arbitration clause in it. The Court ruled that the termination of the subcontract did not make the arbitration clause void or unenforceable.[271]

6) The effect of conflict in a dispute resolution clause to an arbitration agreement:

The conflict of the dispute resolution clause in the contract can happen in many cases. For example, when a statement in the clause conflict to itself or vague and requires the interpretation. No provision in the Arbitration Act 2002 specified the solution for this issue, which for it will be left to the arbitral tribunal and the competent court to determine.

Supreme Court Decision No. 389/2559 has presented the court's positive attitude to arbitration in dealing with this issue. In this case, the parties agreed to incorporate the provisions of the principal contractor in a separated sub-contract. First, the court ruled that as the principal contract contains an arbitration clause, the sub-contract was deemed to contain the arbitration clause as well. Secondly, although the sub-contract states that the defendant will be the one who

[271] The Supreme Court Decision No. 3894/2559 (2016)

makes the decision when a dispute relates to the sub-contract arise, such statement in the sub-contract is not conflicted with the arbitration clause in the main contract. Since the decision of the defendant has no legal effect under the law, if the plaintiff will not comply with, eventually, the dispute will have to adjudicate by arbitration. Therefore, it is contrary to the law that the plaintiff breached the arbitration clause; the parties are required to settle such dispute through arbitration.

7) The Grounds for the Court to not Enforce Arbitration Agreements

The parties to an arbitration agreement have the right under the law to request the Competent Court to enforce the arbitration agreement according to section 14 of the Arbitration Act 2002. However, the court may refuse to enforce the arbitration agreement and continue the litigation procedures if it found the grounds for rendering the arbitration agreement void, or unenforceable or impossible to perform as follow:

a) The Arbitration Agreement is void: The causes that make arbitration agreement void are the general principles prescribing in contract law. For example; An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals (CCC section150), the party has defect intentional to enter in the agreement due to mistake, misrepresentation or fraud, one party was incapacity to enter the agreement;

b) The Arbitration Agreement is unenforceable: For example, the parties agreed to terminate the arbitration agreement before or after the dispute arise, on party terminate the arbitration agreement using the grounds prescribed by law, the period to arbitrate prescribed in the arbitration agreement passed;

c) The Arbitration Agreement is impossible to perform: For example, the arbitration agreement is vague, ambiguous, or conflict statement that cannot found parties' intent to arbitrate.

6.6.2 International Agreement

The dispute concerning international arbitration agreement validity may be under the competent of Thai Courts at the early stage of arbitration when one party litigating the claim to the court and the other party asking the court to refer it the arbitration, or after the arbitration seated in Thailand is completed and a party searching for annulment of the award, or at the state of enforcement.

According to the Arbitration Act 2002, the provision regarding enforcement of arbitration agreements does not distingue between the enforcement of the domestic agreement and international agreement. However, the enforcement of international agreement where the parties have a different nationality or the arbitration seat according to the arbitration agreement will be in other countries, which can raise an issue about application law that the court will apply in considering the status and validity of the arbitration agreement.

The Arbitration Act 2002 clearly prescribes the application that will be used to consider the validity of the arbitration agreement when the party challenges the enforcement of the arbitration awards with the ground that the arbitration agreement is not binding. The law that the court has to rely on in such a case is the law of the country agreed to by the parties, which should be stated in the arbitration agreement, or if failing any indication, the law of the country where the award was made.[272] Therefore, in the interpretation or consider of the validity of arbitration agreement in the case where the parties expressly agreed on the law that complies with the arbitration agreement the court will apply the law according to the parties agreement.

However, according to the study of the researcher, in the case that the court has to enforce international arbitration agreements where the parties have different nationality or the seat of

[272] The Arbitration Act 2002 Section 43(2)

arbitration is outside the country and no agreement on the applicable law of the arbitration agreement, the court never refer to foreign laws but make the decision based on Thai laws.

6.7 Termination of Arbitration Agreement

The Arbitration Act 2002 does not have any specific provisions on the termination of the arbitration agreement. As a result, any arbitration agreements that specify Thai Law as the governing law or choose Thailand as the seat for arbitration will be subject to the general principle of Thai Contract Law. The arbitration agreement will terminate according to the Civil and Commercial Code when:

1) The arbitration agreement was completely performed. After the arbitral proceeding is terminate and the parties perform their obligation under the arbitral award, or when the arbitral award was enforced, and the parties comply with their obligation according to the judgment.
2) The party terminates the arbitration agreement on the agreement grounds or the grounds giving by laws.
3) The party terminates the arbitration agreement after the other party denied to join the arbitration proceeding within the giving period.
4) The party terminate the arbitration contract after the time that was the mandatory condition in the arbitration agreement passed.
5) The party terminates the arbitration agreement as it became impossible to perform.
6) When the parties do not commence the arbitration within the time prescribed in the agreement and do not agree to extend such period, however, this will not affect the parties' right to submit the claim to courts.

7. Conclusion

Thailand became a contracting state of many arbitration conventions since 1930; however, the status of arbitration under Thai laws was not satisfied until the Arbitration Act B.E.2530 (1987) came into force. The Arbitration Act 1987 confirmed its obligation under the conventions in recognition and enforcement of international arbitration agreements and international arbitral awards. In 2002, Thailand upgraded its arbitration law intending to meet international standards. The Arbitration Act 2002(the new act) was enacted to replace and repeal the Arbitration Act 1987 (the old act). The Arbitration Act 2002 was drafted base on the UNCITRAL Model Law 1985. Many new arbitration principles were added into this law, for instance, the doctrines of separability and Competence-Competence Jurisdiction.

According to section 11 of the Arbitration Act 2002, arbitration agreements are accepted either in form arbitration clauses or submission agreements. The form of arbitration agreements is various, still with the requirement to be in writing and signed as an obligation to electronic signatures or other means, which provided a record of the agreement (except verbal).

Most of the commercial and civil disputes are arbitrable, except those relating to a person's legal status or some certain statue rights under the laws. The Act 2002 clearly states that disputes between government agencies and private enterprises can be agreed to submit to arbitration, either qualified as an administrative contract or not. Nevertheless, the attitude of the Government has played an essential role in this issue via Cabinet Resolutions. After many arbitral awards caused the enormous loss to the Government, the Cabinet put the restriction to government agencies not to include arbitration clauses in the contracts between government agencies and private parties, either Thai or foreigner. The case-by-case approval from the Cabinet will be issued when it is necessary. However, Thai government still keeps the view of being the Arbitration Hub in ASEAN. The government has ordered many arbitration related bodies to study the possibility to exclude administrative contracts from arbitration arbitrability. The consideration turns out that arbitration

should be promoted to facilitate domestic and international commerce and investment in the country. Currently, the Cabinet Resolution reduced the limitation usage of arbitration clauses from all contracts between government agency and private sector to contracts under the Private Investment in State Undertaking Act B.E.2556 (2013) and Concession Contracts where the Government Agency grants the concession to private enterprise. The contracts under the said restriction can include the arbitration clause when the approval from the cabinet was issue. This change shows the improvement of the Thai Government's attitude toward arbitration.

The Arbitration Act 2002 prescribe provisions regarding the effects of arbitration agreements ensure the validity and enforceability of the arbitration agreement, where the party becomes incapacity after the arbitration agreement is concluded, or where there is a transfer of claim or liability of the primary contract.

Although the Arbitration Act 2002 giving a party of arbitration agreement right to file the petition to the competent court requesting for the order of interim measure of protection before or during the arbitral proceedings, it does not mention anything about arbitral tribunal's power in ordering an interim measure of protection. Whether the arbitral tribunal empowers to order interim measures of protection or not remains unclear. Therefore, if the country considers to amend the law and including the power in ordering the interim measure to arbitral tribunal, it will benefit both parties of the arbitration and the courts as it can speed the arbitral proceedings and reduce court's work.

According to section 14 of the Arbitration Act 2002, Thai courts will refer the case under the arbitration agreement according to the party request when the claim is presented before the court is subject to the valid arbitration agreement. From the study of Thai Supreme Court decisions relating to arbitration agreement enforcement, it found that Thai Courts has developed its pro-arbitration attitude gradually over time.

Chapter 6

Arbitral Tribunal and Arbitral Proceeding under Thai Law

This chapter reveals Thai laws regarding arbitral tribunal and arbitral proceedings and the ways the Court applied them. Even though the provision under these matters under the Arbitration Act 2002 mostly adopted from the UNCITRAL Model Law, some unique provisions come from national experience and procedure law.

1. Arbitrators

1.1 Qualifications

The Arbitration Act B.E. 2545 (2002) does not have any provision on the qualifications of the arbitrator regarding gender, nationality, specialize, work experience, or education background. However, section 19 paragraph one provides the general concept that Arbitrators must be ***impartial and independent***. Paragraph two requests the prospective arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence from the time of his appointment and throughout the arbitral proceedings. The arbitrator may be challenged by the party if failing to comply with this obligation,

Moreover, the arbitrator must possess the qualifications required by the arbitration agreement or, in the case where the contractual parties agree that the procedures are to be conducted by an arbitration institution, the arbitrator must meet the qualifications required by such institution rules.

The circumstances that can raise doubts about impartiality and independence are open to being broadly interpreted. However, if considered from the old arbitration law which refers to the Civil Procedure Code, regarding the grounds to challenge the arbitrator, the prospective arbitrator

shall disclose its information about; any causes that may cause conflict of interest with the parties; the relationship with the parties either by birth, marriage, social, business, or employment. One Supreme Court decision specified that it is the chairman of an arbitral tribunal's duty to disclose his ownership interest in the company of one of the parties.[273]

The Supreme Administrative Court once stated in its decision that " regarding the question of impartiality, in addition to considering about the non-conflict of interest between the parties or any person related to the dispute parties and the arbitrator, how closely is the relationship between those people and the arbitrators must be considered as well. While the independence of the arbitrator, must be considered whether the arbitrator is not under control, influence, rely on, or regularly keep in touch with the parties or any person related to the parties."[274]

1.2 Appointment of Arbitrators

1.2.1 Appointment Proceedings

Under Thai arbitration law, the parties can agree upon the procedure for an appointment of the arbitral tribunal. This including where the parties agreed to apply any arbitration rules to their arbitration proceedings. The appointment of arbitrators will subject to parties' agreement or the arbitration rules the parties choose. The Arbitration Act 2014 section 18 prescribes the procedure on appointing arbitral tribunal when the parties fail to agree, and how the party can request for courts assistance to appoint the tribunal is as follows:

(1) Where the arbitrator in the tribunal shall be a sole arbitrator, the parties have to agree on the arbitrator together. If the parties failed to agree, either party

[273] The Supreme Court Decision No. 2231-2233/2553 (2010).

[274] The Supreme Administrative Court Decision No. Kor.4/2554 (2014).

might file a motion with the competent court to request for an appointment of the arbitrator;

(2) Where the arbitral tribunal consists of more than one arbitrator, each party has to appoint arbitrators in an equal number. Then the appointed arbitrators jointly appoint another arbitrator to be a chairman of the tribunal. These proceedings have to be done within thirty days after the party receive the notification from the other party or when the parties' appointed arbitrator unable to jointly appoint the chairman of the tribunal within thirty days from the date of their appointment, failing to do so, either party may file a motion with the competent court requesting an order appointing the arbitrator or the chairman of the arbitral tribunal.

In addition, in the case where the parties have agreed on the appointment procedure but fail to proceed, either party can file a motion with the competent court to appoint the arbitrator in the following cases: 1) when a party fails to perform as required under such procedure, 2) the parties or appointed arbitrators cannot reach an agreement expecting under such procedure, 3) or a third party or other institution, fails to perform their function according to the procedure.

While section 18 of the Act 2002, based on Article 11 of the Model Law, it demonstrates neither the method for the court to apply in consideration to select and appoint the arbitrator or whether the court's order regarding the appointment of an arbitrator can be appealed. However, when considering from section 19 of the Act 2002, which clearly states that an arbitrator shall be impartial, independent, and possess the qualifications prescribed in the arbitration agreement, the Court must be subject to this provision when appointing an arbitrator. According to section 45 of the Arbitration Act 2002, no appeals shall lie against the order of judgment of the court unless it is contrary to the provision of law concerning public policy. At the time of the study, no Supreme

Court's judgment mentions this problem. Nevertheless, take into account Article 11(5) of the Model Law,[275] the court's order regarding arbitrator appointment should not be appealable to avoid the delay in constitution of the arbitral tribunal. However, parties' right to challenge the arbitrator according to the Arbitration Act section 19, paragraph three will remains.[276]

1.1.2 Foreign arbitrators

The question about whether foreigners can perform the duties as an arbitrator or party's representative in arbitral proceedings that are seated in Thailand has long been controversial. Thailand arbitration Act 2002 does not have any restrictions on the nationality of arbitrators appointed by the parties or even appointed by the courts. Also, the arbitral rules of the arbitration institutions in Thailand do not mention this issue as well. According to these facts, the parties are free to appoint a foreign arbitrator to process the arbitration on both domestic and international disputes.

Before the issue of the Royal Decree (No.3) of 2000 under the Working of Alien Act 1978, work regarding providing legal services was preserved to Thai national only.[277] The Royal Decree (No.3), which attached to the Working of Alien Act 1978, has explicitly exempted arbitrators from

---

[275] UNCITRAL Model Law on International Commercial Arbitration Article 11(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

[276] The Arbitration Act 2002 section 19 paragraph 3, An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or lack of qualifications agreed to by the parties

to the dispute. But, a party to the dispute may not challenge an arbitrator appointed by him or in whose appointment he has participated unless such party was not aware or could not have been aware of the ground for the challenge at the time of the appointment of the arbitrator.

[277] Published in the Government Gazette Vol 117, No. 105 Gor., p.22-23 (November 15, 2000).

the list of foreigner work restrictions. However, the conditions and long processes of getting VISA and work permit of the foreign arbitrators was debated in all forum that it was an impediment of the development of arbitration in Thailand.[278]

In 2019, the Thai parliament enacted the Arbitration Act B.E.2545 No.2 intending to facilitate foreign practitioners in entering to Thailand to conduct arbitration proceedings. This law entered into force on April 13, 2019. The new rules in this Act will give effect to both foreigner arbitrators and representatives in arbitration conducing in Thailand. The Amendment including the following provision to the Arbitration Act 2002 as Chapter 2/1 on Foreign Arbitrator:

1) The parties to the dispute may appoint one or several foreigners as arbitrators for the arbitration proceedings in Thailand (section 23/1). The foreigners can be appointed to be an arbitrator in all kinds of appointments prescribed under the law, which include the appointment according to the arbitration agreement, arbitral rules, or the appointment by the competent court according to parties' request.[279]
2) To support the consideration of Thai officials on immigration and working of aliens, a foreigner who was appointed to act as an arbitrator or representative in arbitration proceedings in Thailand whether he or she is residing inside or outside of Thailand may request the Certificate from the arbitral institution

[278] However, this Royal Decree contains some restrictions on foreign lawyers. Under this law, foreign lawyers may act on behalf of the parties on arbitral proceedings provided that the applicable law if foreign law or the arbitral award will not be enforced in Thailand. The Attorney-at-Law Act 1985 as well prescribes the condition for foreign lawyers with the request that a person may practice law in Thailand must have a license issued by the Law Council of Thailand. This law bars a foreign lawyer from practice law in arbitral proceedings performed in Thailand.

[279] The Arbitration Act 2002 (No.2) section 23/1 paragraph 2, In the case there is an appointment of arbitrator under Section 18, or there is an appointment of arbitrator under an agreement of the parties to the dispute, a foreigner may be appointed as an arbitrator.

which conducts the arbitral proceedings. (a government agency or an agency established by the law which has mission in connection with the settlement of disputes by arbitration)

3) According to section 23/2, the arbitration institution which has authority to issue the Certificate for a foreigner to act as an arbitrator or party's representative in arbitral proceedings must be a government agency or an agency established by the law and has missions relating to dispute settlement by arbitration where such foreigner will conduct the arbitration under that agency administration. For example, the Thai Arbitration Institute Office of the Judiciary (TAI) and the Thailand Arbitration Center (THAC). This section does not provide any provision regarding ad hoc arbitration, which will conduct in Thailand.
4) The new law requires the arbitration institutions to issue a Certificate for the foreign arbitrator so the person can perform his or her duties upon the rules or regulations of the institution.
5) According to section 23/3, the Certificate should at least contain the detail about; 1) name and address of the arbitration institution which issued the Certificate, 2) reference number or code of the dispute, 3) full name, passport number, and nationality of the arbitrator, 4) estimated period of arbitration proceedings.
6) The arbitrator or the representative of the party may apply for a new Certificate in the case where the procedure is not completed within the period stated in the Certificate.

7) The foreigner who received the Certificate from the arbitration institution is entitled to temporarily reside in Thailand according to the period specified in the Certificate but is not exceeded by the period specified in the immigration law, and is entitled to work in his or her position and duties according to the Certificate and the law governing management of working of aliens.
8) The registrar under the management of the working of aliens law shall issue a work permit to the foreigner who received the Certificate and grant to reside in Thailand according to the Arbitration Act.
9) The foreigner arbitrator or representative may perform his or her duties during the period of processing of work permit. (section 23/5)

The elimination of the restriction for the foreigner to act as an arbitrator or participate in the arbitration as parties representative conducting in Thailand will bring Thailand to another step closing to the arbitration-friendly concept. During the time of this research, many significant changes in the work of the agency related to arbitration in Thailand to support the implementation of the new law can be seen. This amendment may soon attract more foreign arbitrator to come to Thailand and parties of international arbitration to choose Thailand as the seat for their future arbitration.

1.3 Number of Arbitrators

According to the Arbitration Act B.E.2545 (2002), the parties to an arbitration agreement are free to determine the number of arbitrators. However, the law requires that the arbitral tribunal shall be composed of an uneven number of arbitrators. If the parties have agreed on an even number of arbitrators, the appointed arbitrators have to appoint an additional arbitrator to act as a chairman

of the tribunal. In the case where the parties fail to agree on the number of arbitrators, the law states that a sole arbitrator shall be appointed.

In the case where the parties persist in appointing an even number to arbitrate their dispute, will it contribute to a refusal ground to enforce the arbitration agreement or arbitral award? There is no guideline from Thai Courts' decisions. However, such agreement between the parties should be enforceable as long as the appointment of the arbitral tribunal was not contrary to the parties' consent.

1.4 Challenge to Arbitrators

After the arbitral tribunal has established, the arbitrators have to perform their obligations impartially and independently according to the law, parties' arbitration agreement, and institution's rules until an enforceable award is rendered. Even if any party is dead, or becoming an incapable person under the law, the validity of the appointment of arbitrators is not prejudiced. However, the party can challenge the arbitrator who fails to comply with his or her obligation to be impartial and independent, or does not consist of qualification agreed to by the parties.

According to The Arbitration Act B.E.2545 (2002) Section 20, the parties can agree on the proceeding of the challenge. Otherwise, the challenge has to be done within fifteen days after the challenging party becoming aware of the fact which is the ground for the challenge by filing a statement stating the grounds of the challenge with the arbitral tribunal. Then the tribunal has to decide on the challenge unless the challenged arbitrator withdraws from his office, or the other party agrees with the challenge. A party cannot challenge the arbitrator whom he has appointed or in whose appointment he has participated, except the grounds for challenge has been aware by such party after the appointment. The arbitral tribunal may extend the period for the challenge of the arbitrator by not more than fifteen days, where necessary.

In the circumstance that the challenge making with the arbitral tribunal is not successful, the challenging party may request the competent court to decide the challenge within thirty days after having received notice of the decision rejecting the challenge. If there is one arbitrator in the tribunal the challenge has to be made with the competent court within thirty days from the date of knowledge of the appointment of the arbitrator or the date of knowledge of the grounds using for the challenge. After the examination of the challenge, the court will issue an order accepting or dismissing the challenge. While the request is pending, the arbitral tribunal, also the challenged arbitrator, can continue the arbitral proceeding and make the award unless the court orders otherwise.

In 2015, the Supreme Court ruled on a case related to the challenge of the arbitration, which can present the way the court interpreted section 20 of the Arbitration Act 2002. In this case, the court ruled that the party will have the right the file the motion to the competent court to challenge the arbitrator only after the party has brought that issue to the arbitral tribunal for consideration, and either the challenge is not success, or there is only one arbitrator in the tribunal. In this case, the party filed the motion to the court to challenge the arbitrator who was appointed by the other party. However, he did not appoint an arbitrator to be his side nominated arbitrator and did not nominate any person to be a chairman of the arbitral tribunal. Since there is no agreement between the parties prescribed the way to challenge arbitrators, so the challenging is under the Arbitration Act 2002 section 20. Since the challenge never is considered by the arbitral tribunal because the challenged party did not perform his duty in arbitration agreement, the Court dismisses the motion as it contrary to law.

The Supreme Court Decision No. 15010/2558 (2015) mentioned above can illustrate how the Thai Court has tried to limit its intervention in arbitral proceedings when it can, which reflect a positive attitude toward arbitration.

1.5 Termination of the Arbitrator's Mandate

According to section 21, the Arbitration Act 2002, an arbitrator's mandate terminates upon his death, his withdrawal from office, or by the mutual agreement of the parties. The grounds for the arbitrator to ceases office may occur when he or she is unable to perform the duties by refusing to accept his appointment, being subject to an absolute receivership, being adjudicated incompetent or quasi-incompetent, or failing to perform his duties within a reasonable time for other causes. In the case where such grounds are disagreed by the parties or the arbitrator deny to withdraw from the office, either party may file the motion to the competent court requesting to decide on the termination of the arbitrator's status as such.

However, the law clearly stipulates that in the case where the arbitrator withdraws from his office or the parties mutually agree on the termination of the status of an arbitrator does not constitute an acceptance of causes that the parties concern. This provision is based on Model Law Article 14(2).

1.6 Replacement of Arbitrators

According to the Arbitration Act 2002 Section 22, where the mandate of an arbitrator terminates due to the challenged from the parties or the termination of the arbitrator mandate according to the law or parties' agreement, or because the deciding to withdraw himself from the case, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

In the case where there is no rule apply on the appointment of the arbitrator and the parties cannot agree on the appointment of the substitute arbitrator, either party may file the motion to the competence court requesting for the appointment of the arbitrator. To the question, whether the parties can agree to continue the arbitral proceeding without appointing the substitute arbitration, there is no clear answer under the law. However, as the arbitral proceeding on the doctrine of party

autonomy, the parties should be free to agree upon that issue. Furthermore, instead of appointing the substitute arbitrator, the parties may agree to withdraw one arbitrator from the case to constitute the odd number tribunal if doing so is not against the arbitration rules between them.

1.7 Rights and Duties of Arbitrators

1.7.1 Status of Arbitrators

An arbitrator is a private individual who is empowered by the parties to adjudicate the dispute according to the arbitration agreement and arbitration rules and law agreed by the parties. There is no specific definition for the term “arbitrator” under Thai law. The Arbitration Act 2002 defines the term “arbitral tribunal” is either a group of arbitrators or one arbitrator.

However, a person will deem to be an arbitrator who has the power to render an arbitral award only when he or she acting as a neutral person and make a final decision to the dispute according to parties’ agreement. The Supreme Court ruled in the Decision no. 275/2504 (1961) that the fact that the parties agreed to rely on the majority opinion of a group of witnesses about whom the disputed land belongs to is not arbitration since it was just a joint witness claim without appointing of a specific person to decide the dispute.

1.7.2 Obligations of Arbitrators

Arbitrators have an obligation to perform their duties according to the parties’ agreements and the laws. Not complying with the laws or parties’ agreement can be the grounds for the party to challenge the arbitrator or the arbitral awards, and the grounds for the courts to refuse to enforce the arbitration award. The arbitrators’ obligations can be described as follow:

(1) The obligation to disclose some facts

Section 19, paragraph 2 of the Arbitration Act 2002, requests a prospective arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. This duty is required to be done to the parties at the time of the appointment and

throughout the arbitral proceeding with our delay, unless the parties have already been informed of them by the arbitrator. This obligation also included in the Arbitration Rules of the Thai Arbitration Institute (TAI)[280] and Thailand Arbitration Center (THAC).[281]

(2) The obligation to perform all assign duties by himself or herself

Since an arbitrator was appointed to adjudicate the dispute because he or she has a particular qualification that the party prefers and trust, the arbitrator should not assign other persons to do his duties for him.

(3) The obligation to strictly perform according to the arbitration agreement

The arbitrator has to perform the duties according to the arbitration agreement as it is the source of the arbitrator's power. For instance, if the parties agreed on the applicable law of the disputed contract or the arbitral rules to use with the arbitral proceeding, the arbitrator must apply that law when adjudicating the dispute according to the agreed ruled. Also, the arbitrator has to perform his duty to comply with any agreement the parties make after the arbitration agreement was concluded.

(4) The obligation to follow the laws

According to the Arbitration Act 2002 section 25, the arbitration tribunal has the power to conduct any proceedings in any manner, as it deems appropriate unless otherwise agreed by the

---

[280] Thai Arbitration Institute (TAI) Arbitration Rule 2017 Article20 "When contacted or appointed to be an arbitrator, as well as throughout the arbitral proceedings, the person shall disclose any facts that may give rise to justifiable doubts as to his impartiality and independence, to the parties and the Institute.", *available at* https://thac.or.th/theme/file_system/20190919090546.pdf.

[281] Thailand Arbitration Center (THAC) Article 26 "The person appointed as arbitrator shall disclose the facts that may raise doubts over his or her impartiality and independence to the parties and the Registrar. Paragraph 2 While performing his or her duties, should any circumstance under paragraph one arises, the arbitrator shall immediately disclose this to the other parties and arbitrators and the Registrar.", *available at* https://thac.or.th/theme/file_system/20190919090546.pdf.

parties or provided by the act. The arbitrator needs to perform their duties as agreed by the parties, also has to follow the law that applies to the arbitration at the same time.

(5) The obligation to decide the dispute under the scope of the arbitration agreement

The arbitral tribunal has the jurisdiction to decide only the dispute that the parties presented under the arbitration agreement scope. In the case where the arbitrator decides on the dispute outside its jurisdiction, such a decision will not bind the parties and can cause the ground for the court to annulled or refuse to enforce the award.

(6) The obligation to treat all parties equally

According to section 25 paragraph 1, in the arbitral proceeding, the arbitral tribunal shall treat the parties with equality and shall give the parties a full opportunity of presenting their cases under the circumstance of the dispute. If the parties believe that they were not equally treated or did not get the full opportunity to defend the case in the arbitral proceedings, or the arbitral tribunal did not process the proceeding according to arbitration rules agreed by the parties or the Arbitration Act, the parties can rely on this circumstance as a ground to request the court to setting aside,[282] or refuse to enforce the arbitration award which was the result of such circumstance.[283]

1.7.3 Rights and Protection of Arbitrators

(1) Arbitrator Right:

Since the arbitrator provides the parties with the arbitration service which consuming his or her times, knowledge, experience, and energy, the arbitrator reserve the right to be paid according to the agreement with the parties, the arbitration rules, and the law. The Arbitration Act

[282] The Arbitration Act 2002 section 40 paragraph 3.

[283] *Id.* Section 43 paragraph 2 (3), (5).

2002 section 46 provides the arbitral tribunal right to state the fees and expenses related to arbitral proceedings and the remuneration for an arbitrator in the award, otherwise agreed by the parties.[284]

Furthermore, according to section 46 paragraph two, in the case where no arbitrator remunerations state in the award, any party or the arbitral tribunal may file a petition to a competent court for a ruling on the remunerations for the arbitrators as it deems appropriate. Even though this circumstance will not be an issue in the practice of institutional arbitration, this provision of the Act can close the gap for the ad hoc arbitration or whenever the problem concerning arbitrator remunerations arises.

(2) Arbitrator Immunity

As a result of performing a quasi-judicial function, arbitrators are in favor of granting immunity. While the Courts adjudicate and rendering judgments, arbitrator tribunals exercise their legitimate power rendering awards. As a state authority, courts have many protections to ensure independent in performing juridical duty according to the law without being afraid of any civil and criminal liabilities. While, the arbitral tribunal's power in considering and rendering the award comes from an arbitration agreement of private parties, granting arbitrator some immunities can confirm the arbitral award finality.

Similar to other civil law countries, Thailand recognizes a broad immunity for arbitrators. According to section 23 of the Arbitration Act 2002, an arbitrator will not be liable on any civil liability on any act performed in discharging his or her duty as an arbitrator unless it is conducted intentional or with gross negligence causing damage to either party. The arbitration law has set a higher standard for arbitrator liability comparing to ordinary tort claims, which is not easy to prove.

---

[284] *Id.* Section 46 paragraph 1, Unless otherwise agreed by the parties, the fees and expenses incidental to the arbitral proceedings and the remunerations for arbitrator, excluding attorney's fees and expenses, shall be in accordance with that stipulated in the award of the arbitral tribunal.

1.7.4 Liability of Arbitrators

Since an arbitral award is final and binding and cannot be reviewed on its merit, absolutely release the arbitrator from liabilities might lead to the carelessness, fraud, and abuse of power. In such case, granting the arbitrator immunity without any condition will harmfully affect the parties' rights.

(1) Civil Liability:

Even though arbitrators got some immunity form the law and will not be liable on any civil liability from a negligent act in performing their duties, they have to be liable to the parties' damage caused by intentional or gross-negligent conduct, according to section 23 of the Arbitration Act 2002. This provision of law is mandatory and relating to public order, where the parties cannot agree otherwise. The agreement or any arbitration rules which differ from this provision is void and will not restrain parties' right to sue the arbitrator who caused damage to the party by intentional or gross negligence. The party who makes a lawsuit against the arbitrator will hold the burden of proof.[285]

(2) Criminal Liability:

The Arbitration Act 2002 is the first Thai law that prescribes the criminal liability in the case where an arbitrator intentional demanding, accepting, or agreeing to accept an assert or any other benefit for doing or omitting to do any act in his or her duties. The arbitrator who is guilty of bribery must subject to imprisonment for not more than ten years or a fine not exceeding one hundred thousand bahts or both. The punishments in this provision are similar to the punishment in the bribery cases of the government officers. This provision is one of a controversial issue as it can be repelled foreign arbitrators that usually appointed in international arbitration cases.

---

[285] Jayavadh Bunnag, *Arbitration Theory and Practice* [อนุญาโตตุลาการ ทฤษฎีและปฏิบัติ] 2nd edition, 93 (2011).

Therefore, the parties may change their mind from choosing Thailand as a seat of arbitration. However, there is no record of a case that an arbitrator is subject to this offense since the Act enters into force.

Furthermore, a person who bribes an arbitrator to perform or delay his arbitral conducts that is contrary to the arbitrator duties by offering or agreeing to give an asset or another benefit to an arbitrator also subject to imprisonment or a fine, or both.

1.7.5 Ethics of Arbitrators

Thailand does not have a specific law related to the ethics of arbitrators. Arbitrators' ethics are appearing in the Arbitration Institutions Code of Conduct. In addition to the arbitration law, arbitration agreement, and arbitration rules, the arbitrators must conduct their duties according to the Code of Conduct that applies to them. The Code of Conduct of Thai Arbitration Institution (TAI) and the Thailand Arbitration Center (THAC)[286] are based on the Arbitration Code of Conduct provided by the International Bar Association (IBA), which can be accessed from their website online.[287]

1.8 Arbitrators in Administrative Contract Arbitration

Under the Arbitration Act 20014, arbitrators are requested to be impartial and independent to ensure fairness in preforming their duties. The misunderstanding about the position of the party-appointed arbitrator to be neutral and acting as the adjudicator for all dispute parties but not an agent of the appointed party is one of the concern problems in Thai arbitration practice. Not only the parties that expect the arbitrators they appointed to take their side but also the arbitrators

---

[286] Code of Conduct of Arbitrators, the Thailand Arbitration Center, *available at* https://thac.or.th/theme/file_system/20190130225702.pdf.

[287] Code of Ethics and Conduct of Arbitrators, the Thai Arbitration Institution Office of the Judiciary, *available at* https://tai.coj.go.th/th/content/page/index/id/18870.

sometimes sharing this same view. This problem has become controversy especially, in the case of administrative contract where the government agency, as a disputing party, appointed a public prosecutor who still in office to be its arbitrator. In practice, it is normal that the dispute regarding administrative contract where one party is a government agency and the other party is a private body will have a public prosecutor act as a lawyer for the government side, while another experienced prosecutor is nominated as an arbitrator. Even though no law prohibits Thai judges or Thai public prosecutor to act as an arbitrator while still in office, the question regarding appropriation and conflict of interest is inevitable. Since one of the public prosecutors' duties under the law is to protect the state interest by rendering legal opinions to government agencies, reviewing draft government contracts, and handling civil cases whereby public agencies are parties.

The objection about the impartiality and independence of public prosecutors for acting as an arbitrator in administrative contract dispute where one dispute party is a government agency was many times raised in courts. According to the Supreme Administrative Court decisions in consideration of public prosecutors' impartiality and independence, the ground of the dispute has to take into account on a case-by-case basis, regardless of his public prosecutor position. If the prosecutor does not have any close benefit relating to the dispute grounds, it should be deemed that there are no justifiable doubts of his impartiality and independence to serve as the arbitrator for the case.[288] The Supreme Administrative Court also stated in one decision that the public prosecutor has the duty under the law to protect the state interests also have to protect the private's right as well. The protection of the state right is limit to the right that the state entitles under the law, it does not mean that the prosecutor can illegally take the benefit that belongs to a private party for the

[288] The Supreme Administrative Court Decision No. Kor. 1/2560 (2017) states that even if the arbitrator (public prosecutor) was appointed as the representative for the party (the government agency) in the other case. However, the ground of the dispute in that case is not related to this dispute, therefore the appointment of such arbitrator in this case is not contrary to the law.

state. If the public prosecutor does not have any direct conflict of interest to the parties in the dispute, he can act as the arbitrator without suspicious reason concerning impartiality and independence.[289]

However, there are some cases that the courts consider that the public prosecutor as the arbitrator has the justifiable doubt grounds to the impartiality and independence. In the Supreme Administrative Court Decision No. Kor 4/2554 (2011), the court ruled that the domination of the Director-General for Administrative Litigation to be party's nominated arbitrator from the party representative who is a public prosecutor in the department of Administrative Litigation is the fact that has sufficient weight to reasonably suspect to the impartiality and independence of such nominated arbitrator. Since the party representative and the nominated arbitrator are working together where the party representative can be controlled, influenced, also has to rely on and contact the nominated arbitrator regularly.

According to the laws and courts' decision mention above, the appointment of public prosecutors as the arbitrators in administrative contract disputes will be seen. However, it is the public prosecutor's responsibility to prove its reputation in maintaining its impartiality and independence when performing as the arbitrator. It requires self-regulation to deny being involved in the case where he or she has close relations at the appointing state and to honestly acts as the neutral adjudicator for all the parties, not as the representative of the government agency who appointed them.

[289] The Supreme Administrative Court Decision No. Ro. 4/2557.

2. Power of Arbitral Tribunal

2.1 The Competence-Competence doctrine

that gives the arbitral tribunal authority to consider its own jurisdiction never appeared in Thai laws until the implementation of the Arbitration Act 2002. The question about whether courts or the arbitral tribunal has the competence to decide arbitral tribunal jurisdiction was a past controversial issue in Thailand. Due to the reason that there was no law explicitly stated on this issue. The only concerning provision in the old arbitration act stated that a court might be requested to decide on the question of law. Therefore, some scholars argued that it was the court's power to decide on the issue of arbitral tribunal jurisdiction. Moreover, arbitrators were deemed as interested persons who should not have the power to decide on their own jurisdiction. On the other hand, most of the academics agreed that the arbitral tribunal should be empowered to determine its jurisdiction in the same way with other matter summited to the tribunal.

In order to clarify the uncertainty on the issue of arbitral tribunal jurisdiction, the Arbitration Act B.E.2545 introduces the concept of "Competence-Competence" to Thai arbitration law for the first time. The Act expressly states that the arbitral tribunal shall be competent to rule on its own jurisdiction. The procedure for raising the question about jurisdiction to the arbitral tribunal also provided. This provision mirror after the Model Law article 16.

2.2 Timing of objection arbitral tribunal decision regarding jurisdiction:

To avoid the delaying, the law requires the party to submit an objection to the arbitral tribunal no later than the date for submission of the statement of defense. It also secures parties' right to challenge the arbitral jurisdiction by explicitly states that the party is not precluded from objecting by the fact that he or she has appointed or participated in the appointment of an arbitrator.

In the case where the arbitral tribunal is exceeding the scope of its authority, the party must raise the objection as soon as the ground of such objection occurred during the arbitral proceedings.

However, the arbitral tribunal may allow the parties to object after the said period if there is reasonable ground to the delay challenges.

2.3 Form of Jurisdictional decision

The arbitral tribunal has two choices in deciding about its jurisdiction. First, the tribunal can choose to issue a "preliminary award"; otherwise, it can wait to put this question in a final award on merit.

2.4 Appeal jurisdiction to court

If a "preliminary award" is made with the decision that the matter over the dispute is in the tribunal authority, either party may within thirty days after receipt of the preliminary award challenge that preliminary award to the competent court. While the motion is pending, the arbitral tribunal can continue the arbitral proceeding and render an award.[290] Although the law empowers the arbitral tribunal to decide on its own jurisdiction, the court still holds the final decision on the jurisdiction of the tribunal. This provision imitates the Model law.

2.5 Deviate from the Model Law

The difference of the Arbitration Act from the Model Law is that the Act does not provide that the court's decision regarding the jurisdiction of an arbitral tribunal cannot be appealed. Even though section 45 of the act prescribes that no appeals shall lie against the order or judgment of the court under the Act, there is an exemption case where the order or judgment is contrary to the provision of law concerning public policy. Whether the problem about the jurisdiction of the arbitral tribunal is regarding public policy is questionable. Therefore, to avoid the party's delay tactic, the law should be explicit that the order or judgment regarding an arbitral tribunal's jurisdiction is subject to no appeal.

[290] The Arbitration Act 2002 section 24.

3. Arbitral Proceeding

Party Autonomy is one of the essential principles of arbitration. This principle is explicitly shown in the Arbitration Act B.E.2545 (2002), as most of the provisions provide that the parties are free to agree on proceeding issues, and when there is no agreement on such issues, the power to decide will fall to the arbitral tribunal. For instance, it is the parties' freedom to choose the place and the language that they want to use in arbitral proceedings. Furthermore, the law offers parties the right to decide and agree on; the period to submit a statement of claim and defense, the ways they want the case to be heard, how to appoint expert witnesses, and the proceeding in the case when there is a default of a party.

However, when the arbitral tribunal has the power to decide on any issues concerning arbitral proceedings, it must take the parties' convenience and the circumstances of the cases into account. Moreover, it is the tribunal's obligation to communicate with the parties in advance and give the parties sufficient opportunity to present their case.

Before the enforcement of the Arbitration Act B.E.2545 (2002), Thai arbitration law did not mention much about the arbitral proceedings. There were only three provisions stated on this issue in the old act. The changes in the current arbitration law are mostly based on the UNCITRAL Model Law To reach the international standard with the mix of some local law detail.

3.1 Selection of Arbitral Seat

3.1.1 Determination

According to section 26 of the Arbitration Act 2002, the parties are free to agree on the place of arbitration. Otherwise, without parties' agreement, the arbitral tribunal is empowered to decide but must take into account of the parties' convenience and the case circumstance. The arbitral tribunal also has the authority to meet at any place it considers appropriate for consultation its

members, hearing of witnesses, experts witnesses of the parties, for inspection of materials, places or documents, except otherwise agreed by the parties.

The Supreme Court of Thailand has ruled that the agreement between the parties to submit their future dispute to the arbitration of Singapore and apply Singapore Laws to the dispute is enforceable and did not contrary to public policy. Moreover, the plaintiff's allegation that submitting the dispute to arbitration in Singapore will cause him a burden and high expense is not the ground that makes the contract void or unenforceable.[291]

3.1.2 Legal Consequences

Even though there is no provision of Thai Arbitration Act explicitly states the legal consequences of the place of arbitration (the judicial seat of arbitration). It is the requirement under the law that the arbitration award must state the place of arbitration, and the award shall be deemed to have been made at that place.[292]

According to the Courts' decisions, the Courts accepted that the arbitration seat plays many significant roles in arbitration. First, the arbitral award is deemed to be made in the place of arbitration. Therefore, it is subject to the national law of the arbitration seat that it has to be filed or registered within the period required by the laws. This concept appeared in the decision of the Supreme Court ruled that the governing procedural law in arbitration proceedings is the law of the place of arbitration unless otherwise agreed by the parties. Subject to this concept, the proceedings of the arbitration that has its judiciary seat in Thailand will be governed by the Arbitration Act 2002, unless the parties agreed otherwise.

Secondly, the seat of arbitration is used to divide the domestic and international arbitration under some countries' laws and also the Model Law. Although the Arbitration Act 2002 does not

---

[291] The Supreme Court Decision No. 3368/2552.

[292] The Arbitration Act Section 37 paragraph 3)

distinguish domestic arbitration and international arbitration, this legal effect will use to consider when the court is requested to set aside the award. Since the Supreme Court had provided the guideline that the Court will have the jurisdiction to set aside the arbitral award only when it was made in Thailand.[293]

Furthermore, the place of arbitration also uses to consider the Court jurisdiction when the parties need courts' assistance in their arbitration proceedings. For example, when the party requests the court to issue an order for an interim measure, to appoint an arbitrator, or to challenge an arbitrator. According to section 9 of the Arbitration Act 2002, one of the competent courts is the court which has jurisdiction over the area where the arbitration proceedings are conducted. Therefore, if the arbitration has its seat in Thailand, the party may file the motion related to arbitration to the court that has jurisdiction where the arbitration is taking place as it deemed to be a competent court under the Act.

Last but not least, the place of arbitration which use to consider where the award was made has a vital role regarding the enforcement of arbitration awards. This issue will be described in detail in Chapter 8 of this research.

3.2 Arbitral Proceeding in General

3.2.1 Fundamental Principle

The fundamental principles regarding arbitral proceedings are set in section 25 of the Arbitration Act 2002. According to this provision, the parties shall be treated with ***equality*** and shall be given a ***full opportunity*** of presenting their cases under the circumstances of the dispute, in the arbitral proceedings. The second paragraph of this section states that otherwise agreed by the parties or provided by the Act; the arbitral tribunal shall have the power to conduct any proceeding in any manner as it deems appropriate. These provisions imitate the Model Law article 18 and 19.

[293] The Supreme Court Decision no. 9467/2558 (2015)

This provision of law is mandatory and has to be followed by the arbitral tribunal. If the arbitral tribunal process the arbitration without providing all parties full opportunity to present their case or did not treat all parties with equality, it can be the grounds for the parties to challenge the arbitrator or even the award.

According to the Act, in consideration of the proceedings, the parties' agreement is the first thing that the arbitral tribunal has to follow together with the laws. In this case, the parties' agreement is including the arbitration rule that the parties agreed to apply to the arbitration proceedings as well. To fill the gaps where no parties agreement or law is prescribing, the arbitral tribunal then has the power to decide as it deems appropriate, including the power to determine the admissibility, relevance, materiality, and weight of any evidence.

Section 25 paragraph three provides that for the purpose of provisions in the Act regarding arbitral proceedings, the arbitral tribunal may apply the provision on the law of evidence under the Code of Civil Procedure to the proceedings *mutatis mutandis*. Nonetheless, from the wording in this provision, the arbitral tribunal is free to apply the law of evidence under the CCP as is deems appropriate.

3.2.2 Commencement of Arbitral Proceeding

Before the use of the Arbitration Act B.E.2545 (2002), Thai arbitration law never mentions about the commencement of arbitral proceedings. There was a problem with when the arbitration should be deemed to begin because the commencement of the arbitration is related to the period of some procedurals that the parties have to do during the arbitral proceeding and statute of limitations of the claim.

According to section 193/14 of the Thai Civil and Commercial Code, the statute of limitations will be interrupted when a dispute is submitted to arbitration. Therefore, the law needs to define the specific time that the arbitration is deemed to commence. Section 27 of the Arbitration

Act B.E.2545 (2002) states that an arbitral proceeding is deemed to commence 1) when a party receives a written request from the other party to refer the dispute to arbitration; 2) when a party notifies the other party in writing to appoint an arbitrator or to approve the appointment of an arbitrator; 3) when a party send a written notice to the arbitral tribunal, which appointed in arbitration agreement to inform about the dispute; or when a party submits the dispute to an agreed arbitration institution.

Although the parties are free to agree upon the time limitation that they have to submit the dispute to arbitration, that period cannot exceed the period fixed by law. Therefore, the parties have to commence the arbitration before the end of the period of time fixed by law regarding the dispute. Otherwise, the arbitral award may be annulled on the basis that the claim was barred by prescription (time limitation), which is a matter of public policy.

3.2.3 Language of Arbitration

In line with the Model Law, the Arbitration Act 2002 provides parties autonomy to choose the language to use with their arbitral proceedings. Without a mutual agreement, the arbitral tribunal can determine the language or languages to use in the proceedings. The agreement or determination will govern the language that will be used in the statement of claim, statement of defense, any written statement by a party, any hearing, and any award, decision, or other communications by or to the arbitral tribunal. However, the parties or the tribunal can decide otherwise.[294] The Act also provides arbitral tribunals' power to order the translation of any documentary evidence into the language agreed to used in arbitral proceedings.

Besides facilitating proceedings and communication between the parties and arbitrators, language use in the proceedings also affect the fees of arbitration institution and arbitrators remunerations according to some arbitration rules. For example, the Thailand Arbitration Center

[294] The Arbitration Act 2002 section 28.

(THAC) Arbitration Rules No.2 (2019) reduce the fees and arbitrator remuneration for the arbitration proceedings in Thai, which will be about 65 to 85% lower than the arbitration that process in other languages to promote domestic arbitration.[295]

3.2.4 Exchange of Written Pleadings

According to section 29 of the Arbitration Act 2002, unless otherwise agreed by the parties, the claimant shall submit the statement of claim includes; facts, a matter of dispute, and the relief sought to the arbitration tribunal within the time agreed by the parties or prescribed by the tribunal. Likewise, the respondent shall state his argument in his defense.

The Act requires the arbitral tribunal to communicate all the information provided by a party to the tribunal, including the statement of claim, statement of request, and other documents with the other party of the case. Also, the report of an expert witness or documentary evidence which the tribunal may rely upon making its decision shall be communicated to all parties[296]

The law provides parties the right to amend or supplement its claim or defense during the arbitral proceeding, however, subject to the opinion of the tribunal to consider whether the amendment or supplement will cause undue delay. This rule in not mandatory as the parties are free to agree otherwise. [297]

3.2.5 Oral Hearing

It is the party's choice to decide whether they prefer to have an oral hearing as part of arbitral proceedings. Without the parties' agreement, the determination will be under the tribunal's power. The arbitral tribunal may decide to take only the cross-examination of witnesses that are held before

---

[295] THAC Arbitration Rules No.2 (2019), *available at* https://thac.or.th/theme/file_system/20190402064900.PDF.

[296] The Arbitration Act 2002 section 30 paragraph 4.

[297] *Id.* 29 paragraph 2.

the tribunal to reduce the time and cost relating proceedings. Otherwise, the arbitral tribunal can hold oral hearings for the presentation of evidence or for oral argument and take the evidence according to that at any stage of the proceedings when a party request is not contrary to the agreement, and the tribunal thinks appropriate. [298]

3.3 Evidence

Even though the arbitral tribunal has the power to request the present or the evidence over the parties, it cannot exercise its power over third persons without their consent. In the case where the witnesses refuse to appear before the tribunal or do not want to be adduced by the party, judicial assistance is necessary for arbitration. Besides, judicial assistance is beneficial when the arbitral tribunal needs to use documentary evidence, which is in possession of a third party or government agency.

Section 33 of the Arbitration Act B.E.2545 (2002) provides that the arbitral tribunal, an arbitrator, or a party, with the consent of the majority of the arbitral tribunal, may request a competent Court to issue a subpoena or to order the delivery of any documents or materials. If the Court considers that such requested assistance could have been carried out by the court in a legal proceeding, it can assist in the arbitration, applying the relevant provisions of the Code of Civil Procedure for such proceeding.

The reason that the law states that the party can request for court assistance in taking evidence only if the majority of arbitral tribunal agrees on such request is to avoid the dilatory act of the party, the arbitral tribunal, therefore, has the authority to consider whether the evidence is needed for making decisions. This concept was taken from the Model Law article 27.

Notably, this provision provides the right to request the court assistance in taking evidence to an arbitrator and a party with majority consent from arbitral tribunal while the Model Law Article

---

[298] *Id.* Section 30.

27 provides the right to the arbitral tribunal and a party with the approval of the arbitral tribunal. This provision in theoretical seems to be a conflict with section 35 of the Act regarding decision making by the arbitral tribunal where states that; unless otherwise agreed by the parties, any awards, orders, and rulings of the arbitral tribunal shall be made by a majority of vote, but if the majority of votes can not be obtained, the chairman of the tribunal shall solely issue an award, an order or ruling. It could be considered that section 33 is the exception of section 35 regarding the chairman's power where the majority agreement of the arbitral tribunal is failed, as section 33 does not provide the parties room to agree differently from the law. However, this issue will not easily be seen in practice.

According to the arbitration law, the relevant provisions of the Code of Civil Procedure are applied to provide judicial assistance for arbitration cases. Therefore, in international commercial arbitration that has its seat in Thailand, judicial assistance will be limited to the measures and procedures available under the Code of Civil Procedure as the ***lex fori***. However, today, there is no law or the Supreme Court decision that explicitly states about the judicial assistance for the arbitration, which has its seat outside the country. As a result, that Thai arbitration law does not distinguish the use of provision between domestic arbitration and international arbitration; the application of the rule may be different from the Model Law article 1(2), which reduces the application of article 27 to the territory of the lex loci. We have to wait and see how Thai Courts will decide on this issue in the future.

The Arbitration Act 2002 leaves the parties, and the arbitral tribunal freedom to determine the proceedings regard of hearing of witnesses, examination and cross-examination, and sworn, as no provision in the Act mentions on this matter.

3.4 Tribunal-Appointed Experts

3.4.1 Power of the Tribunal

The Arbitration Act 2002 section 32 is in line with the Model Law Article 26 that provides the arbitral tribunal power to appoint one or more experts to report to it on specific issues for the tribunal to determine, also to request a party to provide the expert any relevant information or document or to provide access to any relevant materials, documents, or places for the expert to make any inspection. However, provision can be agreed otherwise by the parties.

3.4.2 Role of the Parties

Unless agreed otherwise by the parties, in order for the party to ask questions or to present his or her own expert, the expert shall attend the hearing after the delivery of his written or oral report according to the parties or the arbitral tribunal request.[299] As this provision is not a mandatory rule, the parties may agree that no such hearing could be held for speeding the procedures.

While some jurisdictions included the provision on the challenge of expert witness appointed in the arbitral proceeding in their arbitration laws[300], notably, the Arbitration Act does not state on the challenging of the appointed expert. Neither, Arbitration Procedure Rules of the Thai Arbitration Institute (TAI), nor the Thailand Arbitration Center (THAC) do not provide any rule regarding the challenge of the expert witness. According to the general principle of arbitral proceedings, if the parties can not agree on the problem regarding the expert challenge, the arbitral tribunal will have the power to decide what they think appropriate.

---

[299] *Id.*seciton 32paragraph 3.

[300] For example, the German Code of Civil Procedure s.1049 (3) apply the provision on the challendge of arbitrators to the challenge of an expert appointed by the arbitral tribunal mutatis mutandis.

3.5 Interim Measures of Protection

According the section 16 of the Arbitration Act 2002, the power to issue an interim measure order belongs to the competent court. The law does not provide the arbitral tribunal to order an interim measure of protection neither before or during the arbitral proceedings. Under this section, a party to an arbitration agreement may file a motion requesting the competent court to issue an order imposing interim measures to protect his interest before or during the arbitral proceedings. The law requires the competent court to determine according to the Civil Procedure Code, and if the court would issue the order.

This provision is different from the Model Law and can cause some problems in practice. In the case where the arbitral tribunal process under the arbitration rules that provide the tribunal authority to order an interim measure, would it be considered to be contrary to the law. For example, the new arbitration rules of the Thai Arbitration Institute (TAI) (2017) section 39[301] or UNCITRAL Arbitration Rule section 26.[302] There is no Supreme Court decision giving a guideline on this problem so far; however, if the parties agreed to follow the interim measure issued by the arbitral tribunal with consent, there should be no problem. Nevertheless, in the case where the party does

[301] The Thai Arbitration Institute (TAI) Arbitration Rules (2017) Article39 states that "The Arbitral Tribunal may, at the request of a party, grant interim measuresof protection for the partyas it deems appropriate. The Arbitral Tribunalmay directthe party requesting suchinterim measure to provide appropriate security for any damage that may arise in connection with the measure.

The request pursuant to paragraph one shall not affectthe right of theparty to requestthe court to grantinterim measures. Such request shall not be deemedto beincompatible with the arbitral proceedings under these Rules." , *available at* https://tai.coj.go.th/th/content/category/detail/id/2196/iid/18875.

[302] UNCITRAL Arbitration Rule, Article 26 interim measure 1. The arbitral tribunal may, at the request of a party, grant interim measures…,*available at* https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

not comply with the tribunal interim measure order, this issue may be challenged to the competent court whether the arbitral tribunal conduct is against the law.

This provision can cause some delay and inconvenient to parties of the arbitration. To facilitate arbitration and promote the country as a venue for international arbitration, Thailand should consider amending the law and provide the arbitral tribunal the power to grant interim measures of protection for the parties. According to international standards such as the UNCTRAL Model Law article 13 and other jurisdictions arbitration laws, the arbitral tribunal has the power to issue an interim measure when it considers appropriate upon the party request. [303] This concept will bring Thai Arbitration to the next level.

3.6 Default

The issue regarding the validity of arbitration proceedings and award in the case of a default of the parties did not include in the old arbitration law (the Arbitration Act B.E. 2530 (1987)); therefore it was debatable whether the arbitral tribunal had the power to continue process the proceedings, and would court enforced the award which is the result of such arbitration.

However, the Arbitration Act 2002 section 31 explicitly provides the arbitral tribunal guideline to follow in the case of party default. This section is based on the UNCITRAL Model Law article 25 with some different wording but the same concept. According to section 31, unless otherwise agreed by the parties, the arbitral tribunal must proceed as prescribe which can separate into three circumstances as follow;

1) In the case where the claimant fails to communicate the statement of claim under section 29 paragraph one (within the period the parties agreed or

[303] Singapore International Arbitration Act (Chapter 143A) section 12(1)(i) provide that the tribunal has the power to issue an interim injunction or any other interim measures., *available at http://www.siac.org.sg/images/stories/articles/rules/IAA/IAA%20Aug2016.pdf.*

prescribed by the tribunal; the statement must include at least the facts supporting the claim, the points at issue and the relief sought), the arbitral tribunal must terminate the proceedings.

2) If the respondent fails to communicate the statement of defense under section 29 paragraph 1(within the period agreed by the parties of prescribed by the arbitral tribunal), the tribunal must continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.

3) If any party absent from a hearing or failed to produce documentary evidence, the arbitral tribunal must continue the proceedings and make the award on the evidence before it.

This provision presents non-mandatory characteristics and assures party autonomy to agree differently from the laws by state that unless otherwise agreed by the parties. Furthermore, the law (section 31 paragraph two) empowers the arbitral tribunal to examine the default and reason for the respondent's failure to file the statement of defense or failure to appear before making any order as it considers appropriate in order to find whether the party has the sufficient causes for failing to conduct its duty in arbitral proceedings. Therefore, if the wording of this section is different from article 25 of the Model Law, it contains the same purposes and essential meaning.

4. Confidentiality of the Arbitral Proceedings

4.1 Confidentiality of the Arbitral Proceedings

The Arbitration Act 2002 does not contain any provision regarding the confidentiality of the arbitral proceedings. However, this issue can be found in the Arbitration Rules of institutions in Thailand.

The Arbitration Rule 2017 of the Thai Arbitration Institute, Office of the Judiciary (TAI) section 36, provides that all arbitral proceedings, the statement of claims, the statement of defense, hearings, evidence, documents, orders, and award are confidential. The parties, arbitral tribunal, and the institutes cannot disclose all or any matters regarding arbitral proceedings, except where the parties are consent, or for obtaining protection exercising right under the laws, or for enforcing or challenging an award, or under the duty to disclose by law.

Same concept but more detail, the Thai Arbitration Center Arbitration Rule 2015 contains a section about the confidentiality of arbitral proceedings. The rule provides that the arbitral proceedings and all matter related to arbitration under the rule are confidential. Other than the parties' statements, evidence, hearing, and documents, the arbitrator named in the tribunal also must be kept confidential. Section 88 of the rule taking the confidentiality in arbitration proceedings more severe as the arbitral tribunal is empowered to issue any measure or even making an award against the parties who breach the obligation for the loss incurred.[304] It also requests that the parties' consent to disclose any information relating to arbitral proceedings must be in writing. In order to assure the confidentiality of the proceedings, section 89 of the rule prescribes that all workers of the THAC do not have a duty to give any statement regarding arbitral procedures conducted under the rule, except it was required by laws, also parties have the obligation not to refer THAC workers and arbitrators as witnesses in any legal proceedings regarding arbitral proceedings conducted under THAC rules expect required by law.

---

[304] THAC Arbitration Rule 2015 article 88 Where a party's action is in breach of Article 87, the Arbitral Tribunal has

the power to prescribe any measure it deems appropriate, including issuing an order or Award against the party in breach to accept liability for the loss incurred., *available at* https://thac.or.th/theme/file_system/20190919090546.pdf.

4.2 Confidentiality of Arbitration-Related Court Proceedings

In court proceedings regarding setting aside or enforcement of arbitral awards, the fact relating to arbitral proceedings must be revealed. Even though there is no specific requirement under the Arbitration for the party who filed the motion to set aside the arbitral award to present any particular document or evidence to the courts, also the request for the enforcement of arbitral award the law requires only the original or certified copy of the arbitral award, arbitration agreement and Thai translation of such documents, the regarding fact must be presented to the courts since the grounds for setting aside, enforcing, or refusal of the arbitral award also regard the arbitral proceedings which court need to determine.

The decision of Thai Courts has a general pattern which consists of claims for both parties, the summary of fact from the hearing, follow with reasoning on fact and law questions according to the law and the verdict. The decisions of the Thai Court are accessible. However, only the decision of the Supreme Court and the Supreme Administrative Court are made available to the public,[305] while decisions of the courts of the first instance and the court of appeals can only access by the parties of the cases, and any interested persons upon the approval regulations of each court. However, the decisions that can be accessed will not include the documents that were used as evidence in courts. Arbitration agreements, arbitral awards, arbitral proceedings, and the names of arbitrators will not open to public, but the relevant matter that needed court decision will appear in the judgments. As a result that judicial decisions are delivered and written only in Thai without translation into foreign languages, it caused a barrier to foreigners who wish to study and access Thai Court decisions.

[305] Search engine is available at the website of the Supreme Court, www.supremecourt.or.th. And at the website of the Supreme Administrative Court, http://www.admincourt.go.th/admincourt/site/05SearchSuit.html.

5. Arbitral Awards

The manifest characteristic of an arbitral award is its finality and binding. The arbitral tribunal is obliged to make an award that is dispositive of the issues in the case. The parties are bound to perform their obligation according to the award. However, when the parties do not voluntarily comply with the arbitration award, to be enforceable, the award has to meet the requirement under the law of the place where it needs to be enforced. Otherwise, the arbitration will be meaningless to the parties. Chapter 5 of the Arbitration Act 2002 is regarding arbitral award and termination of proceedings.

5.1 Types of Arbitral Award

No provision in the Arbitration Act 2002 specifies types of arbitral awards. However, the term award in the law is under the concept of the final award. The preliminary decision of the arbitral tribunal regarding its jurisdiction can be deemed as the interim award, which the party may challenge to the court under section 24 paragraph 3.[306]

5.2 Making of the Arbitral Award

1) Time limitation

According to chapter 5 of the Arbitration Act 2002, the law provides parties some freedom to agree on how the award should be made. There is no provision prescribes time limit in making an award, so the parties are free to agree or rely on this issue on the arbitration rules of the arbitration institution conducted the arbitration or the arbitral tribunal guideline of arbitral proceedings.

[306] The Arbitration Act 2002 section 24 paragraph 3, The arbitral tribunal mya rule on its jurisdiction either as a preliminary question or in an award on the merits. If the arbitral tribunanl rules as a preliminary question that it has jurisdiction, either party may file a motion requesting the competent court to decide thmatter within thirty days after receipt ot the ruling on the preliminary issue, and during the time that the motion is pending, the arbitral tribunal may continue the arbitral proceedings and render an award.

However, the Supreme Court has ruled in its decision no.4896/2557 that the time limit in making an award provided in the arbitration institution's rule is only a guideline for managing the arbitration. In the case where the arbitral tribunal cannot issue an award within the time limit in the arbitration rules, it does not defect the arbitral proceedings and does not contrary to the law regarding public policy.[307]

2) Chairman's Decisive Vote

According to the old arbitration law, when the award cannot make by the majority of the tribunal, an umpire had to be appointed. The umpire system had caused many problems with the arbitration in Thailand. Due to the reason that an appointment of an umpire would not have to do until the last proceeding of the arbitration when the award cannot be rendered because it could not reach the majority of the arbitral tribunal. The umpire would not have any chance to attend in hearing or observing the testimony of witnesses but studying the case files which will cause some difficulty in making decision. The problem usually happened when there was an even number of arbitrator. Although in some cases where the parties agreed to appoint an umpire at the beginning of the procedure to observe the proceeding, the umpire would have to play his role only when the majority of the arbitral cannot meet.

Therefore, the Arbitration Act 2002 prescribes that the arbitral tribunal must be composed of an uneven number of arbitrators, where the parties have agreed on the even number, the arbitrators must jointly appoint an additional arbitrator to be a chairman of the tribunal. Unless

[307] The Supreme Court decision No.4896/2557. In this case, the defendant alleged that the arbitral tribunal making an award exceeded the time provide in the Arbitration Institution Rule (TAI) article 27 which required that the award must be issue within 180 days from the date the last arbitrator was appointed, is contrary to public policy. The Supreme Court ruled that such arbitration rule is only the time frame provided by the institution, however, in the case that the tribunal cannot process the arbitration within the time will not make the arbitral proceeding contrary to the law. Therefore, the enforcement of the arbitral award is not against public policy according to section 45 (1).

otherwise agreed by the parties, any awards, orders, and rulings of the arbitral tribunal must be made by a majority of the vote. The chairman of the tribunal will solely decide on such orders, rulings or awards if the majority of votes cannot be obtained. This provision deviates from the Model Law.

According to the Arbitration Act B.E.2545 (2002), the chairman is entrusted with obtaining such superior power because it was believed that the decision of the chairman would represent the most moderate and fair choice. On the contrary, UNCITRAL Model Law does not present the idea of believing in the single chairman voice, compromise between each arbitrator shall be made to find a majority in every decision. In the same way as the Model Law, Thai arbitration law provides the chairman authority to decide on the question of procedure, where authorized by the parties or all members of the arbitral tribunal.

5.3 Form and Contents of Arbitral Award

According to Section 37 of the Arbitration Act 2002, the arbitral award must be in **writing, stating the date and place of arbitration and signed by members of the tribunal**. If there is more than one arbitrator in the tribunal, the award must be signed by the majority of the tribunal. The reason for any omitted signature must be provided.

The arbitral tribunal has to **include clear reasons** for its decision in the award unless otherwise agreed by the parties. This provision does not exist in the Model Law. Even though the Arbitration Act gives the parties the freedom to decide not to include the reasons of the arbitral tribunal in the award, without the parties' agreement, the award required to contain the precise reasons for the tribunal decision. Where the arbitration has a legal seat in Thailand, and there is no agreement between the parties to not include the arbitral tribunal reasons in the award, a party of the award may challenge the award to the competent court on the ground that the arbitral

proceedings were not accordance with the law. The award can be revoked or refused to be enforced under this ground under section 40 (1)(จ) and 43(5) of the Arbitration Act 2002.

Section 37 paragraph two of the arbitration act explicitly states that the tribunal cannot prescribe or decide on any matters falling beyond the scope of the arbitration agreement or the relief sought by the parties, except an award was rendered following the settlement agreement under the act. However, the tribunal may determine arbitration fees, expenses, or remunerations of the arbitrators and states them in the award. Otherwise, the party or the arbitral tribunal may later file the petition requesting the competent court to decide on these matters. In contrast, the Act excludes lawyers' fees and expenses from the arbitral tribunal's authority concerning costs. Likewise, exemplary and punitive damages cannot be awarded by the arbitral tribunal as a result that the right concerning compensation under Thai law is based on the principle of recovery for actual loss. Furthermore, the law requires the tribunal to send a copy of the award to all parties after the award is made to be evidence that the parties are noticed and bound by the award.

5.4 Jurisdiction

As described above in section 2 of this chapter regarding the Power of Arbitral Tribunal, the Arbitration Act accepts the doctrine of Competence-Competence, which provides the arbitral tribunal power to determine its own jurisdiction according to the arbitration agreement between parties and the laws. Section 37 paragraph two of the Arbitration Act explicit the jurisdiction of the arbitral tribunal once again by stating that the ***award must not prescribe or decide on any matters falling beyond the scope of the arbitration agreement or the relief sought by the parties***, except a settlement award under section 36, or the fixing of arbitration fees, expenses or remunerations of the arbitrator under section 46. This provision is an extra from the Modle Law.

According to this provision, where the arbitral award consists of both the matter under the scope of arbitration agreement and outside the arbitration agreement sphere, the issue outside the

arbitration agreement even appear as part of the award will not bind the parties and cannot be enforced and may subject to the be set aside by the law.

However, the arbitration has the authority to interpret the arbitration agreement and make determination on its jurisdiction. In the Supreme Court Decision No.13570/2556 the court rules that the interpretation of the arbitral tribunal that the parties of the arbitration contract have explicit and real intention to apply Thai arbitration law with their proceedings, and interpreted that the Arbitration Act 2002 which is the current arbitration law shall be applied is the use of the tribunal's discretion which neither outside its jurisdiction nor contrary to the public order or good morals of people.

5.5 Applicable Law

The parties' freedom to select the substantive law to use with their commercial relationship is a distinct advantage for using arbitration as a means for their dispute resolution. This characteristic of international commercial arbitration provides the parties with the ability to agree on the applicable law in advance and assure that it will be hardly changed. The provision of the Arbitration Act 2002 imitates the UNCITRAL Model Law article 28 with some slight differences.

(1) Applicable Substantive Law

According to section 34 first paragraph of the Arbitration Act 2002, the arbitral tribunal has to decide the dispute in accordance with the governing law chosen by the parties. Any designation of the law or legal system of a country must be construed as directly referring to the substantive law of the country and not the conflict of laws rules unless otherwise expressed. It is clear that section 34 of the Thai Arbitration Act is based on the UNCITRAL Model Law by accepting party autonomy and make it a priority in considering the law that will govern the dispute.

As a result, that Thailand does not distinguish the arbitration law provisions between domestic arbitration and international arbitration, section 34, paragraph two prescribes slightly

different from the Model Law, in the case where if the parties fail to decide the governing law, the arbitral tribunal has to decide the dispute under Thai laws. However, this will limit to the case, where the arbitration has its legal seat in Thailand and does not have any international component.

Nevertheless, where there is a conflict of laws, the arbitral tribunal must apply the principle of conflict of laws it considers appropriate to determine the applicable law of the dispute. It means that if the disputed contract between the parties has an international element regardless of the parties' nationality, the tribunal shall apply the principle of conflict of law that they deemed appropriate to find the substantive law to apply to the dispute. In such case, it does not have to be the Conflict of Law principle of Thailand. This provision is consistent with the Model Law, under the idea of restriction the arbitral tribunal's choice of law to conflict of law rules, while more than half of the jurisdictions that adopted the Model Law does not comply with this idea.[308] However, at the time of this study, there are no Thai court guidelines about the legal consequences of the conduct of arbitral tribunal against this provision, where the arbitration rule of the institution or the arbitral tribunal determines to apply a law to the dispute regardless of the choice of law rules.[309] For example, if the arbitral tribunal process the arbitration under the THAC Arbitration Rule 2015 article 68, will it be deemed contrary to the law and challengeable.

Likewise, article 2(d) of the Model Law, the Arbitration Act section 6 explicitly excludes article 34 from the parties' freedom of choosing the applicable law of the contract to be referable to the third party or institution to make that determination on their behalves. This provision makes the requirement under the law mandatory in the case where the parties failed to agree on the

---

[308] Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law* Jurisdictions 401, (4th ed. 2019).

[309]The Thailand Arbitration Center Arbitration Rule 2015 Article 68 states that the Arbitral Tribunal shall apply the law agreed by the parties to the dispute. In the event that the parties have not agreed, the Arbitral Tribunal shall apply the law which it determines appropriate for the case.

governing law of their disputed contract, the power to determine the applicable law will undertake by the arbitral tribunal according to the rules prescribed in the Arbitral Act.[310]

Another observation that has to be made when the governing law of the dispute is foreign, according to section 5 Thailand's Conflicts of Laws Act 1938, foreign law can be applied insofar as it is not contrary to public order and the good morals of people.

(2) Ex aequo et bono

Ex aequo et bono or amiable compositeur is another choice of parties' decision concerning the way that they want the tribunal to decide their case. With *ex aequo et bono*, the arbitral tribunal can make any decision based on reasonableness and fairness and does not have to apply the law strictly. Whether the concept of ex aequo et bono were acceptable under Thai law, had been a controversial issue before the promulgation of the Arbitration Act 2002.

According to section 34 third paragraph of the Arbitration Act 2002, the arbitral tribunal can render the case ex aequo et bono, where the parties expressly agreed. However, the law does not explicitly state when the parties may agree to do so. Some scholars argue that parties can agree upon this matter both at the time they enter into an arbitration agreement and at the time they are submitting the dispute to arbitration. Although there is no exact scope of the concept, the parties, and arbitral tribunal can apply the concept of ex aequo et bono with confident that the award will not be annual due to that matter under Thai arbitration law. However, the law requires the arbitral tribunal to take into account trade usages concerning the disputing transaction in all cases.

(3) Rule of Procedure

According to the Arbitration Act 2002, the parties are free to decide on their arbitral procedure. The act also provides the proceeding from the beginning to the end when an award is

[310] The Arbitration Act 2002 section 6, Subject to Section 34, where the provisions of this Act empower the parties, to determine any issue, the parties may authorize a third party or institution to make that determination on their behalves.

rendering. To fill the gap between parties' agreement and the law, the arbitral tribunal has an authority to conduct any proceeding including determining the admissibility and weight of the evidence as it deems appropriate. The parties may decide their own rules or choose one from the rules of the arbitral institutions.

(4) Procedural Law

Although there is no law explicitly states that the parties are free to agree on the law of procedural, it can be imply construed from the basic notion of the Arbitration Act, which gives the importance of party autonomy, that the parties can make their own choice of procedural law. As most of the provisions concerning arbitral proceeding provide that "otherwise agree by the parties." However, where the parties fail to agree upon the procedural law, in general, the law of the place of arbitration will be the ***lex abitri*** of that arbitration. Therefore, if Thailand is chosen as the seat to arbitrate, the Arbitration Act 2002 will be the procedural law of the case.

5.6 Settlement

During the arbitral proceeding, parties may be able to agree on their dispute; in this case, there is no need to continue any proceeding. However, the parties may request the arbitral tribunal to make an award accordingly to their settlement agreement. The consent award can secure the parties' rights according to the settlement agreement since the enforcement means under the New York Convention provides a more enforceability chance in most jurisdictions.

According to the Arbitration Act 2002 section 36, if the parties can settle the dispute during the arbitral proceeding, the arbitral tribunal has to terminate the proceeding. In this case, the parties may request the tribunal to render an award according to the parties' settlement. After considering that the parties' settlement is not contrary to the law, the arbitral tribunal must render an award subject to the parties' settlement agreement.

Furthermore, the arbitral tribunal must follow form requirements regarding a regular arbitral award, which including being writing with arbitrators' signature, statement of date and place where the award was made as provides in section 37. However, the award on agreed terms is under the exception of the law as it does not have to contain the reason. The law explicitly states that the award rendered upon the settlement agreement of the parties will have the same status and effect as the award on the merits.

According to the vague wording in section 37 of the Act where states that " Unless otherwise agreed by the parties, the award shall clearly state the reasons for making such decisions. However, it shall not prescribe or decide on any matters falling beyond the scope of the arbitration agreement or the relief sought by the parties, except an award rendered in accordance with the settlement agreement under section 36…" The statement in this provision may raise an issue of whether the award on agreed terms can exceed the arbitration agreement. Considering from article 30 (2) of the Model Law, where exclude the award on settlement agreement from including the reason, the intention of section 37 should be the same. As a result, the award on the parties' agreed terms cannot go beyond the scope of the arbitration agreement in the same way as the ordinary award.

5.7 Consequence of the Award

According to section 41 of the Arbitration Act 2002, an arbitral award irrespective of the country in which it was made, shall be recognized as binding on the parties and upon petition to the competent court shall be enforced.

1) The award is final and binding

The fundamental consequence of an arbitral award is that it is final and binding the parties of the arbitration contract. The dispute between the parties is settled and ends according to the final award. Entering into the arbitration agreement, the parties have obligations to resolve the dispute

under the scope of the agreement through arbitration and to be bound by the final decision of the arbitral tribunal. The parties cannot appeal the final award or bring the same dispute to other dispute settlement schemes or to another arbitral tribunal.

- **The parties cannot raise the same dispute under the arbitral award to other tribunals:** In the Supreme Court Decision No. 22/2554, the arbitral award the first arbitral tribunal is final and binding the parties according to section 22 of the Arbitration Act 1987 (section 41 of the Arbitration Act 2002), the parties of the award cannot allege the same dispute to other arbitral proceedings. The conduct of the respondent in the preceding arbitration in raising the same dispute to the second arbitral tribunal was contrary to the law and against the fundamental principle of the arbitral award. The award granted by the second tribunal is against the law, not bind the parties, and cannot be enforced. The court does not have to set aside the second award as it deemed to be void.
- **The debt amount between the parties of the arbitration agreement is not fixed until the arbitral award is issued:** The plaintiff and the defendant had a dispute under the contract, which consists of the agreement on arbitration. The rights and duties between the plaintiff and the defendant are in accordance with the arbitral award after the arbitration proceedings. Therefore, as long as the Arbitral Tribunal has not yet made an award, it shall not be considered that the debt that the plaintiff brought to the defendant, in this case, is a debt that

may definitely fix the amount. As a result, the plaintiff has not yet filed bankruptcy to the defendant under the Bankruptcy Act B.E. 2483.[311]

- **The new dispute occurs outside the arbitration award can be submitted to another arbitral tribunal:** The award is final and binding the parties only on the matter of dispute that was considered by the arbitral tribunal. In the case where the new dispute occurs after the award outside its scope, the parties are not barred from submitting such dispute to the arbitral tribunal. In the Supreme Court Decision no. 8664/2558; The first arbitral tribunal has a final award for the parties to comply with the contract within a period of 9 months. When the facts show that in the performance of the first arbitral award, the petitioner delayed the delivery of the plane and equipment. As a result, there was a new problem in the contractual fines, which is not the dispute that the first arbitral tribunal made. The claimant shall have the right to rely on the principle contract to propose the dispute to the Arbitral Tribunal to decide on that dispute. The latter arbitrator shall have the power to arbitrate emerging disputes relating to refunds of fines. It is not the case that the award is amended or extended according to the first arbitral award.

2) The power and duty of the arbitral tribunal is ended after the issue of the final award

The granting of arbitral award causes the termination of the arbitral proceeding according to section 38 of the Arbitration Act 2002 and also terminates the power and duty of the arbitral tribunal as well. It means that the arbitral tribunal can neither make other decision to bind the parties

[311] The Supreme Court Decision No. 5525/2552

nor any change to the final arbitral awards, except it is empowered by the law as to correct any insignificant error in the award or to interpret the award at the particular point upon the request of the party (section 39).

5.8 The End and Termination of Arbitral Proceeding

5.8.1 General

The Arbitration Act 2002 section 38 provides the matters that caused the termination of the arbitral proceedings. This provision if imitate from the UNCITRAL Model Law arbitral 32. According to this provision, the arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal as follow:

1) The claimant withdraws his claim unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part on obtaining a final settlement of the dispute;
2) The parties agree on the termination of the proceedings;
3) The arbitral tribunal finds that the continuation of the proceedings has for any reason become unnecessary or impossible;

In the case where the arbitral tribunal makes a final award, it has a duty under the law (section 37 paragraph 4) to send a copy of the award to all parties. It is crucial for all parties to receive the final award from the tribunal. In the Supreme Court decision no. 9658/2542 (1999), the court rules that the party does not have the right to requesting the court to enforce the arbitral award since he cannot prove that the copy of the arbitral award was properly sent to the defendant. Notable, the prescription period for setting aside the award is started counting from the date that the parties receive a copy of the award, while the prescription period for requesting the court to

enforce the arbitral award starts to count from the date where the award may become enforceable (see chapter 8 for the detail).[312]

5.8.2 Exception

Section 38, paragraph three, states that the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. Expect where provides under section 39 regarding the correction and interpretation of the award which will be described in the following subject, and the under 40 regarding the court's order for the tribunal to resume the case to eliminate the grounds for setting aside upon the request of the party in the court proceedings of setting aside the arbitral award.

5.9 Correction and Interpretation of the Award

As the arbitral tribunal is a private body that authorized by the disputed parties according to the arbitration agreement to decide on some specific disputes between them, the final award is the objective of the arbitral proceedings. The termination of the arbitral proceedings leads to the termination of the arbitral tribunal mandate. However, the law provides the arbitral tribunal some authority to resume the case in some particular circumstances to facilitate the parties in fixing the problem that may arise after the final award was made.

According to section 39 of the Arbitration Act 2002, unless otherwise agreed by the party, the arbitral tribunal may be requested within thirty days of receipt of the award to correct the arbitration award or to interpret the award on a specific point according to the following conditions:

1) Correction of the award:

A party may file a motion requesting the arbitral tribunal to correct any error in computation, any clerical or typographical errors, or any insignificant error in the award, provided

[312] supra note 151, at 286.

that a copy of the motion be submitted to the other party for information. If the tribunal considers that the motion is justified, it must make the correction within thirty days of receipt of the motion. The tribunal may also correct any error or mistake on its own initiative within 30 days of the date of the award.

2) Interpretation of the award:

If so agreed by the parties, a party may file a motion with the arbitral tribunal to give an interpretation or explanation of a specific point of the award. A copy of the said request shall be submitted to the other party. If the tribunal considers that the motion is justified, it shall make an interpretation within thirty days of receipt of the motion. The interpretation or explanation is a part of the award. The law does not provide the arbitral tribunal the power to interpret the award on its own consideration. The interpretation or explanation of the award shall be done only upon the request of all parties of the case.

The law empowered the arbitral tribunal the extend the period for making the correction, interpretation, or explanation of the award as prescribed by law when it is necessary. The law also requires that the correction, interpretation, and explanation of the award must follow the provision according to the form and content of the arbitral award.

3) Defect found in the law:

Section 39 of the Arbitration Act 2002 begins with the statement that "unless otherwise agreed by the party, within thirty days of receipt of the award" and follow with the provision about correction and interpretation of the award. This statement can cause the problem with the scope of what the parties agree upon, whether the parties have the right to agree on the period of time to file a motion regarding correction and interpretation of the award to the tribunal, or they are free to agree on the scope of the provision regarding what can be corrected and when the interpretation can be made. This ambiguous statement can cause a problem when applying.

It can be seen that the Arbitration Act 2002 adopted this provision from the UNCITRAL Model Law article 33, which explicitly states that “Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties”. The Model Law clearly provides that the matter that the parties can agree different from the law is the period of time to file the motion, but not the conditions of when the correction or interpretation can be made. Nevertheless, the Arbitration Act seems to mistranslate this article. Therefore, the parties, the arbitral tribunal, and the court shall apply this provision by taking into account the meaning provided in the Model Law, until the amendment of the law in this issue is made. However, there is no court decision guideline for the application of this concerning issue so far.

5.10 Additional Award

According to section 39 paragraph 4 of the Arbitration Act 2002, the party may file a motion to the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings omitted from the award within 30 days for receipt of the award. If the arbitral tribunal considers the motion is justified, it shall make the additional award within 60 days of receipt of the motion. The parties may agree otherwise on the period of time to file the said motion. The laws require that the party who files to motion to notice its request to the other party. The arbitral tribunal has the power under the law to extend the period of time for making the additional award as necessary. This provision mirrors the Model Law article 33 (3).

5.11 Fees, Expenses and Remunerations

The Arbitration Act 2002 Chapter 8 prescribes that unless otherwise agreed by the parties, the fees and expenses incidental to the arbitral proceedings and the remunerations for the arbitrators, excluding attorney’s fees and expenses shall be in accordance with that stipulated in the award of the arbitral tribunal. This provision explicitly confirms the arbitral tribunal’s power to indicate the fees and expenses regarding arbitral proceedings also the arbitrators’ remunerations in

the award to avoid the question concerning the conflict of interest for the arbitrator's mandate to do so.

However, there is a question regarding whether the arbitral tribunal is able to indicate the attorney's fees and expenses in the award as the provision excluding the attorneys'fee from it. If considered from the entire statement in this section, the law has provided the parties freedom to agree differently from what the law said. Therefore, if there is an agreement between the parties provides the arbitral tribunal power to stipulate the attorney's fees and expenses in the award, the tribunal is authorized to do so, and the parties are bound by such award.

According to section 46 paragraph 2 of the Act, any party or the arbitral tribunal may file the petition requesting for court's assistance for ruling on the arbitration fees, expenses, and arbitrator remunerations where such fees, expenses or remuneration have not been fixed in the award as it deems appropriate.

The law also states that the arbitration institution may prescribe the fees, expenses, and remunerations incidental to the arbitral proceedings. This law supports the practice perspective where the arbitral tribunal generally prescribes the fees, expenses in arbitration, and the remuneration of arbitrators in the institution rule. For example, the Thailand Arbitration Center (THAC) prescribes in the institution arbitration rule 2015 that the arbitral tribunal shall determine the liability for the fees, legal fees, and any other expenses that the other party paid for the arbitration in the arbitral award according to Annex 1 of the Rule.[313]

6. Conclusion

International Standard: The Arbitration law of Thailand that is governing the issue of arbitral tribunals and arbitral proceedings it the Arbitration Act B.E.2545 (2002). Most of the

[313] The Thailand Arbitration Center (THAC) Arbitration Rule Chapter 7, *available at* https://thac.or.th/theme/file_system/20190919090546.pdf.

provisions regarding the arbitral tribunal and proceedings are adopted the UNCITRAL Model Law with some slight differences. The arbitration law of Thailand can get involved in international commercial arbitration whenever the arbitration takes place in Thailand or has Thailand as its legal seat. The Arbitration Act 2002 explicitly accepts the Competence-Competence doctrine, the separability of the arbitration agreement, and the party autonomy concept.

Observation: Even though the principle concept of the law regarding arbitral tribunal and proceedings is party autonomy, where the parties have the freedom to make their own choice differ from the law, the Court has many roles to play on from the beginning through the end of arbitration. There always room for the party of the arbitration agreement and the arbitral tribunal to request for court assistance. For example, in the proceedings regarding; arbitrator appointment, arbitrator challenge, termination of arbitrator mandate, evidence collection, interim measure, and arbitration fees, expenses and arbitrator remunerations determination. Furthermore, where there is no parties agreement on any matter regarding the arbitral proceedings, the provisions of the Arbitration Act 2002 will be applied as the *lex fori*. Therefore, it is the need for the parties and the arbitral tribunal to follow the rules provided in the law since the arbitration award can be revoked or refuse to enforce on the grounds that the arbitral proceedings were not in accordance with the agreement of the parties or the Act.

Notwithstanding, the Arbitration Act adopted most provisions and concept for the Model Law, the power to grant the interim measure order before and during the arbitral proceedings still belongs to the court. Whether the arbitration rule that offers the arbitral tribunal power to make an order on the interim measure of protection is valid under Thai arbitration law is still debatable as there is no Supreme Court decision giving a guideline on this matter so far.

Promise future: On 13 April 2019, the Arbitration Act (No.2) B.E.2562 (2019) was enforced. This new law added a new chapter (Chapter 2/1) regarding foreign arbitrators to the Arbitration Act 2002with the purpose of facilitating the appointment of foreign arbitrators and

foreign representatives to arbitration in Thailand. According to the new law, the parties may appoint a foreign arbitrator or foreign representative to process the arbitration in the country, regardless of the matter of the disputes or the party nationality, which eliminates the restriction under other relating laws. Furthermore, the new provisions prescribe the detail on how the government agency shall facilitate the foreign arbitrators and representatives regarding the work certificate, VISA, and work permit. The foreign arbitrator or foreign representative in arbitration proceedings even allowed to perform their work during the period of processing of work permit. Likewise, the study of Thai court decisions reveals some significant development of the pro-arbitration concept by assistance the flow of arbitration proceedings and somehow limit the intervention. These changes can represent Thailand serious in taking the next step in international commercial arbitration and promoting the country as a new forum.

Chapter 7

Annulment of International Commercial Arbitral Awards

1. Introduction

Before the Arbitration Act 2002 enter into force, the provision regarding setting aside the arbitral award never exists. When the parties did not agree with the arbitral award, their only choice was to deny to perform their obligation under the award and challenge the award on the grounds under the law when the other parties requested the Court for enforcement.

The establishment of the Arbitration Act B.E.2545 (2002), which replace and repeal the old arbitration law (the Arbitration Act B.E.2530 (1987)), introduces the concept and provisions of the UNCITRAL Model Law to the country. The Arbitration Act 2002 includes the provision regarding setting aside the arbitral agreement in section 40 of the Act. This section adopts the Model Law article 34 on the application for setting aside with some slight differences.

Due to the reason that there is no separation of arbitration law for the domestic arbitration and international arbitration and the provision of law under the Arbitration Act 2002 does not clearly state that the motion to set aside the arbitral award can be made only when the arbitration was seated in Thailand, it causes a critical problem when court apply to the law. The said issue will be revealed at the end of this chapter.

2.Presumptive Validity of Arbitral Awards under Thai Law

The Arbitration Act 2002 institutes the concept of the presumptive validity of arbitral awards in section 41, which prescribes that an arbitral award irrespective of the country in which it was made, shall be recognized as binding on the parties. Even though section 40 regarding the setting aside of arbitral awards does not adopt the statement from the Model Law article 34 (1), which clarifies that recourse to a court against an arbitral award may be made only by an application for setting aside according to the article, section 40 of the Act is the only provision that provides the parties opportunity to challenge the arbitral award before the petition for enforcement since there is no law permits the appealing of arbitration awards in Thailand.

3. Challenge of International Commercial Arbitral Awards in Thailand

3.1 The motion for setting aside

According to section 40 of the Arbitration Act 2002, the challenge of an arbitral award can be made by the motion for setting aside to the competent court. This section provides the right to challenge the arbitral award to the parties of the dispute under the arbitral award. Other people, including the arbitrator, the arbitral tribunal, or the arbitration institution, are not allowed to make any objection.

The motion for setting aside the arbitral award is under the governed of the Procedure Code of the Competent Court; therefore, the rule regarding filing petition or motions to the court also applies to the motion for setting aside. For instance, in the Supreme Court Decision no.525/2559, the court dismissed the motion for setting aside an arbitral award of the party on the ground that it was against the rule of double jeopardy. In

this case, the party filed the motion request for the court to set aside the arbitral award for the second time using the different ground of challenge. The court rules that since the matter of the motion is the same as in the first motion and the party may raise the challenging ground in the second case to the court in the first case; the second motion of the party is double jeopardy which is prohibited under the Civil Procedure Code section 148.

3.2 Competent court

The motion for setting aside an arbitral award needs to be submitted by the party to the competent court, according to section 9. The competent court that has jurisdiction over the motion of setting aside are; the court that has jurisdiction over the matter of the dispute under the arbitral award; or the court that has jurisdiction over the place of arbitration; or the court where the challenging either party is domiciled.

Therefore, the challenge of an international commercial arbitral award, which has its seat in Thailand, the parties will have choices to submit the motion either to the Intellectual Property and International Trade Court or the Court where the arbitral proceedings were conducted, or the court in which either parties is domiciled.

3.3 Time limitation

The party wished to challenge the arbitral award must file the motion for setting aside to the competent court within 90 days from the day that he or she received a copy of the award or interpretation or the making of an additional award, according to the section 40 paragraph 2 of the Arbitration Act 2002. This given period is equal the time limit in the Model Law. In the case where the party files the motion to the court after the end of the

said period, the court will dismiss the motion as the party is deemed to lost the right to challenge the award.

However, the period prescribes under this provision is not the prescription time, but is the time limit for the party to exercise the right under the law. Therefore, in some cases, the court extends this period for the parties but only limit to a specific circumstance. For example, in the case where the parties file the motion for setting aside of the arbitral award within 90 since receiving the copy of the award but the motion was dismissed due to the reason that the court did not has jurisdiction over the case, then within 60 days after the motion was dismissed re-submit the motion to the competent court. Take into account the party's good faith intention. The court accepted the motion even the time limit under section 40 of the Arbitral Act has passed.[314]

3.4 Burden and Standard of Proof

It is the burden for the party who requested the competent court to set aside the arbitral award to prove to the court that the arbitral award is under some defection according to the grounds prescribes in section 40. If the party cannot present to the court strong evidence to support the challenge or the grounds that the party relies on is not the once provided in the law, the court will dismiss the party's motion. Even though there are some grounds that the court may raise by itself without the proof from the party, which will be described in 3.7.

[314] The Supreme Court Decision No. 10878/2554 (2011).

3.5 Grounds for Setting Aside Rise by the Party

3.5.1 Party Lack of Capacity

1) General Principle: According to section 40 paragraph 3 (1)(a), the court shall set aside the arbitral award if the party filing the motion can furnish proof that a party to the arbitration agreement was under some incapacity under the law applicable to that party. This provision is sitting on the ground that the arbitration agreement is invalid according to the incapacity of the party. The invalid arbitration agreement always leads to the lack of jurisdiction of the arbitral tribunal, which can only make the invalid proceedings and the invalid arbitral award. The term incapacity of the party means that the party was under some mental or physical condition or legal restriction to enter the arbitration agreement at the time the agreement was concluded. Also, as the law does not describe otherwise, the incapacity of the party shall include both individuals and the legal entities.

2) Applicable Law: While it is silent under the Model Law on the applicable law to the party incapacity, the Arbitration Act 2002 clearly states that the incapacity of the party is considered under the law that applies to that party. From the researcher's view, the term "the law applicable to that party" should mean the law of the party's nationality under the conflict of law rules. Whether the law applicable to the party capacity can be the law of the governing law of arbitration agreement, there is no guideline from Thai Court's decision over this issue so far.

3.5.2 Nonexistent or Invalid Arbitration Agreement

1) General Principle: According to section 40 paragraph 3(1)(b), the court shall set aside the arbitral award if the party filing the motion can furnish proof that the arbitration agreement is not binding under the law of the country agreed by the parties, or failing any indication thereon, under the law of Thailand.

2) Burden and Standard of Proof: Likewise, the challenge of the arbitral award on the other grounds that raises by the party who filed the petition, the burden of proof on the grounds of the petition falls on that party. To rely on the grounds that the arbitration agreement is nonexistent or invalid, the party must be able to prove to the court the law that applies to the arbitration agreement and how the arbitration agreement is invalid or nonsexist under that law.

3) Separability Presumption: According to the separability of the arbitration agreement under section 24 of the Arbitration Act 2002, the allegation of the party to challenge the arbitral award on this ground must attack the invalidity of the arbitration agreement itself not the invalidity of the main contract between the parties.

4) Choice of Law Governing Arbitration Agreement: The law governs the consideration of the arbitration agreement validity is the law that the parties agreed or under Thai law where the parties are failing on any indication. This provision is based on the Model Law. Since the arbitration agreement generally is included as a part of the main contract, therefore, the term "the law that the party agreed" in this provision is the governing law of the arbitration agreement as well. However, in the case where the arbitration agreement separately indicated the governing law, the consideration of invalidity of the arbitration agreement shall be under that law. If the parties failed to indicate the governing law of the main contract and arbitration agreement, then Thai laws will be applied.

However, these grounds usually use to challenge at the beginning of the arbitration proceeding before the arbitral tribunal or at time when the dispute is filed to the court instead of arbitral tribunal. In the case where the validity of the arbitration agreement has to be determined under Thai law, besides the provisions of the Arbitration Act, the agreement must be valid under the general rules according to contract law under the Civil and Commercial Code as well.

According to section 26 paragraph 3 of the Arbitration Act, the law requires the party to file a motion requesting the competent court to decide the matter of arbitral jurisdiction within thirty days after receipt of the ruling on the preliminary concerning jurisdiction from the arbitral tribunal whether the parties will lose their right to challenge the award if they fail to comply with the condition under section 26.

5) Preclusive Effect of Prior Jurisdiction Ruling by Arbitral Tribunal: Even though the Arbitration Act accepts the concept of Competence-Competence where the arbitral tribunal has the authority to make the consideration on its own jurisdiction under the arbitration agreement. The party has the right to challenge on the ground regarding the non-existence or invalidity of the arbitration agreement before the court by the motion for setting aside. If the party can prove to that ground to the court, the court can set aside the arbitration award, even though the arbitral tribunal has ruled that the arbitration agreement is valid and the tribunal has the jurisdiction to adjudicate the dispute. The said circumstance happens when the party challenge that the arbitration agreement is invalid due to the reason that the primary contract between the parties never concluded. There was a case where the Supreme Court ruled that the arbitral award is invalid and not bind the parties because the main contract between them never concluded. Therefore, there is no arbitration agreement. Notable, in this case, the court applied Thai law regarding the invalidity of the primary contract even though the disputed transaction was international, and the governing law of the contract was English Law.[315] However, this court decision was made before the Arbitration Act 2002 came into force, and in this case, the party requested the enforcement of the arbitral award. We have to wait and see how the court will employ this provision according to the new law.

[315] The Supreme Court Decision No. 520/2520 (1972).

3.5.3 Denial of Opportunity to Present Case

According to Section 40 paragraph 3 (1)(c) of the Arbitration Act 2002, the court shall set aside the arbitral award when the parties filing the motion can furnish proof that the party making the application was not given proper advance notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings. The law also requires in section 25 that the arbitral tribunal shall treat the parties in arbitral proceedings with equality and shall give a full opportunity of presenting their case in accordance with the circumstances of the dispute. In consideration of the challenge on this ground, the law and the arbitration rules that govern the arbitral proceedings will be taken into account.[316] This provision also included the circumstance where the party did not present its cases before the arbitral tribunal due to the cause, which was not their fault.

3.5.4 Excess of Authority

1) General Principles According to section 40 paragraph 3(1)(d) the court shall set aside the arbitral award if the party who filed the motion can furnish proof that the award deals with a dispute not within the scope of the arbitration agreement or contains a decision on matter beyond the scope of the arbitration agreement.

Since the arbitration agreement is the source of the arbitral tribunal's power to rules on the dispute between the parties, the arbitral tribunal shall not exercise its power exceed the scope of the arbitration agreement. The arbitral award that exceeds the scope of the arbitration agreement or term of the submission to arbitration is invalid and cannot bind the parties. Where the party has challenged the arbitral tribunal jurisdiction during the arbitral proceeding, the party also has the right to challenge to an arbitral award by filing the motion for setting aside to the competent court.

[316] The Supreme Court Decision No. 1273/2543 (2000).

Even though the arbitral tribunal has the competence to rules on its own jurisdiction, the court has the power to make a final decision on the existence and scope of the arbitral tribunal jurisdiction when the issue is present before the court and the party can furnish proof.

2) Partial Annulment of Award: The Arbitration Act section 40 provides that where the award on the matter which is beyond the scope can be separated from the part that is within the scope of the arbitration agreement, the court may set aside only the part that is beyond the scope of arbitration agreement or clause. For instance, when the arbitral awarded exceed the amount of compensation requested by the party, the court may set aside only the part that is exceeded that arbitral agreement or clause.

3.3.5 Failure to Comply with Arbitral Procedures Agreed by Parties

1) General Principles

The parties of the arbitration agreement are free to agree on the composition of the arbitral and the arbitral procedures. It is crucial that arbitration needs to be conducted according to the parties' agreement. The parties' agreement regarding the arbitral procedures also included the arbitral rules that they selected to apply with their arbitration. According to section 40 paragraph 3(1)(e) of the Arbitration Act 2002, the court shall set aside the arbitration award where the party filing the motion can furnish proof that the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, unless otherwise agreed by the parties, accordance with this Act. This provision has an ample sphere covering all defects of arbitral proceedings under the arbitration agreement or the Arbitration Act.

2)Composition of Arbitral Tribunal

The parties are free to agree on the number of arbitrators and the arbitrators' qualification upon the matter and circumstance of the dispute. This agreement has to be followed by the arbitral tribunal. The proceeding conducted against the agreement can subject to be challenged under the

law. However, where the parties failed to agree with the composition of the arbitral tribunal, the provision under the Arbitration Act will be applied. According to section 17 of the Arbitration Act 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 to be the chairman of the arbitral tribunal. If the parties fail to reach an agreement on the number of arbitrators, a sole arbitrator shall be appointed. Therefore, if the arbitration agreement is silent on the number of the arbitrator and the parties fail to agree, an arbitrator should process the arbitration. The arbitral award issued by the even number of arbitrators in the tribunal may cause a ground for the court to set aside.

3) Failure to Comply with Agreed Arbitral Procedures: The agreed arbitral procedures mean the arbitral procedure that parties agreed under the arbitration agreement and also included the arbitral procedures under the arbitration rules which the party agreed to govern the arbitration.

4) Failure to Comply with the Arbitration Act: The party can challenge the arbitral award to rely on the ground that the arbitral composition and procedures did not comply with the Arbitration Act, where there is no agreement between the parties otherwise on that matter. This provision provides the party right to challenge the award on the ground that the arbitral composition of the arbitral proceedings was not following the agreement of the parties which was adopted from the Model Law article 34(2)(a)(iv), but missing one part in the Model Law which exclude the parties agreement that conflict with a provision of law that is mandatory.

3.6 Grounds for Setting Aside may Rise by Court

The Arbitration Act 2002 section 40 provides the grounds for setting aside the arbitral award that the court can raise by itself when the court found that the dispute of arbitral award is the matter that cannot be settled by arbitration, and when the recognition or enforcement of the arbitral award would be contrary to public policy.

The party can use these two grounds to be the reason for the challenge as well. However, if the party failed to prove to the court or does not raise to the court the grounds that the arbitral award must be set aside because of non-arbitrability of dispute or enforcement of the award will be conflict with public policy, the court has to examine on its own motion without the party having the burden of proof.

3.6.1 Non-arbitrability of Dispute

1) General Principles

There is no specific provision under Thai laws that provide the scope of dispute that can be arbitrated. While most of the civil and commercial disputes are arbitrability, the dispute relating to public policy and good morals of people should be deemed to be non-arbitrability disputes. For example, the dispute regarding family and legal status. Thailand, as a state member of the New York Convention, does not make the reservation to apply the Convention limit to the commercial dispute arbitration. It even prescribes in the law that the government agencies are binding to the arbitration agreement concluded with private parties either in commercial agreement or administrative contract. Therefore, the dispute arises from an administrative contract, or the non-commercial contract is arbitrable under Thai law as long as it is not contrary to public policy or the goof morals of the people.

2)Choice of Law Governing Non-arbitrability

The statement in section 40, paragraph 3 (2)(a), does not specify the law that will apply to the question regarding non-arbitrability. Therefore, if there is a law that the parties agreed to apply to their dispute, the court should consider the non-arbitrability of the dispute according to that law. If there is no agreement on the governing law of the dispute, then Thai Laws will be applied. Notable, in the case where the governing law of the dispute provides that the matter of the dispute capable of settlement by arbitration, but the matter is deemed as non-arbitrability under Thai Law,

whether the recognition or enforcement of such arbitral award will contrary to the public policy of Thailand. There is no guideline from the court so far.

3.6.2 Public Policy

Another grounds that may be raised up by the court is when the court finds that the recognition or enforcement of the award would be contrary to public policy. Because there is no explicit meaning of the public policy, this matter causes many problems in the use of arbitration under Thai law. The problem of application will be described in the next chapter.

1)General Principles

According to section 40 (2)(b), the court shall set aside the award if it found that the recognition or enforcement of the award would be contrary to public policy. The term "public policy" hardly defines the particular definition, and each jurisdiction may have its own concept of public policy that can change over time. However, the public policy should be comprised of the fundamental notions and principles of justice in substantive as well as procedure respects. For instance, the arbitral award that constituted under corruption, fraud or bribery, and other similar severe cases that affect the justice of the procedures.[317]

2)Choice of Law Governing Public Policy in Annulment Proceedings

The Arbitration Act does not prescribe about the law that the court shall apply to consider public policy issues. Since the ground to set aside the arbitration award because of it contrary to public policy is the ground that the court has authority to raise by itself without the challenge from the party, the applicable law that governing public policy shall be the Thai law. It is unusual for courts to apply other jurisdictions public policy to consider the case before them.

[317] The UNCITRAL Commission Report A/40/17, para 296, 297.

Even though the concept of public policy of Thailand also includes the good morals of the people as part of it, the court shall apply the term strictly to limit its intervention to arbitration. The interpretation of the term public policy that the court employed to set aside the arbitral award was a controversial topic in Thailand. However, the decision of the court regarding this concern is moving to the pro-arbitration regime.

3) Burden and Standard of Proof

As the law requests the court to set aside the arbitral award, it found that the recognition or enforcement will contrary to public policy, the party does not have any burden of proof on this ground. However, if the party raised a problem with public policy as the ground for setting aside the award, it shall hold the responsibility to prove to the court both fact and legal problems.

4)Specific matters raised from Judgements

One of the Supreme Administrative Court ruled that the arbitration agreement which is a part of the additional agreement that was added to the concession contract without the approval from the Cabinet. Since adding the arbitration agreement is deemed to cause a significant change to the contract according to the Private Investments in State Undertakings Act B.E.2534 (1986), which required approval from the Cabinet. Therefore, the arbitration agreement was not binding the parties of the contract, the enforcement of the arbitral award would be contrary to the public interest, and the good morals of the people. Even though the party did not challenge the arbitral award on that ground, the court has the power to set aside the award according to section 40 paragraph 3 of the Arbitration Act 2002.[318] In the same decision, court rules that the arbitral tribunal decision that made change to the term and condition regarding the proportion of the program the

[318] The Supreme Administrative Court Decision No. 349/2549 (2006)

private party can broadcast was exceeded the tribunal jurisdiction as it under the control of the state; as a result the court raised the same ground to set aside the arbitral award.

4. Suspending the Setting -Aside Proceedings

The Arbitration Act section 40 paragraph 4 adopts the provision of the Model Law article 34(40), which allows the arbitral tribunal to resume the arbitral proceedings for fixing the defects to eliminate the ground for setting aside the award. Under section 40, in considering application for setting aside an award, if the party, so requests and the court consider it reasonably justified, the court may adjourn the hearing of the cases as it deems fit so that the arbitral tribunal can resume the case or carry out any action as it deems fit to eliminate the grounds for setting aside.

Some observations should be made according to the suspending the setting-aside proceedings for the arbitral tribunal to resume the arbitral proceeding are; 1) the request from the party for the arbitration to resume the proceedings can be made by one party, or it has to be agreed by both parties of the arbitral award. 2) Even the court adjourn the hearing for the tribunal to resume the case, the tribunal can decide whether or not to resume the case.

5. Setting Aside International Commercial Arbitral Awards rendered in Foreign Countries

The problem concern Thai Court jurisdiction to set aside the arbitral awards made outside the country was a serious controversial issue in Thailand. The debater who agreed with the idea that Thai Court has the power to set aside the arbitral award regardless of where the award was made, rely on the reason that there is no specific provision limit the court jurisdiction to do so, and there is no separation between international arbitration and domestic arbitration under the Arbitration Act 2002. While the other side lays its opinion on the concept of the principle of the UNCITRAL Model Law, which is the model of the provision regarding setting aside under the Arbitration Act 2002.

5.1 General Principle

The Arbitral Act 2002 does not mention whether the court can set aside the arbitral award that was made in other countries. However, section 40 regarding the annulment of the arbitral award is separate from chapter 7 of the Act regarding the recognition and enforcement of the arbitral award, which explicitly states that the arbitral award shall be recognized and enforcement irrespective of the country where the award was made. According to how the law was formed, it can be interpreted that even law does not prohibit the court from setting aside the foreign arbitral award. It does not provide the court power to do so either. Therefore, the consideration of this problem, the source of the law should be taken into account. Since the Arbitration Act adopt section 40 regarding the setting aside of the award from Article 34 of the Model Law, it should remain the scope of application of the Model Law as well. According to the UNCITRAL Model Law and the modern standard of most arbitration laws, the court at eh seat of the arbitration is the proper court to make a decision on setting aside the arbitral award.[319] Due to the reason that the court of the seat of arbitration is considered to have supervisory jurisdiction over the arbitral proceedings to endure that it was conducted in a fair and noncorrupt manner, the court at the seat of arbitration is appropriate to preserve the jurisdiction regarding arbitral award annulment.[320]

5.2 Change and Development of Judgements

In the past, Thai Courts held the view that the arbitration took away court privilege judicial power in adjudication. However, courts' attitude toward arbitration has improved according to time and the awareness of international trend. This perspective demonstrated in the court decision regarding arbitration.

---

[319] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration,* 203 (2d ed. 2012).

[320] *Ibid.*

In 2009 the Supreme Court held that the Thai Courts has the power to refuse the enforcement and set aside the arbitration award made in other countries as the reason that there is no restriction under the law. [321]

Later in 2013, the Supreme Court ruled that even though the Intellectual Property and International Trade Court is the competent court under the Arbitration Act to adjudicate the party's motion to set aside the award, accepting the motion can cause inconvenience as it will be contrary to the country obligation under the conventions. In this case, the court mention that the exercise of court power to set aside the arbitral award that was made in the other country may lead to the conflict of award enforcement between the contracting state of the New York Convention.[322]

Recently in 2015, the Supreme Court explicit in it decided that the Arbitration Act 2002 does not provide the court jurisdiction to set aside the arbitral award that made in the other country. The motion of the party to set aside to arbitral award must be filed to the court where the arbitral award was made in only which is according to the New York Convention Article 5(1)(e) as Thailand is a state party, and the UNCITRAL Model Law Article 34 and 36.[323]

According to the Supreme Court decisions mentioned above, it quite right to conclude that the Thai Court's attitude toward arbitration regarding the annulment of the arbitral award is developing to meet the standard of international commercial arbitration of the global. This change of court will also present the court's role to institute the arbitration-friendly environment in the country, while the law is vague or unclear and taking long time and process to be changed.

---

[321] The Supreme Court Decision No. 5511-5512/2552 (2009).

[322] The Supreme Court Decision No. 13534/2556 (2013).

[323] The Supreme Court Decision No.9467/2558 (2015).

6. Conclusion

Since the arbitration law of Thailand regarding the annulment of the arbitral award is adopted from the UNCITRAL Model Law, the provision under the Arbitration Act will not cause any surprise to the parties and practitioners of international commercial arbitration. However, there are some rooms in the provision that will need the courts' guidelines on the way of application, which should keep an eye on. The Supreme Court decision limited Thai Court Jurisdiction in setting aside the foreign arbitral award can present the court trend in eliminating its interferer to international commercial arbitration.

This chapter reveals Thai laws regarding arbitral tribunal and arbitral proceedings and the ways the Court applied them. Even though the provision under these matters under the Arbitration Act 2002 mostly adopted from the UNCITRAL Model Law, some unique provisions come from national experience and procedure law.

Chapter 8

Recognition and Enforcement of International Commercial Arbitration Awards in Thailand

One of the reasons arbitrations has become the primary resolution mechanism for international commercial disputes is the enforceability of awards. Even though most cases of international commercial arbitration awards are voluntary comply, when it is not the creditor of the case can initiate judicial enforcement with the promising chance to be enforceable around the world. Due to the reason that most jurisdictions have become state party of Convention on Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) which has a robust regime of pro-enforcement of the arbitration agreement and arbitral award that guarantee the enforcement ability of the arbitral award with a very limit grounds of refusal.[324] Without its own enforcement mechanism, arbitration requires help from national courts to enforce the arbitral awards. Therefore, national courts having an important role that affects the effectiveness of international commercial arbitration in some instances.

Since December 1959, Thailand has become a contracting state of the New York Convention. Even though the arbitration law in Thailand had been amendment from time to time since then, the provision concerning the recognition and enforcement of foreign arbitral award remain as same as the rules appearing in the New York Convention. Notably, the way of its application varies on the courts' attitude toward arbitration. This Chapter exposed Thailand's arbitration law regarding the recognition and enforcement of international commercial arbitral awards together with the ways law was applied.

[324] On November 16, 2019 the New York Convention has 161 parties, *available at* https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

1. Legal Framework for Recognition and Enforcement of Arbitral Awards in Thailand

Thailand becomes a contracting state of many Conventions regarding Arbitration to promote the business and investment of the country as the acceptance of the popular of the arbitration clause in international commercial contracts. Now, Thailand has concluded 42 Bilateral Investment Treaties, which allowed the dispute between Thailand and private investors to submit to arbitration.[325]

According to section 41 of the Arbitration Act B.E.2545 (2002), an arbitral award is recognized and can be enforced in Thailand irrespective of the country in which it was made. An arbitral award which made in a foreign country will be enforced by the competent court only if it is subject to an international convention, treaty or agreement to which Thailand is a party, and will be applicable only to the scope that Thailand accedes to be bound.

Since 1959 Thailand has become a Contracting State of the New York Convention, which applies to the recognition and enforcement of arbitral awards made in the country other than the country where the recognition and enforcement of such awards are sought. According to Article I (3) of the New York Convention, any Contracting State may make reservations that it will apply the Convention only to the arbitral awards made in other Contracting State as to the "reciprocity reservation", or to the disputes which are considered as commercial under the national, "commercial requirement" . However, Thailand did not make any of these reservations during the time the country ratified the Convention. Therefore, it is the obligation of Thailand under the New York Convention to recognize and enforce every arbitral award made in other countries on all matters that do not limit to commercial as long as that award does not contrary to the laws.

[325] Detail and number of BITs that Thailand has concluded, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/207/thailand.

2.Comparative of Recognition and Enforcement of Foreign Judgment and Foreign Arbitral Awards

Since Thailand has not signed any agreement or treaty regarding the enforcement of judgments rendered in other jurisdictions, the judgment of foreign courts is not directly enforceable in Thailand. The foreign judgment presented before Thai Courts; it will be treated as evidence of the case. The court may request more supporting evidence and will render judgment based on the merit of the case. The court may consider the case different from the foreign judgment; however, Thai Court judgment will be enforceable within its territory.

In contrast, according to the Arbitration Act 2002, the courts will recognize and enforce the foreign arbitral award regardless of the place it was rendered. The foreign arbitral award may be challenged in Thai court on a very limit grounds as provides in the New York Convention.

Therefore, the parties of the international commercial contract, which have any substantive part of the contract related to Thailand should consider to include an arbitration clause as a part of their agreement. To ensure that it will be benefited from the law regarding enforcement of the arbitral award of Thailand.

3.Competent Court to Recognition and Enforcement of International Commercial Arbitral Awards in Thailand

According to the Arbitration Act 2002 section 9, states that the competent court under the Act shall be the Central Intellectual Property and International Trade Court, or the regional intellectual property and international trade court, or a court where the arbitration proceeding is conducted, or a court in which either party is domiciled, or a court which has jurisdiction over the dispute submitted to arbitration as case may be.

According to the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E.2539 (1996), the Central Intellectual Property and International Trade Court have the territorial jurisdiction to cover the whole Bangkok Metropolis and other six

provinces around Bangkok. However, today, the territorial jurisdiction of the Central Intellectual Property and International Trade Court extends throughout the country, since the regional Intellectual Property and International Trade Courts are not yet established. Therefore, the Central Intellectual Property and International Trade Court currently have exclusive jurisdiction both in civil and criminal matters concerning intellectual property rights and international trade. Arbitration of civil cases regarding international trade is covered by the jurisdiction of the Court. To sum up the court that has jurisdiction to enforce the arbitral award regarding a commercial dispute, which was rendered in a foreign country, is the Central Intellectual Property and International Trade Court, which is located in Bangkok of Thailand.

However, if the arbitral proceedings of the international commercial dispute proceeded in Thailand, the court where the arbitration proceeding was conducted also has the power to enforce the said arbitral award. In this case, the party who wishes to enforce the arbitral award is free to make a selection.

4.Petition to Recognition and Enforcement of Arbitral Awards

4.1The Right to File the Petition

As a result, that Thailand did not make either the “reciprocity reservation” or the reservation to apply the Convention only to a commercial dispute at the time of ratifying the New York Convention, the provision of the Arbitration Act 2002 governing the enforcement of arbitral award apply to both domestic and foreign awards. The Arbitration Act 2002 takes a further step by adopting Article 35 of the Model Law, prescribes that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding on the parties, and upon petition to the competent court, shall be enforced. Therefore, under Act 2002, the arbitral award rendered in the country and the foreign arbitral award are treated under the same rules, while the Arbitration Act 1987 treated it separately.

As no restriction under the law, the party who relies on the arbitral award regardless of its nationality has the right to file the application to the competent court seeking for the enforcement under the condition and requirement of the law, the court shall promptly examine and give judgment accordingly.

According to Supreme Court Decision No. 9691/2554 (2011), the court rules that the term "party" in section 41, which has the right to seeking enforcement of the arbitral award is including the transferee of the right under the contract or by the law. The right under an arbitral award is transferable by the provision of law or by the contract according to the requirement under the law.

4.2 Time Limitation

Under the Arbitration Act 2002 section 41, the enforcement of arbitral awards, both domestic and international, are staying on the same provisions of law. The party who wants to enforce an arbitral award in Thailand has to file an application to the competent court ***within three years from the year the award is enforceable***. This limitation period does not appear in the New York Convention and the UNCITRAL Model Law.

The term "the date on which the award is enforceable" covers the varying situations. In the case where the arbitral award prescribes the party to perform its obligation directly, for example, paying a sum of money, the date the award is enforceable means the date that the arbitral tribunal sent the award to the party, not the date that the award was made. Another situation is when the grace period is giving for the party, the expiration of such period will be the date that the award is enforceable.

In the case where the application is filed to the competent court after the limitation period, the court will dismiss the case as the issue of time limit by the law regards public policy, which the court can raise as a ground to refuse the enforcement on its own. However, the arbitral award is not invalid or unbind the parties; it just cannot request the enforcement from Thai Courts.

This time limitation was extended from the limitation period in the previous arbitration law that require the party to file the application for enforcement the foreign award within one year of the date copies of the award were sent to the parties. However, this period is shorter than the limitation period to enforce the court's judgments, which is ten years from the date of judgment.

Section 42 of the Act requires the court to examine and give judgment according to the arbitral award promptly.

4.3 Documents Required

As same as Article IV of the New York Convention, the application for enforcement of the award must produce the evidence of arbitration to the competent court as follow;

1) **Proof of Arbitration Award,** which can be the original or certified copy of the arbitral award,
2) **Proof of Arbitration Agreement,** which can be the original or certified copy of the arbitration agreement to the competent court in Thailand.
3) **Translation of Arbitration Agreement and Award:** The arbitration law requires the party to provide the translation of the award and the arbitration agreement in the Thai language. The law states that the required documents have to be translated by the translator who has taken an oath or who affirmed before the court or in the presence of an official or an authorized person, or certified by an official authorized to certify translations or by Thai or consul in the country where the award or the arbitration agreement was made.

However, in the case where the translation of the arbitral awards of agreements does not meet the requirements mentioned above, the court would not use this to be the ground to refuse the enforcement of the arbitral award, if the other party does not argue that the translation does not comply with the original documents. The translations will be included in the order or

judgment, and the court will refer them as the exact terms to enforce against the party unless the ground for refusal was found.

4.4 Burden and Standard of Proof

To fulfill the petition, the law only requires the party who is seeking enforcement of arbitral awards to submit to the court *prima facie* evidence that can prove the validity of its right and the validity of arbitration, which is arbitration agreement and arbitral award. If there is a challenge from the other party, that party who makes the challenge will bear the burden of proof of the grounds for refusal of the arbitral award according to the law.

4.5 Court Procedure

According to sections 41, 42, and 43 of the Arbitration Act 2002, after the petition requesting the court to enforce the arbitral award was submitted to the court, the court will promptly consider whether there is a valid arbitral award. However, the person against the award will be enforced an opportunity to challenge the award on the grounds provides by law in section 43. If that person can furnish proof the ground of refusal to the court, after the inquiry, the court will decide whether to dismiss the petition for enforcement or to enforce the award.

Upon the petition seeking for enforcement of the arbitral award, Court cannot make other decisions except to enforce the award or refuse to enforce the award and dismiss the petition. The court cannot make any decision outside the scope of the arbitral award. For example, the court rules that the party cannot ask the court to issue interest of the debt after the day the award was rendered as it was not part of the arbitral tribunal.[326]

[326] The Supreme Court No.9477/2558 (2015).

The party whom the award was made against can only challenge the award on the grounds provided in the law and cannot make a counterclaim to the petition for enforcement. The party who not agree with the arbitral award only has the right to file the motion for setting aside to the competent court according to section 40 of the Act or challenge the enforcement petition on the refusal grounds stated in the law.[327]

The court decisions addressed above present the court's pro-enforcement attitude consistent with the concept of the New York Convention and the UNCITRAL Model Law.

5. Challenging the Enforcement of International Commercial Arbitration Awards

5.1 General Principles

The provisions regarding the grounds for refusing recognition or enforcement of the arbitral award under the Arbitration Act B.E.2545 (2002) are precisely the same as the provision stated in the UNCITRAL Model Law and the New York Convention. Section 43 of the Arbitration Act explicit that the provision regarding the refusal of the enforcement of arbitral award is applied to the award irrespective of the country in which it was made. These grounds can be separated into two groups; first, are the grounds that the party against whom the award will be enforced must furnish proof, and second are the grounds that the court can raise on its own initiative.

According to the grounds for refusal of enforcement provides in section 43 of the Arbitration Act 2002, the court cannot review the merit of the award as the mistake in the decision of the arbitral tribunal in considering fact or law is not included in the ground's states in this section. However, the court may need to review the merit to the limit to consider the ground of refusal where the party challenge that the arbitral tribunal made the award exceeding its jurisdiction.

[327] The Supreme Court No. 2045/2557 (2014).

Even though the party able to prove to the court of the ground for refusal the award, the court may not refuse the enforcement as section 43 using the term that the court ***may*** refuse the enforcement. Therefore, under this section, the court has rooms to determine whether the ground it found is severe enough to refuse the enforcement.

5.2 Burden and Standard of Proof

Refusal grounds that the party against whom the award will be enforced must furnish proof are provided in Section 43 of the Arbitration Act B.E.2545 (2002). Generally, the party who wants to enforce the arbitral award only has to prove to the court that there is a final and binding arbitral award by providing the court with the arbitral agreement and award, which is the origin of enforcement. The burden of proof will be on the other party who effort to overturn the award. The grounds that the party against whom the award will be enforced must furnish proof consist of the grounds regarding the defects in arbitration awards or the arbitral procedurals as describes below.

5.3Grounds for Refusing to Recognize and Enforce International Commercial Arbitral Awards initiated by the party

5.3.1Party Lack of Capacity

1) General Principles: According to section 43 (1), the court may refuse enforcement of the arbitral award if the person against whom the award will be enforced furnished proof that a party to the arbitration agreement was under some incapacity under the law applicable to that party. This ground was adopted from the New York Convention Article V(1)(a).

The term incapacity of the party means that the party was under some mental or physical condition or legal restriction to enter the arbitration agreement at the time the agreement was concluded. Also, as the law does not describe otherwise, the incapacity of the party shall include both individuals and the legal entities.

2) Choice-of-Law Governing Capacity: Section 43 (1) explicitly states that the law governing the party's ability to conclude the arbitration agreement is the law applicable to that party. The applicable law that determines parties' capacity to enter into an arbitration agreement should be the national law of the relevant party. However, some scholars point out that the law determining the capacity of the parties can either be the law chosen by the parties or, if the parties did not choose a governing law, the issue would be determined under the law of the country where the award was made.

Whether the law applicable to the party capacity can be the law of the governing law of arbitration agreement, there is no guideline from the Thai Court's decision over this issue so far. From the researcher's view, the term "the law applicable to that party" should mean the law of the party's nationality under the conflict of law rules.

5.3.2 No Valid Arbitration Agreement

1) General Principle: According to section 43 (2), the court may refuse enforcement of the arbitral award if the person against whom the award will be enforced furnished proof that the arbitration agreement is not binding.

2) Choice-of-Law Governing Validity of Arbitration Agreement: When the party raises the invalidity of the arbitration agreement, the law requires the court to initially examine the validity of arbitration agreement according to the law of the country agreed by the parties. In the case where the parties did not agree on the governing law of the arbitration agreement, the validity of such agreement will be examined under law of the country where the arbitral award was made. Notably, the law governing the validity of arbitration agreement under this provision in the case where there is no agreement regarding the governing law of arbitration agreement is different from the law that applies to the validity of arbitration agreement under section 40 regarding the setting aside of arbitral award where the court will apply Thai law for determination such issue. This difference

can be the result that the court, which has the power to set aside the arbitral award is the court of arbitration seat; therefore, the national law of the seat should take into account.

3)Separability Presumption: According to the separability of the arbitration agreement under section 24 of the Arbitration Act 2002, the allegation of the party to challenge the enforcement of arbitral awards on this ground must attack the invalidity of the arbitration agreement itself not the invalidity of the main contract between the parties.

5.3.3 Denial of Opportunity to Present Party's Case

According to section 43 (3) the court may refuse enforcement of the arbitral award, if the person against whom the award will be enforced furnish proof that he or she was not given proper advance notice of the appointment of the arbitral tribunal or the arbitral proceedings or otherwise unable to defend the case in the arbitral proceedings.

Since the fairness in arbitration proceeding is the fundamental of the valid arbitral award, the violation of due process can the enforcement of the arbitral award. Section 25 of the Act require that the arbitral tribunal shall treat the parties in arbitral proceedings with equality and shall give a full opportunity of presenting their case in accordance with the circumstances of the dispute. Besides the arbitral tribunal has to process the arbitration under the arbitration rules that apply to the arbitral proceedings.

Thai Court consider the violation of due process as the violation of public policy which is one of the grounds of refusal that court can raise on its own. In the Supreme Court Decision No. 1273/2543, the court addressed that the arbitral proceeding must be according with the arbitration rules agreed by the parties. In this case the arbitration rules provide that a person who can perform as an arbitrator should not have any conflict of interest with the dispute. Therefore, the fact that the party did not be informed about the name of the person who will be appointed as an arbitrator

before the appointment of the arbitral tribunal and the appointment proceeding by registered mail, causing the ground for the court to refuse the enforcement of arbitral award.

5.3.4 Arbitral Tribunal Excess of Authority

According to section 43(4) the court may refuse to enforce the arbitral award, if the person against whom the award will be enforced furnish proof that the award deals with the dispute outside the scope of arbitration agreement, or the award contains decision on matters beyond the scope of the submission to arbitration.

1) Awards Addressing Claims Outside Scope of Arbitration Agreement

The statement in this provision is different from the term given in Model Law Article 36 and the New York Convention Article 5(c) which about the exceed of the tribunal authority over the matter of the dispute submit to the arbitral tribunal which may be narrow than the scope of arbitration clause while the Arbitration Act refer back to the matter in the scope of arbitration agreement. This different may cause differences in the scope of the refusal. However, where the case is presented before Thai Court, the award deals with a disputed not falling within the scope of the arbitration agreement may be refuse the enforcement regarding the party able to provide sufficient evidence to prove the grounds to the court.

2) Awards Addressing Claims Not Presented by Parties

The arbitral award that contains decisions on matters beyond the scope of the submission to arbitration can be subject to the refusal of enforcement. The power of the arbitral tribunal comes to form the consent of the parties. It is parties' freedom to decide the scope of the dispute that they want to settle by arbitration. This provision focuses on the arbitral tribunal's mandate, which can be broadened by the parties' submission beyond the scope of the arbitration agreement. In contract, the parties may want to arbitrate only some issued in their underlying contract or scope the amount of compensation they prefer to decide by arbitral tribunal. If the arbitral tribunal rendered the award

outside the scope of the term of submission, even if inside the matter under the main contract or arbitration clause, the arbitral tribunal had acted in excess of its authority, resulting the possibility that the award will be unenforceable.

However, in the case where the respondent argued that the arbitrator did not make a decision based on the facts and the contract and did not bring evidence that the opposition considered it more important. It is an argument of discretion in listening to the evidence regarding the content of the decision. It is a right that can be done right.

3) Partial Recognition of Awards: However, if the award on the matter which is beyond the scope thereof can be separated from the part that is within the scope of the arbitration agreement, the court may set aside only the part that is beyond the scope of the arbitration agreement or arbitration clause.

5.3.5 Failure to Comply with the composition of the arbitral Tribunal or Arbitral Procedures Agreed by Parties

1) General Principles: According to section 43(5), the court may refuse enforcement of the arbitral award, if the person against whom the award will be enforced furnishes proof that the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, if not otherwise agreed by the law of the country where the arbitral award was made.

This grounds for refusal of an arbitral award is based on party autonomy principle. Because one of the essential reasons that parties choose to settle their dispute by arbitration is under arbitration mechanism, they will have the freedom to choose decision-makers and to decide on the procedure they think fits their disputes. The party may challenge the enforcement of the award if their arbitral agreement concerning these matters is not complied with.

2)Composition of Arbitral Tribunal: The parties are free to agree on the number of arbitrators and the arbitrators' qualification upon the matter and circumstance of the dispute. This agreement has to be followed by the arbitral tribunal. The proceeding conducted against the agreement can subject to be challenged under the law. The composition of the tribunal, including the number of arbitrators to consist in the tribunal and any special requirement regarding an arbitral qualification. If the parties fail to agree on the composition of the tribunal the arbitration law of the country where the award was made shall be applied to condition of arbitral tribunal composition.

3) Noncompliance with Parties' Agreed Procedure: The agreed arbitral procedures mean the arbitral procedure that parties agreed under the arbitration agreement and also included the arbitral procedures under the arbitration rules which the party agreed to govern the arbitration. If the arbitral award was a fruit of the procedure that noncompliance with the parties agreement, or without the agreement contrary to the arbitration law of the country where the award was made.

5.3.6 None Binding Awards or Annulment or Suspension of Award in Arbitral Seat

According to section 43(6), the court may refuse enforcement of the arbitral award, if the person against whom the award will be enforced furnishes proof that the arbitral award has not yet become binding or has been set aside or suspended by a competent court or under the law of the country where it was made. Save where the setting aside or suspension of the award is being sought from the competent court, the court may adjourn the hearing of this case as it thinks fit; and if requested by the party making the application, the court may order the party against whom enforcement is sought to provide appropriate security.

1) Awards have not yet become binding: So far, there is no guideline on how Thai Courts will interpret the term of the award has not yet become binding. However, it should mean that the award is final according to section 37 of the Act however under some circumstance that makes the

award not yet binding. For example, the award that is during the interpretation by the arbitral tribunal.

2)Annulment or Suspension Awards: The provision under the Act states that the award has been set aside by the competent court or under the law of the country where the award was made. The term competent court in this provision means the competent court in Thailand.[328] The reason that the law using this term is different from the term in the Model Law Article 36 and the New York Convention Article V (1) (e) because this provision applies to both the award rendered in Thailand and the foreign awards. Therefore, the suspension or setting aside of the foreign awards that can be used as the ground to refuse enforcement should be made by the court or under the law of the country where the award was made. However, there is no Thai Court guideline on this section yet.

3)Adjournment of the Decision on Enforcement: According to section 43 (6) the court may adjourn the hearing of the case as it thinks fit; and if requested by the party making the application, the court may order the party against whom enforcement is sought to provide appropriate security, where the setting aside or suspension of the award is being sought from the competent court.

5. Court's Power to Refuse Arbitral Award Enforcement

5.1 General Principle

Two grounds that can be raised by the court without the allege of the party are the grounds about the arbitrability of the subject matter of the award and the public policy ground. Section 44 of the Arbitration Act 2002 provides that the court may dismiss the application for enforcement

[328] supra note 199, at 286.

under section 43 if it finds that the award involves a dispute not capable of settlement by arbitration under the law or if the enforcement would be contrary to public policy.

5.1.1 None-arbitrability Awards

The court has to dismiss the party's application if it finds that the dispute under the arbitral award cannot be arbitrated under Thai law. No explicit provisions concerning the arbitrability provided under Thai law, however almost all of the civil matters can be arbitrated. The issue about arbitrability of the case is easy to forecast and not often appear as the ground to refuse the enforcement of the arbitral award. For example, the dispute regarding copyrights, trademarks, patents, securities, and transfer of technology can be arbitrated under Thai law.

5.1.2 Awards Contrary to Public Policy

On the other hand, the ground about public policy is often raised both by the court and the party. There is no exact scope of the term "public policy" in Thai law; however it has been referring in national sense. Similar to other developing countries, Thailand tends to protect its state immunity in the arbitral cases involving state entities

1)Choice of Law Governing Public Policy

There is no provision under the arbitration act states regarding the choice of law governing public policy. This issue is one of the most controversial in Thailand, especially regarding the public policy scope that should be applied to the foreign arbitral awards. Some courts' judgment showed that the court applied public policy in national sense; this idea is supported on the reason that the enforcement of the arbitral award will have its effect in the territory of the country; therefore, the public policy of the country should take into account. On the other side, the idea that the public policy should be interpreted in the scope of international sense to be in line with international trends and to support the pro-enforcement concept under New York Convention and the Model Law.

2)Public policy under Thai Law

The concept of public policy and good morals of the people appears in many places under the laws of Thailand. For example; - Under the Arbitration Act the court must set aside the award and refuse enforcement the arbitral award if the enforcement would be contrary to public policy (section 40 and 44), the appeals lie against the order or judgment of the court where the enforcement or recognition of the award is contrary to public policy can be appealed.

According to the Civil and Commercial Code section 150, any activities or contract that has the purpose against the law or impossible to comply with, or contrary to public policy and the good morals of the people is void.

According to the Civil Procedure Code, the court has the power to raise the issue regarding public policy on its own discretion.

3) Public Policy from Courts' Views: The courts' views toward the concept of public policy has changed from time to time. The part will present some examples regarding how the Thai Court has given a guideline on the term of public policy.

i. Court's guideline of the case where the matters not contrary to public policy and good morals of the people:

a) The allegation of the party on the fact that the arbitral tribunal did not make a decision based on the facts and the contract and did not bring evidence that the party considered important is an argument on discretion in listening to the evidence regarding the content of the dispute. It is not contrary to public policy and cannot constitutes the grounds to refuse enforcement of the awards.[329]

[329] The Supreme Court Decision No. 160/2555 (2012).

b) In this case, the arbitral tribunal adjudicated the dispute according to the agreement of the parties and rendered an award requesting the government agency to make a payment to the private parties. The government agency alleged that if it has to make a payment out of the country's budget will contrary to the public interest. The court ruled that such allegation cannot constitute the grounds for refusal of enforcement of the arbitral award as it is not deemed contrary to public policy.[330]

c) The arbitral tribunal has the discretion to interpret the agreement according to the law. If the party was given full opportunity to present their case and evidence, the arbitral procedures were not contrary to public policy.[331]

ii. Court's guideline of the case where the enforcement of arbitral award contrary to public policy and good morals of the people:

a) The contract between the party arose from the corruption act of government officials is void. The enforcement of the arbitral award regarding the contract is contrary to the public policy.[332]

b) The enforcement of the arbitral award was not in accordance with the term of the contract is contrary to public policy.[333]

c) The arbitration agreement was invalid because it was included in the additional agreement between the parties, which deemed to be invalid as the Cabinet did not approve it as required by the law. The arbitral tribunal does not

[330] The Supreme Court Decision No.639/2556 (2013).

[331] The Supreme Administrative Court Decision No.Or 248/2557 [อ.248/2557](2014).

[332] The Supreme Court Decision No. 7277/2549 (2006).

[333] The Supreme Court Decision No. 1730-1731/2555 (2012).

have the jurisdiction to arbitrate the dispute. Therefore, the enforcement of the arbitral award would be contrary to public policy.[334]

Notable, according to the sample of court decision regarding public policy mentioned above, most of the case that the court rules that the enforcement of arbitral awards would be contrary to public policy, were the cases regarding arbitration in administrative contract where award rendered against the government agencies. In the cases regarding the dispute over administrative contracts, which is under the judgment of the Administrative Court, the court will apply the principles of administrative law to determine the issue of public policy where the public interest would take into account. While the arbitral tribunal will consider the case base on commercial law, which is the applicable law of the dispute.

Nevertheless, there were many cases where the court enforced the arbitral award which rendered against the state sides, even such enforcement took a considerable amount of the country's budget and caused public criticism of the use of arbitration in administrative contracts.[335]

6.Appealing of Court's Order or Judgement relevant to Arbitration

The parties who choose to settle their disputes by arbitration are hoping to reserve all of its advantage characteristics; final, binding, and fast. To support the benefits of arbitration, judicial review by courts should be limited. According to the Arbitration Act B.E.2545 (2002) section 45 provides that no appeals shall lie against the order of judgment of the court under the Act.

---

[334] The Supreme Administrative Court Decision No. Or.349/2549 [อ.349/2549] (2009).

[335] Vanina Sucharitkul, *Thailand's top Administrative Court Reinstates Rail Award*, Global Arbitration Review (2019).

However, some exceptions concerning important issues are provided to ensure that the parties to arbitration could reach possible justice. Under the Arbitration Act B.E.2545 (2002), there are five grounds for appeal order or judgment of court regarding arbitration as follows:

(1) The recognition or enforcement of the award is contrary to public policy;

(2) The order or judgment is contrary to the provisions of law concerning public policy;

(3) The order or judgment is not in accordance with the award;

(4) The judge who sat in the case gave a dissenting opinion; or

(5) The order is an order concerning the provisional order of protection.

The appeal against the court's order or judgment under this Act must be filed with the Supreme Court if the matter of the award is a civil matter, or in the case that such order is regarding the administrative contract, the Supreme Administrative Court will be the competent court to appeal.

7. Fee, Expense, and Remunerations

Even though the court cannot order the enforcement exceed of the arbitration award, the arbitration act empowers the court to fix the fee, expenses, and arbitrator remuneration in the judgment upon the request of the party for arbitral tribunal. According to section 46 of the Arbitration Act 2002, in case where the said fees, expenses or remunerations have not been fixed in the award, any party or the arbitral tribunal may petition a competent court for a ruling on the arbitration fees, expenses and remuneration for the arbitrator as it deems appropriate. This petition can make during the requesting for enforcement of the arbitration award.

8. Conclusion

The provisions regarding the recognition and enforcement of arbitral awards in Thai Law is based on the obligation of the country under the New York Convention and UNCITRAL Model Law. There is no restriction on the nature of the disputes as long as it not contrary to country's

public policy and capable of arbitrating under Thai Law. The court has the obligation under the law to enforce the arbitral award when receiving the party request with the arbitration agreement and awards to prove the validity of the awards. The award's debtor may challenge the enforcement petition hold the burden of proof about the defect of the awards. The court cannot review the merit of the case and cannot make any enforcement exceeding from the award, except fixing the fees, expense, and arbitrator remuneration upon the party or arbitrator's request.

The issue that should be concerned is the interpretation of the term public policy made by courts since it is a ground that can raise by a party or by the court to refuse the enforcement. While, the refusal grounds under section 43 the party who rely on the grounds will have the burden of proof and the law also leave room for enforcement even the refusal ground is really existence, if the court considers that the enforcement of the award will contrary to public policy it will refuse the enforcement in all cases. Even though the scope of public policy of each jurisdiction may be different, and the New York Convention leaves the authority to the national courts to determine this issue on its own, Thai Court should interpret the term public policy in international commercial arbitral award according to the international trend in international commercial arbitration standards to gain acceptance from international parties. Thai Courts should interpret the conflict of public policy excluded from political stance or international policy of the state and limit to the fundamental notions and principles of justice.[336] For example, when the award induced or affected by fraud or corruption or breach of the rules of natural justice occurred.[337]

[336] The UNCITRAL Model Law on International Commercial Arbitration, United Nations documents A/40/17, para.228.
[337] The New Zealand Arbitration Act. Article 34(6).

Chapter 9

Conclusion and Recommendation

Base on the study, it is found that arbitration in Thailand is moving on its way to global standards. However, there are rooms for improvement for the country to be accepted from all international parties as an arbitration-friendly seat. This chapter illustrates the conclusion and recommendation follow the way it is organized.

1. The Judiciary System of Thailand is in line with the international standard. The organize of courts is systematic. There are many specialized courts to take care of different areas of dispute. According to its high standard of recruitment for career judges, court remains its legacy as the most trust from the people comparing the other government bodies. However, the number of judges are considering low if comparing to the number of claims enter to the court which causes delay in court procedures. Courts have relied on Alternative Dispute Resolution as a primary tool to reduce number of cases in hands. While the settlement agreement of in-court mediation can be issued as court judgment, in-court arbitration is rarely used. Arbitration award both domestic and foreign can be enforced by the court under the same provisions. If the court able to consider ADR as a tool to support the court in providing justice to the people, by lower its restriction on ADR when it can, mediation and arbitration will be more accepted by the parties both domestic and international.

2. During the study, there were a significant development in the Mediation Law of Thailand. The introduce of the first Mediation Act B.E.2562 (2019) will increase the use of out-of-mediation as the Act provide the provision regarding the enforcement of settlement agreement made of mediation. However, the benefit of this new law may limit to the domestic dispute as they provide some limitation in the amount of the dispute and govern only to the mediation which process by government agencies. If the country considers to extend the scope of application of the Mediation Act or consider to become a contracting state of the United Nations Conventions on

International Settlement Agreement Resulting from Mediation (Singapore Mediation Convention), it will support the growth of investment and economic of the country. However, this change will need more study in detail.

3. According to the study, the government has a plan for the country to be the arbitration hub of the region for more than 30 years, so step was taken. The establish of Arbitration Institutions, TAI, and THAC to promote and provide arbitration to the public. However, this area of law is considered new to Thai lawyers. Many seminars and training courses regarding arbitration have been introduced to the public to build awareness and to prepare practitioners to be ready for the field. Some academic institutions have included the Alternative Dispute Resolution to their curriculums. The language boundary is one of the obstacles to the development of international commercial arbitration in Thailand. The country should consider to include Arbitration law and English as mandatory subjects for in law schools. This change may need some time to prove its benefit but will last for long term.

4. The Arbitration law of Thailand is mostly in line with international standards as it is based on the New York Convention and the UNCITRAL Model Law. However, there are many provisions opens the door for court intervention. To facilitate the flow and effective of arbitration, the first provision that State should consider to change is section 16 of the Arbitration Act regarding interim measure. The law should empower the arbitral tribunal to grant interim relief both before and after the arbitral tribunal is instituted.

5. During the study Thailand enacted the Arbitration Act No.2 B.E.2562 (2019), providing the provisions to facilitate foreign arbitrators and foreign representatives to enter the country to perform their duties in arbitration. The foreigner who will enter the country can request a certificate from the arbitration institution where the arbitration will be conducted, to submit as evidence for VISA and work permit, and can process the work according to the certification while waiting for

the work permit. This new law eliminates the old restrictions and will attract more parties to arbitrate in Thailand.

6. According to the study, even though courts' attitude toward arbitration is in a positive trend which can be seen from the change in the judgments. The misunderstanding in the concept of arbitration also showed. The problem whether Thai court has jurisdiction to set aside a foreign arbitral award according to section 40 of the Arbitration Act was recently solved. The supreme court has laid a guideline that Thai courts do not has power to set aside foreign arbitral awards. The setting aside provision now applies to the arbitration award that was made in Thailand only.

7. There is no certain definition of the term "public policy" under Thai law. The courts generally apply the term public policy based on the national sense. This issue causes a problem that can lead to the parties' reluctance to choose Thailand as the seat of their arbitration. Since the public policy and be raised by the party or the court as a ground to set aside and refuse enforcement of arbitral awards, Thai Court should interpret the term of public policy narrowly.

8. While the law allows the user of the arbitration clause in administrative contract, the government issued a restriction on the scope of using. Even though the Cabinet resolution regarding the restriction of the arbitration clause in administrative contract does not have a direct effect on international commercial arbitration, it presents the attitude of the country toward arbitration. The government should take a careful step to solve the problem regarding being a lost side in arbitration by giving good contract management before the dispute arises, instead of denying arbitration. Recently, the Cabinet issued a Resolution to reduce the restriction which bar government agencies to include arbitration clause in ***all of the administrative contracts*** concludes with private parties unless it has been approved from the cabinet case by case, to ***the concession agreement***. This change improves the investment environment in the country.

Bibliography

International Convention and Treaties

The Protocol on Arbitration Clauses 1923 (Geneva Protocol 1923).

The Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (Geneva Convention).

Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (The New York Convention 1958).

UNCITRAL Model Law on International Commercial Arbitration 1985.

UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

Institution Rules

Code of Conduct of Arbitrators, the Thailand Arbitration Center

Code of Ethics and Conduct of Arbitrators, the Thai Arbitration Institution Office of the Judiciary

THAC Arbitration Rules No.2 (2019)

The Arbitration Rules, The Thai Arbitration Institute 2017,

The Thai Arbitration Institution, Office of Judiciary, Arbitration Rule 2017.

The Thailand Arbitration Center (THAC) Arbitration Rule 2015.

UNCITRAL Arbitration Rule (as revised in 2010) Model arbitration clause for contracts

UNCITRAL Model Law on International Commercial Arbitration

UNCITRAL Model Law on International Commercial Conciliation, 2002

Book

Ali, Shahla F., and Tom Ginsburg. *International commercial arbitration in Asia*. Huntington, N.Y: Juris, 2013.

Bhatia, V. K., Christopher Candlin, and Maurizio Gotti. *Discourse and practice in international commercial arbitration issues, challenges and prospects*. Farnham, Surrey, England Burlington, VT: Ashgate, 2012.

Binder, Peter, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 2019.

Born, Gary. *International arbitration and forum selection agreements: drafting and enforcing*. Austin Tex. Alphen aan den Rijn, The Netherlands Frederick, MD: Walter Kluwer Law & Business Kluwer Law International Sold and distributed in North, Central and South America by Aspen Publishers, 2010.

Carbonneau, Thomas E. *Cases and materials on arbitration law and practice*. St. Paul, MN: Thomson/West, 2012.

Carbonneau, Thomas E. *Arbitration in a nutshell*. St. Paul, MN: Thomson/West, 2012.

Garner, Bryan A., and Henry C. Black. *Black's law dictionary*. St. Paul, MN: Thomson/West, 2004.

Indlekofer, Manuel. *International arbitration and the Permanent Court of Arbitration*. Alphen aan den Rijn, The Netherlands Frederick, MD Biggleswade, United Kingdom: Kluwer Law International,Aspen Publishers Turpin Distribution Services, 2013.

Jitdhamm, A., *The development of mediation system in the court of justice*, 70 (2009).

Klein, James R., *THE ASIA FOUNDATION WORKING PAPER SERIES: The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy*, (1998)

McConnaughay, Philip J., and Thomas B. Ginsburg. *International commercial arbitration in Asia*. Huntington, NY: JurisNet, 2006.

Moses, Margaret L. *The principles and practice of international commercial arbitration*. Cambridge New York: Cambridge University Press, 2012.

Onyema, Emilia. *International commercial arbitration and the arbitrator's contract*. London New York, N.Y: Routledge, 2010.

Park, William W. *Arbitration of international business disputes: studies in law and practice*. Oxford New York: Oxford University Press, 2006.

Varady, Tibor, Barceló, and Arthur T. Mehren. *International commercial arbitration: a transnational perspective*. St. Paul, Minn: Thomson/West, 2006.

Journal and Articles

A.B. Griswold and Prasert na Nagara, *The Inscription of King Rama Gamhan of Sukhodaya (1292 A.D.) Epigraphic and Historical Studies No.9*,
Journal of the Siam Society.59 (2): 179–246, (July, 1971).

Institute of Developing Economies, *Alternative Dispute Resolution in Thailand - IDE Asian Law Series No.19*, 8 (March 30, 2019), *available at* https://www.ide.go.jp/English/Publish/Download/Als/19.html.

Jelita Pandjaitan and Steven Pettigrove of Linklaters, and Nicola Nygh of Allens Linklaters. *Myanmar Accedes to the New York Convention*, (Jul. 17, 2013).

Limparangsri, Soriwit and Sillapamahabundit, Montri*, Mediation Practice: Thailand's Experience" (The 11th General Assembly of the ASEAN Law Association, Bali, Indonesia, 2012)*, (2012).

National Institute for Development Admistration (NIDA), *The public opinion towards the constitutional court*,(2012).

Satayanurug, Pawat, and Nakornin, Nattaporn, *Courts in Thailand: progressive development as the country's pillar or justice*, ed.Jiunn-Rong Yen and Wen (2014).

Sorawit Limparangsri and Prachy Yuprasert, *Arbitration and Mediation in ASEAN: Laws and Practice from a Thai Perspective*, (March 5, 2013).

Sorawit Limparangsri, *Alternative Dispute Resolution in ASEAN: A Contemporary Thai Perspective*, 2 TAI Journal of Arbitration, 13, 29-30 (2007).

Sorawit Limparangsri, *Improving on enforcement of International Commercial Arbitral Award in ASEAN; A Thai Perspective*, (2009).

Thai Materials

Laws and Regulations

Act Amending the Civil Procedure Code (No.27), B.E.2558 (2015).

Act on Establishment of Administrative Courts and Administrative Courts Procedure, B.E. 2542 (1999).

Act on Protection of Victims in Domestic Violence B.E.2550 (2007).

Act on the Establishment of and Procedure for Intellectual Property and International Trade Court B.E.2539 (1997)

Act on the Establishment of and Procedure for Labor Court B.E.2522 (1989).

Act on the Establishment of and Procedure for Tax Court, B.E. 2528 (1985).

Act on Unsafe Product B.E.2551 (2008).

Civil and Commercial Code B.E.2535 (1992).

Local Administration Act of B.E.2457 (1914).

Regulation of Thailand Arbitration Center regarding Mediation B.E.2557 (2014).

THAC Regulation on Mediation (No.2) B.E.2561 (2018).

Thailand Mediation Act B.E.2562 (2019).

The Act on Procedure of Consumer Case B.E.2551 (2008)

The Act on the Organization of Military Courts B.E.2498 (1955).

The Arbitration Act B.E.2530 (1987).

The Arbitration Act B.E.2545 (2002).

The Arbitration Act (No.2) B.E.2562 (1992).

The Civil Procedure Code B.E.2477 (1934).

The Constitution of the Kingdom of Thailand B.E.2489 (1956).

The Constitution of The Kingdom of Thailand B.E.2540 (1997).

The Constitution of the Kingdom of Thailand B.E.2560 (2017).

The Juvenile and Family Court and Its Procedure Act, B.E. 2553 (2010).

The Mediation Act B.E.2562 (2019).

The President of the Supreme Court's Rule of Mediation B.E.2554 (2011).

Book

Assavarod, Saowanee, *Commentary on Business Dispute Resolution by Arbitration,* (Bangkok, Thailand, 2011)

Ariyanuntaka, Vichai, *Intellectual Property and International Trade Court: A New Dimension for IP Rights Enforcement in Thailand*, 54 Bod Pundit 9, 9-13 (1998).

Boonyawan, Chanchai and Petsiri, Apirach. *The History of Justice and Legislative Process of Thailand." Chap. 5, In Legislative Process in Thailand,* edited by Thanitcul, Sakda and Shinya Imaizumi, p.66: IDE-Jetro (Institution of Development Economies Japan External Trade Organization), 2011.

Bunnag, Jayavadh, *Arbitration Theory and Practice* [อนุญาโตตุลาการ ทฤษฎีและปฏิบัติ] 93 (2011).

Chantana Opakorn, Anan, *International Commercial Arbitration in Asia: Arbitration in Thailand* (JurisNet 2006).

Chantana Opakorn, Anan, *International Arbitration Law,* (Bangkok, Thailand, 1995).

Chuathai, Somyos, *The explanation of General Constitutional Principles, Faculty of Law Thammasat University* [คำอธิบายหลักรัฐธรรมนูญทั่วไป คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์], **(**Bangkok), (1992).

Na Nakorn, Kanit, *Criminal Law General Part,* [กฎหมายอาญาภาคทั่วไป] 98-99 (2000).

Praya, Nittisart Prisan Wan [นิติศาสตร์ไพศาล (วัน) พระยา], *Thai Laws History, lecture for Thammasat Faculty of Laws,* [ประวัติศาตร์กฎหมายไทย, คำสอนชั้นปริญญาตรี มหาวิทยาลัยธรรมศาสตร์] (Bangkok, Thailand, 1459).

Pramoj, Seni, *A lecture on Law in the Ayutthaya Era* [ปาฐกถา เรื่อง กฎหมายสมัยอยุธยา], (1957).

Journal and Article

Bunnag, Jayavadh, *Commentary on The Supreme Court Judgment No.9691/2554: Whether the transferee or assignee of an arbitral award was entitled to request the court to enforce the award, The* intellectual Property and International Trade Law Forum: Special Issue 2012, (Bangkok, 2012)

Central Intellectual Property and International Trade Court Thailand, *The Judicial System in Thailand: An Outlook for a New Century,* (2014).

Chantana Opakorn, Anan, *The Development of Arbitration in Thailand*, TAI Journal of Arbitration Volume 4 (Bangkok, 2009)

Lamyai, Chitchanok, *The amendment of Thai Arbitration Act*, A Step forward or Backward, TAI Journal of Arbitration Volume 4 (Bangkok, 2009)

Limparangsi, Sorawit, *Developin mediation work in the Court of Justice, Journal of the Ministry of Justice*, 113-114 (May, 2007), *available at* http://elib.coj.go.th/Article/50_5_9.pdf

Manakul, Tawan, *The proceeding of Mediation in Thailand*, [กระบวนการไกล่เกลี่ยข้อพิพาทในประเทศไทย], Report of the Survey of Knowledge for Thailand Reform Project, National Public Health Foundation, [รายงานประกอบโครงการสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย มูลนิธิสาธารณสุขแห่งชาติ], (2014).

Marike P.P. Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International, (2016).

Mek – yong, Toon, *Thai Court as a Court of Jurisdiction to set aside Foreign Arbitral Awards,* The intellectual Property and International Trade Law Forum: Special Issue 2012, (Bangkok, 2012)

Narintarangkul Na Ayudhaya, Tidarat, *Guidelines on Best Practices in the Enforcement of Arbitral Awards within Asean,* The intellectual Property and International Trade Law Forum: Special Issue 2012, (Bangkok, 2012)

Rodchanasarot, Chanchay, *Public Section and Arbitration,* TAI Journal of Arbitration

Volume 4 (Bangkok, 2009)

Suvanpanich, Thawatchai, *Public Policy and Arbitration: The commentary on Supreme Administrative Court Case no. 1659-1660/2550 (2007),* The intellectual Property and International Trade Law Forum: Special Issue 2012, (Bangkok, 2012)

The Institution for Justice of Thailand, Dumrong Rachanubhab [สถาบันเพื่อการยุติธรรมแห่งประเทศไทย, ดำรงราชานุภาพ,สมเด็จฯกรมพระยาม], *The Legend of Thai Laws,* [*ตำนานกฎหมายเมืองไทย*], 2015.

Richard Kreindler, Reinmar Wolff, Markus S. Rieder, *Commercial Arbitration in Germany*, (March 2016)

Surapol Srangsomwong & Christopher Bailey, *Arbitration in Thailand*, *in* 3 International Commercial Arbitration in Asia, 537, 545 (Shahla F. Ali & Tom Ginsburg eds.,2013).

Sucharitkul, Vanina, *Thailand's top Administrative Court Reinstates Rail Award,* Global Arbitration Review (2019).

Chinnavat Chinsangram, Warathorn Wongsawangsiri, Chumpicha Vivitasevi, *Thailand – The International Arbitration Review – Edition 7,* (Aug 2016)

Masimilian Clasmeier, *The Kingdom of Thailand And International Arbitration – Ending The Journey On A Winding Tollway?*, (Dec 2015)

Biswas, Tushar Kumar, *Introduction to Arbitration in India: The Role of the Judiciary*, Alphen aan den Rijn, The Netherlands: Kluwer Law International, (2014).

Case Law

The Supreme Court Decision No.1296/2518 and 182/2521 (1978) (Thailand).

The Supreme Administrative Court Decision No. 349/2549 (2006) (Thailand)

The Supreme Administrative Court Decision no. 3491/2549 (2006) (Thailand)

The Supreme Administrative Court Decision No. Kor.4/2554 (2014) (Thailand)

The Supreme Administrative Court Decision No. Or.349/2549 [อ.349/2549] (2009) (Thailand)

The Supreme Administrative Court Decision No.Or 248/2557 [อ.248/2557] (2014) (Thailand)

The Supreme Court Decision GorKor 4611/2545 [ก.ค.4611/2545](2002) (Thailand)

The Supreme Court Decision No. 10878/2554 (2011) (Thailand)

The Supreme Court Decision No. 11235/2556 (2013) (Thailand)

The Supreme Court Decision No. 115/2560. (Thailand)

The Supreme Court Decision No. 1273/2543 (2000) (Thailand)

The Supreme Court Decision No. 13534/2556 (2013) (Thailand)

The Supreme Court Decision No. 1425/2542 (2000) (Thailand)

The Supreme Court Decision No. 160/2555 (2012) (Thailand)

The Supreme Court Decision No. 1730-1731/2555 (2012) (Thailand)

The Supreme Court Decision no. 183/2545, (2002). (Thailand)

The Supreme Court Decision No. 2039/2550 (2007) (Thailand)

The Supreme Court Decision No. 2231-2233/2553 (2010) (Thailand)

The Supreme Court Decision no. 230/2545 (2002) (Deeka 230/2545) (Thailand)

The Supreme Court Decision no. 297/2546 (2003) (Deeka 29712546) (Thailand)

The Supreme Court Decision No. 3368/2552 (2009) (Thailand)

The Supreme Court Decision no. 3429/2530 (1987) (Thailand)

The Supreme Court Decision No. 3894/2559 (2016) (Thailand)

The Supreme Court Decision No. 520/2520 (1972) (Thailand)

The Supreme Court Decision No. 5511-5512/2552 (2009) (Thailand)

The Supreme Court Decision No. 5525/2552 (2019) (Thailand)

The Supreme Court Decision no. 7277/2549 (2006) (Thailand)

The Supreme Court Decision No. 7277/2549 (2006) (Thailand)

The Supreme Court Decision no. 9467/2558 (2015) (Thailand)

The Supreme Court Decision No.639/2556 (2013) (Thailand)

The Supreme Court Decision No.9467/2558 (2015) (Thailand)

The Supreme Court No. 2045/2557 (2014) (Thailand)

The Supreme Court No.9477/2558 (2015) (Thailand)

Institution Reports

Annual Judicial Statistic, Thailand 2018.

Boonyawan, Chanchai, *Report on the Follow-up and assessment of the affairs of the Administrative Court,* (King Prajadipok's Institute), (2011).

Ministry of Justice, *Rights and Liberties Protection Department, Ministry of Justice 2018 annual report*, (May 21, 2019).

Office of Judicial Affairs Annual Report 2018, (July 26, 2019).

Office of Judicial Affairs, *Memo by Office of Judicial Affairs to the Secretary of Office of Judiciary about "the development of Pre-Litigation Mediation Proceeding,* (January 31, 2019)

Office of Judiciary, The *Office of Judiciary announcement of Roster of Mediators 2018-2019* [ประกาศสำนักงานศาลยุติธรรม เรื่อง ทะเบียนผู้ประนีประนอมประจำปี พ.ศ. ๒๕๖๒-๒๕๖๓] (2019).

Statistical Summary of Cases under the Court of Justice of Thailand in 2016, *available at* https://www.coj.go.th/th/page/item/index/id/9.

The Thai Arbitration Institute, Office of Judiciary, *Statistical Report of arbitration cases of TAI from 1990 to 2017* [สถิติข้อพิพาทที่รับใหม่และข้อพิพาทที่ดำเนินการแล้วเสร็จตั้งแต่ปี พ.ศ.2533 ถึง พ.ศ. 2561 ของสถาบันอนุญาโตตุลาการ สำนักงานศาลยุติธรรม] (2018).

Internet Resources

Charoonbara, Suthee, *The Organizaton of Military Courts in Thailand*, 93/25-93/56, Military LawReviwe) MIL.L.REV) Vol 93. (1981). available at https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/276C8B~1.pdf.

Code of Conduct of Arbitrators, the Thailand Arbitration Center, *available at* https://thac.or.th/theme/file_system/20190130225702.pdf.

Code of Ethics and Conduct of Arbitrators, the Thai Arbitration Institution Office of the Judiciary, *available at* https://tai.coj.go.th/th/content/page/index/id/18870.

Corruption Index 2017, (last visited Oct.19, 2018), *available at*

Detail and number of BITs that Thailand has concluded, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/207/thailand.

Gavin Margetsom, Vanina Sucharitkul, *Thai Government Lifts Total Ban on Arbitration Clauses in State Contracts,* http://hsfnotes.com/arbitration/2015/11/25/thai-government-lifts-total-ban-on-arbitration-clauses-in-state-contracts/ (Nov 2015)

Henderson, Alastair, *Arbitration Guide: Thailand*, (Feb.10, 2015),

http://kluwerarbitrationblog.com/blog/2013/07/17/myanmar-accedes-to-the-new-york-convention/

http://www.aseanlawassociation.org/10GAdocs/Thailand6.pdf

http://www.aseanlawassociation.org/docs/w4_thai.pdf

http://www.ide.go.jp/English/Publish/Download/Als/06.html

http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

https://www.transparency.org/country/THA

Institute of Developing Economies, *Alternative Dispute Resolution in Thailand - IDE Asian Law Series No.19*, (March 30, 2019), available at https://www.ide.go.jp/English/Publish/Download/Als/19.html.

Ramkhamhaeng Inscription, available at https://en.wikipedia.org/wiki/Ram_Khamhaeng_Inscription.

Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure, B.E. 2543 (2000), clause 5, *available at* http://www.admincourt.go.th/admincourt/upload/webcmsen/The%20Institution/The_Institution_100118_144832.pdf.

Singapore Mediation Centre Mediation Procedure , *available at* http://www.mediation.com.sg/assets/downloads/commercial-mediation/CMS-Mediation-Procedure-Rules-with-Annexes-1Apr18.pdf.

TAI Roster of Arbitrators, *available at* https://tai.coj.go.th/th/content/page/index/id/141186.

THAC Arbitration Rules No.2 (2019), *available at* https://thac.or.th/theme/file_system/20190402064900.PDF.

Thai Arbitration Institution, office of the Judiciary Model Arbitration Clause, *available at* https://tai-en.coj.go.th/th/content/category/detail/id/7749/iid/125884.

Thai Council of Arbitration, Thai Chamber of Commerce Model Arbitration Clause, *available at* https://thaichamber.org/en/home/mainpage/3/10.

Thailand Arbitration Center (THAC) Rule on Small Claims Arbitration, B.E. 2560 (2017), *available at* https://thac.or.th/theme/file_system/20190429083849.pdf.

Thailand Arbitration Center annual report 2018-*2019, available at https*://thac.or.th/theme/file_system/%E0%B8%AA%E0%B8%96%E0%B8%B4%E0%B8%95%E0%B8%B4%E0%B8%84%E0%B8%94%E0%B8%B5_3-9-62.pdf.

Thailand Arbitration Center's Model Arbitration Clause, *available at* https://thac.or.th/law/index/1.

The Announcement of the Office of Judiciary (Arbitrator's Fee), *available at* https://tai.coj.go.th/th/file/get/file/201907247cf14e608b60ba91914a47c20bb5700f131553.pdf

The Constitutional Court: Protector of the rule of law, Academic Seminar for 20th Anniversary of the Constitution Court of Thailand on 9th-10th April 2018, Bangkok Thailand, *available at* http://www.constitutionalcourt.or.th/occ_web/download/article/article_20180411200439.pdf.

The Court of Justice System (ระบบศาลยุติธรรม), *available at* https://www.coj.go.th/home/file/structure_22052560.pdf

The Court of Justice System*, available at* https://coj.go.th/th/content/page/index/id/91994.

The development of Thailand Administrative Court [วิวัฒนาการศาลปกครองไทย ศาลปกครองไทยใต้พระยุคลบาท], *available at* http://www.admincourt.go.th/admincourt/upload/webcms/Court/Court_201212_160637.pdf

The interview of the Chief Justice of Specialized Court of Appeal on September 27, 2016, [บทสัมภาษณ์ ท่านเมทินี ชโลธร ประธานศาลอุทธรณ์คดีชำนัญพิเศษ คนแรก โดย ไทยรัฐออนไลน์ วันที่ 27 กันยายน 2559], (December 2016). *Available at* https://www.thairath.co.th/content/734981

The list of Bileteral Treaties which Thailand is party of, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/207/thailand#.

The mediation fees of Malaysian Mediation Centre begin with 100 RM (around 24 USD) for the filling fee, and 300 RM (72 USD) for the mediation Fees per session., *available at* http://www.malaysianmediationcentre.org/mediation-process/how/.

The mediation fees of Singapore Mediation Centre which including the mediator's fee, rental of premises and food and beverage charges is between 700 USD to 3,636,400 USD per party per day. With the filling fee of 195 USD per party for the center's provision of administrative and support services., *available at* http://www.mediation.com.sg/assets/downloads/commercial-mediation/CMS-Mediation-Procedure-Rules-with-Annexes-1Apr18.pdf.

The Regulations of the Office of the Prime Minister Regarding Complying with Arbitration Awards B.E.2544 (2001) section 5 (in Thai), *available at* http://www.mratchakitcha.soc.go.th/search_result.php.

The Regulations of the Office of the Prime Minister Regarding Complying with Arbitration Awards B.E.2544 (2001) section 5 (in Thai), *available at* http://www.mratchakitcha.soc.go.th/search_result.php.

The streaming lecture by Dr. Pornpat Tantikulananta Judge of the Office of the President of the Supreme Court and Executive Director of the TAI regarding Mediation system of the New Mediation Act hosted by the Court of Justice on May 27, 2019.

The Supreme Court Decision No. 4288/2558 (2015). *See. Thailand Case Update: Arbitrating Tort Claims* www.internationalarbitrationasia.com/arbitrating-tort-claims.

Vanina Sucharitkul, Thai Administrative Court Overturns an Arbitration Award against the Government, (October 9,2014), *available at* http://kluwerarbitrationblog.com/2014/10/09/thai-administrative-court-overturns-an-arbitration-award-against-the-government/

Wichit Chaitrong, *Researcher pushed for revamp of pay system at Thai courts*, The Nation Thailand (Aug. 19,2018) *available at* https://www.nationthailand.com/Economy/30352484.

Appendix A

Arbitration Act B.E.2545 (2002)

(Translation)

Arbitration Act B.E. 2545

BHUMIBOL ADULYADEJ, REX., Given on the 23rdday of April B.E. 2545 (2002)

Being the 57th Year of the Present Reign.

His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:

Whereas it is deemed expedient to reform the law concerning arbitration. Be it, therefore, enacted by the King, by and with the advice and consent of the Parliament as follows:

Section 1 This Act shall be called the "Arbitration Act B.E. 2545."

Section 2 This Act shall come into force as from the day following the date of its publication in the Government Gazette.

Section 3 The Arbitration Act B.E. 2530 (1987) shall be repealed.

Section 4 Whenever a reference is made by any law to the provisions of the Civil Procedure Code relating to out-of-court arbitration, such reference shall be deemed to have been made to this Act.

Section 5 Under this Act:

"**Arbitral Tribunal**" means a sole arbitrator or a panel of arbitrators;

"**Court**" means any organization or institute that has judicial power under the laws of the country in which the court is established;

"**Claim**" includes a counterclaim, except the claims under Section 31(1) and Section 38 paragraph two (1);

"**Defense**" includes an answer to counterclaim, except the answer to counterclaim in Section 31(2) and Section 38 paragraph two (1).

Section 6 Subject to Section 34, where the provisions of this Act empower the parties to determine any issue, the parties may authorize a third party or institution to make that determination on their behalves.

Where a provision of this Act stipulates that any fact shall be or may be agreed by the parties, or in any other way refers to an agreement between the parties, such agreement shall include any arbitration rules referred to in the agreement.

Section 7 Unless otherwise agreed by the parties, any written communication sent under this Act is deemed to have been received by the addressee if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address as specified therein; or if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business address, habitual residence or mailing address by a registered letter or certified registered case of domestic mail, or sent by any other means which provides a record of the attempt to deliver it.

The provisions of this Section do not apply to the service of documents court proceedings.

Section 8 In the event that any party who knows that any provision of this Act from which the parties may delegate or any requirement under the arbitration agreement has not been complied with, if that party still proceeds with the arbitration without stating his objection to the other non-complying party within a reasonable period of time or, within a time-limit provided thereof, it shall be deemed that the party have waived his right to object.

Section 9 The competent court under this Act shall be the Central Intellectual Property and International Trade Court, or the regional intellectual property and international trade court, or a court where the arbitral proceedings are conducted, or a court in which either party is domiciled, or a court which has jurisdiction over the dispute submitted to arbitration, as the case may be.

Section 10 The Minister of Justice shall take charge of this Act.

CHAPTER 1

Arbitration Agreement

Section 11 Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

The arbitration agreement shall be in writhing and signed by the parties. An arbitration clause constitutes an arbitration agreement if it is contained in an exchange between the parties by means of letters, facsimiles, telegrams, telex, data interchange with electronic signature, or other means which provide a record of the agreements, or in an exchange of statement of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.

The references in a contract evidenced in writing to any document containing an arbitration clause constitutes an arbitration agreement, provided that the reference is such as to make that clause part of the contract.

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

Section 13 When there is a transfer of any claim or liability, the transferee shall be bound by the arbitration agreement concerning such claim or liability.

Section 14 In case where any party to the arbitration agreement commences any legal proceedings in court against the other party thereto in respect of any dispute which is the subject of the arbitration agreement, the party against whom the legal proceedings are commenced may file with the competent court, no later than the date of filing the statement of defense or within the period for filing the statement of defense in accordance with the law, a motion requesting the court to issue an order striking the case, so that the parties may proceed with the arbitral proceedings. Upon the court having completed the inquiry and found that there are no grounds

for rendering the arbitration agreement void or unenforceable or impossible to perform, the court shall issue an order striking the case.

While the motion filed in accordance with paragraph one is pending before the court, either party may commence the arbitral proceedings, or the arbitral tribunal may continue the proceedings and render an award on the dispute.

Section 15 In any contract made between a government agency and a private enterprise, regardless of whether it is an administrative contract or not, the parties may agree to settle any dispute by arbitration. Such arbitration agreement shall bind the parties.

Section 16 A party to an arbitration agreement may file a motion requesting the competent court to issue an order imposing provisional measures to protect his interest before or during the arbitral proceedings. If the court views that had such proceedings been conducted in court, the court would have been able to issue such order, the court may proceed as requested. The provisions governing provisional measures under the Civil Procedure Code shall apply ***mutatis mutandis***.

Where the court issues an order at the party's request pursuant to paragraph one, if the party filing the motion fails to carry out the arbitral proceedings within thirty days from the date of the court's order or within the period prescribed by the court, that order shall be deemed cancelled upon the expiration of such period of time.

CHAPTER 2

Arbitral Tribunal

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 arbitral 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.

Section 18 Unless otherwise agreed upon by the parties, the procedure for appointment of the arbitral tribunal shall be as follows:

(1) Where the arbitral tribunal shall be a sole arbitrator, if the parties are unable to agree on the arbitrator, either party may file a motion with the competent court requesting an appointment of the arbitrator.

(2) Where the arbitral tribunal shall consist of more than one arbitrator, each party shall appoint an equal number of arbitrators; and the appointed arbitrators shall appoint an additional arbitrator. If either party fails to appoint the arbitrator within thirty days after receipt of the notification from the other party or if the party appointed arbitrators are unable to jointly appoint the chairman of the arbitral tribunal within thirty days from the date of their appointment, either party may file a motion with the competent court requesting an order appointing the arbitrator or the chairman of the arbitral tribunal.

If, pursuant to the appointment procedures under paragraph one, no other procedures for successful appointment of arbitrators are provided, either party may file a motion with the competent court to appoint the arbitrator as it deems appropriate in the following cases:

(1) A party fails to act as required under such procedure;

(2) The parties, or the party appointed arbitrators, are unable to reach an agreement expected of them under such procedure; or

(3) A third party, including an institution, fails to perform any function entrusted to it under such procedure.

Section 19 An arbitrator shall be impartial, independent and possess the qualifications prescribed in the arbitration agreement; or if the parties agree to submit the dispute to an institution established for the purpose of administrating arbitration, the arbitrator shall have the qualifications prescribed by the institute.

A prospective arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. No party shall challenge the arbitrator whom he has appointed or in whose appointment he has participated, except where the said party did not become aware of or could not have become aware of the grounds for challenge at the time of his appointment.

Section 20 Unless otherwise agreed by the parties, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the appointment of the arbitrator or of the fact stipulates in Section 19 paragraph three, file a statement stating the grounds of the challenge with the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

If a challenge under any procedure agreed upon by the parties or under paragraph one is unsuccessful, the challenging party may request the competent court to decide on the challenge, within thirty days after having received notice of the decision rejecting the challenge, or the date of knowing of the appointment of the arbitrator or the date of knowing of the facts as provided in Section 19 paragraph three, as the case may be. After examination of the challenge, the court shall issue an order accepting or dismissing the challenge. Unless the court orders otherwise, while such request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Where necessary, the arbitral tribunal may extend the period for the challenge of arbitrator under paragraph one by not more than fifteen days.

Section 21 An arbitrator ceases office upon death.

If any person who will be or has been appointed as an arbitrator is unable to perform his duties, whether by refusing to accept his appointment, being subject to an absolute receivership, being adjudicated incompetent or quasi-incompetent, or failing to perform his duties within a reasonable time for other causes, he shall cease to be an arbitrator upon his withdrawal or by mutual agreement between the parties. However, if there is a disagreement as to such causes, either party may, by motion, request the competent court to decide on the termination of the arbitrator's status as such.

Subject to the provisions of paragraph two or Section 20 paragraph one, the fact that an arbitrator withdraws from his office or that the parties mutually agree on the termination of the status of an arbitrator does not constitute an acceptance of the cause referred to in paragraph two or Section 19 paragraph three.

Section 22 Where the mandate of an arbitrator terminates under Sections 20 or 21 or because of his withdrawal from office, or because of the revocation of his mandate by agreement of the parties or in any other cases of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

Section 23 An arbitrator shall not be liable for any civil liabilities on any act performed in the course of his duty as an arbitrator, unless it is performed willfully or with gross negligence causing damage to either party.

Any arbitrator wrongfully demanding, accepting or agreeing to accept an asset or any other benefit for himself or anyone else for doing or omitting to do any act in his duties shall be subjected to imprisonment for not more than ten years or a fine not exceeding one hundred thousand baht, or both.

Whoever giving, offering or agreeing to give an asset or any other benefit to an arbitrator to induce him to do or omit to do any act or to delay an act that is contrary to his duties shall be subjected to imprisonment for not more than ten years or a fine not exceeding one hundred thousand baht, or both.

CHAPTER 3

Jurisdiction of Arbitral Tribunal

Section 24 The arbitral tribunal shall be 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 issues of dispute falling within the scope of its authority. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the main contract. A decision by the arbitral tribunal that the contract is null and void shall not affect the validity of the arbitration clause.

The challenge as to the competence of the tribunal shall be raised no later than the date of submission of the statement of defense; the parties shall not be precluded from raising on the grounds that they appointed or participated in the appointment of the arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter occurs during the arbitral proceedings. Save where the arbitral tribunal considers that there are reasonable grounds to delay the challenge, the arbitral tribunal may allow the party to file a challenge after the fixed period of time.

The arbitral tribunal may rule on its jurisdiction either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, either party may file a motion requesting the competent court to decide the matter within thirty days after receipt of the ruling on the preliminary issue, and during the time that the motion is pending, the arbitral tribunal may continue the arbitral proceedings and render an award.

CHAPTER 4

Arbitral Proceedings

Section 25 In the arbitral proceedings, the parties shall be treated with equality and shall be given a full opportunity of presenting their cases in accordance with the circumstances of the dispute.

Unless otherwise agreed by the parties or provided by this Act, the arbitral tribunal shall have the power to conduct any proceedings in any manner, as it deems appropriate.

The arbitral tribunal's power shall include the power to determine the admissibility and weight of the evidence.

For the purposes of this Chapter, the arbitral tribunal shall apply the provisions on the law of evidences under the Code of Civil Procedure to the proceedings ***mutatis mutandis***.

Section 26 The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, hearing of witnesses including experts witnesses or the parties, for inspection of materials, places or documents.

Section 27 For settlement of dispute by arbitration, it shall be deemed that a dispute is submitted to arbitration under Section 193/14 (4) of the Civil and Commercial Code and the arbitral proceedings have commenced in one of the following circumstances:

(1) When a party receives a letter from the other party, requesting that the dispute be settled by arbitration;

(2) When a party notifies the other party in writing to appoint an arbitrator or to approve the appointment of an arbitrator;

(3) When a party send a written notice of the disputed issues to the arbitral tribunal designated in the arbitration agreement;

(4) When either party submits the dispute to an agreed arbitration institution established for settlement of disputes by arbitration as has been agreed upon.

Section 28 The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any statement of claim, statement of defense, any written statement by a party, any hearing, and any award, decision or other communications by or to the arbitral tribunal.

The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into language or languages agreed upon by the parties or determined by the arbitral tribunal.

Section 29 Unless otherwise agreed by the parties, within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief sought, and the respondent shall state his defense in the statement of defense. The parties may submit the relevant documents or list of evidence describing the documents or other evidence that they purport to adduce.

Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings, except the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Section 30 Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted solely on the basis of documents or other evidences.

An arbitral tribunal shall have the power to take evidence, as provided in paragraph one, at any stage during the cause of proceedings as it thinks fit if so requested by a party, save where the parties have agreed that no evidence shall be adduced orally or in writing.

The arbitral tribunal shall communicate to the parties a sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of materials, places or documents.

All statement of claim, statement of defense, statement of request, documents or any other information supplied to the arbitral tribunal by one party shall 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.

Section 31 Unless otherwise agreed by the parties, the arbitral tribunal shall proceed as follows:

(1) Terminate the proceedings if the claimant fails to communicate his statement of claim in accordance with Section 29 paragraph one;

(2) Continue the proceedings without treating such failure in itself as an admission of the claimant's allegations, if the respondent fails to communicate his statement of defense in accordance with Section 29 paragraph one;

(3) Continue the proceedings and make the award on the evidence before it if any party fails to appear at a hearing or to produce documentary evidence.

The arbitral tribunal shall have the power to carry out any examination as it considers appropriate before proceeding in accordance with paragraph one, including reasons for the respondent's failure to file the statement of defense or failure to appear, as the case may be.

Section 32 Unless otherwise agreed by the parties, the arbitral tribunal may proceed as follows:

(1) Appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(2) Require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, materials or places for his inspection.

Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing in order that the parties may have an opportunity to ask questions or to present his own expert witnesses.

Section 33 The arbitral tribunal, an arbitrator or a party may, with the consent of the majority of the arbitral tribunal, request from a competent court to issue a subpoena or an order for submission of any documents or materials.

If the court is of the opinion that such proceedings could have been carried out by the court if a legal action were brought, it shall proceed in accordance with the motion, provided that the provisions of the Civil Procedure Code in the part relating to such proceedings shall apply ***mutatis mutandis***.

CHAPTER 5

Award and Termination of Proceedings

Section 34 The arbitral tribunal shall decide the dispute in accordance with the governing law chosen by the parties. Any designation of law or legal system of a country shall be construed, unless otherwise expressed, as directly referring to the substantive law of the country and not to its conflict of laws rules.

Failing any designation by the parties, the arbitral tribunal shall decide the dispute in accordance with Thai laws, save where there is a conflict of laws, the arbitral tribunal shall apply the law determinated by the principle of conflict of laws it considers appropriate.

The parties may expressly stipulate that the arbitral tribunal shall determine the dispute ***ex aequo et bono***.

The arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the trade usage applicable to the transaction.

Section 35 Unless otherwise agreed by the parties, any awards, orders and rulings of the arbitral tribunal shall be made by a majority of vote. If a majority of votes cannot be obtained, the chairman of the arbitral tribunal shall solely issue an award, an order or a ruling.

The questions of procedure shall be decided by the chairman of the arbitral tribunal if so authorized by the parties or all members of the arbitral tribunal.

Section 36 If, during the arbitral proceedings, the parties can settle the dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties and the arbitral tribunal considers that such settlement is not contrary to the law, the arbitral tribunal shall render an award accordingly.

An award on the agreed terms shall be made in accordance with Section 37 and such award shall enjoy the same status and effect as the award on the merits.

Section 37 The award shall be made in writing and signed by members of the arbitral tribunal. In the arbitral proceedings with more than one arbitrator, the signatures of the majority shall suffice, provided that the reason for the omission of signature is stated.

Unless otherwise agreed by the parties, the award shall clearly state the reasons for making such decisions. However, it shall not prescribe or decide on any matters falling beyond the scope of the arbitration agreement or the relief sought by the parties, except an award rendered in accordance with the settlement agreement under Section 36, or the fixing of arbitration fees, expenses or remunerations of the arbitrator under Section 46.

The award shall state the date and place of arbitration in accordance with Section 26 paragraph one. The award shall be deemed to make at that place.

After the award is made, the arbitral tribunal shall send a copy of the award to all parties.

Section 38 The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph two.

The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(1) The claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(2) The parties agree on the termination of the proceedings;

(3) The arbitral tribunal finds that the continuation of the proceedings has for any reason become unnecessary or impossible.

Subject to the provisions of Sections 39 and 40 paragraph four, the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

Section 39 Unless otherwise agreed by the party, within thirty days of receipt of the award:

(1) A party may file a motion requesting the arbitral tribunal to correct any error in computation, any clerical or typographical errors or any insignificant error in the award, provided that a copy of the motion be submitted to the other party for information; or

(2) If so agreed by the parties, a party may file a motion with the arbitral tribunal to give an interpretation or explanation of a specific point or part of the award. A copy of the said request shall be submitted to other party.

If the arbitral tribunal considers the motion referred to in (1) and (2) of this Section is justified, it shall make the correction or give the interpretation within thirty days of receipt of the motion. The interpretation or explanation shall form part of the award.

The arbitral tribunal may correct any error or mistake referred to in (1) of this Section on its own initiative within thirty days of the date of the award.

Unless otherwise agreed by the parties, a party, with notice to the other party, may file a motion with, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings omitted from the award. If the arbitral tribunal considers the motion is justified, it shall make the additional award within sixty days of receipt of the motion.

The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation, explanation or an additional award under paragraphs two and four of this Section.

The provisions of Section 37 shall be applied to the correction, interpretation, and explanation of the award. They shall also apply to an additional award.

CHAPTER 6

Challenge of Award

Section 40 Challenge of an arbitral award may be made a motion for setting aside to the competent court in accordance with this Section.

Within ninety days after receipt of a copy of the award or after the correction or interpretation or the making of an additional award, a party may file a motion for setting aside of the award with the competent court.

The court shall set aside the arbitral award in the following cases:

(1) The party filing the motion can furnish proof that:

(a) A party to the arbitration agreement was under some incapacity under the law applicable to that party;

(b) The arbitration agreement is not binding under the law of the country agreed to by the parties, or failing any indication thereon, under the law of Thailand;

(c) The party making the application 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;

(d) The award deals with a dispute not within the scope of the arbitration agreement or contains a decision on matter beyond the scope of the arbitration agreement. However, if the award on the matter which is beyond the scope thereof can be separated from the

part that is within the scope of arbitration agreement, the court may set aside only the part that is beyond the scope of arbitration agreement or clause; or

(e) The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, unless otherwise agreed by the parties, in accordance with this Act.

(2) Where the court finds that:

(a) The award deals with a dispute not capable of settlement by arbitration under the law; or

(b) The recognition or enforcement of the award would be contrary to public policy.

In considering application for setting aside an award, if a party so requests and the court considers it reasonably justified, the court may adjourn the hearing of the case as it deems fit so that the arbitral tribunal can resume the case or carry out any act as it deems fit to eliminate the grounds for setting aside.

CHAPTER 7

Recognition and Enforcement of Awards

Section 41 Subject to Section 42, Section 43 and Section 44, an arbitral award, irrespective of the country in which it was made, shall be recognized as binding on the parties, and upon petition to the competent court, shall be enforced.

In case where an arbitral award was made in a foreign country, the award shall be enforced by the competent court only if it is subject to an international convention, treaty, or

agreement to which Thailand is a party. Such award shall be applicable only to the extent that Thailand accedes to be bound.

Section 42 The party seeking enforcement of the arbitral award shall file an application with the competent court within three years from the day that the award is enforceable. After receipt of the application, the court shall promptly examine and give judgment accordingly.

The applicant for enforcement of the award shall produce the following documents to the court:

(1) Original or certified copy of the arbitral award;

(2) Original or certified copy of the arbitration agreement;

(3) Thai translation of the award and of the arbitration agreement by the translator who has taken an oath or who affirmed before the court or in the presence of an official or an authorized person, or certified by an official authorized to certify translations or by a Thai envoy or consul in the country where the award or the arbitration agreement was made.

Section 43 The court may refuse enforcement of the arbitral award, irrespective of the country in which it was made, if the person against whom the award will be enforced furnishes proof that:

(1) A party to the arbitration agreement was under some incapacity under the law applicable to that party;

(2) The arbitration agreement is not binding under the law of the country agreed to by the parties, or failing any indication thereon, under Thai law;

(3) The party making the application 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;

(4) The award deals with a disputed not falling within the scope of the arbitration agreement or contains a decision on matter beyond the scope of the arbitration agreement. However, if the award on the matter which is beyond the scope thereof can be separated from the part that is within the scope of arbitration agreement, the court may set aside only the part that is beyond the scope of arbitration agreement or clause;

(5) The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, if not otherwise agreed by the parties, in accordance with this Act; or

(6) The arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where it was made. Save where the setting aside or suspension of the award is being sought from the competent court, the court may adjourn the hearing of this case as it thinks fit; and if requested by the party making the application, the court may order the party against whom enforcement is sought to provide appropriate security.

Section 44 The court may dismiss the application for enforcement under Section 43 if it finds that the award involves a dispute not capable of settlement by arbitration under the law or if the enforcement would be contrary to public policy.

Section 45 No appeals shall lie against the order or judgment of the court under this Act unless:

(1) The recognition or enforcement of the award is contrary to public policy;

(2) The order or judgment is contrary to the provisions of law concerning public policy;

(3) The order or judgment is not in accordance with the arbitral award;

(4) The judge who sat in the case gave a dissenting opinion; or

(5) The order is an order concerning provisional order measures for protection under Section 16.

The appeal against the court's order or judgment under this Act shall be filed with the Supreme Court or the Supreme Administrative Court, as the case may be.

CHAPTER 8

Fees, Expenses and Remunerations

Section 46 Unless otherwise agreed by the parties, the fees and expenses incidental to the arbitral proceedings and the remunerations for arbitrator, excluding attorney's fees and expenses, shall be in accordance with that stipulated in the award of the arbitral tribunal.

In case where the said fees, expenses or remunerations have not been fixed in the award, any party or the arbitral tribunal may petition a competent court for a ruling on the arbitration fees, expenses and remunerations for the arbitrator as it deems appropriate.

Section 47 An institution established for the settlement of the disputes by arbitration may prescribe the fees, expenses and remunerations incidental to the arbitral proceedings.

Transitional Provisions

Section 48 The provisions of this Act shall not prejudice the validity of the arbitration agreements and arbitral proceedings that have been carried out prior to the date of entry into force of this Act.

Any arbitral proceedings which have not been conducted and the time limit thereof under the applicable law has not lapsed**,** prior to the effective date of this Act, may be conducted within the time limit under this Act.

Countersigned

Pol.Lt.Col.Thaksin Shinawatra

Prime Minister

Appendix B

Arbitration Act (No.2) B.E. 2562

His Majesty King Maha Vajiralongkorn Bodindradebayavarangkun

Given this 12th day of April 2019,

Being the 4th year of the present Reign.

His Majesty King Maha Vajiralongkorn Bodindradebayavarangkun is graciously pleased to proclaim that,

Whereas it is deemed expedient to revise the law governing arbitration, Be it, therefore, enacted by H.M. the King, by and with the advice and consent of the National Legislative Assembly acting as the Parliament, as follows:

Section 1. This Act shall be called "Arbitration Act (No. 2) B.E. 2562".

Section 2. This Act shall be enforced on and from the day following the date of its publication in the Government Gazette[338].

Section 3. The following shall be added as Chapter 2/1, Foreign Arbitrator, Section 23/1, Section 23/2, Section 23/3, Section 23/4, Section 23/5, and Section 23/6, of the Arbitration Act B.E. 2545 (2002):

[338] **Published in the Government Gazette on 14 April 2019.**

Chapter 2/1

Foreign Arbitrator

Section 23/1. The parties to the dispute may appoint one or several foreigners as arbitrators for the arbitration proceedings in the Kingdom.

In the case there is an appointment of arbitrator under Section 18, or there is an appointment of arbitrator under an agreement of the parties to the dispute, a foreigner may be appointed as an arbitrator.

Section 23/2. In the case where there is an appointment of a foreigner who resides outside the Kingdom to act as an arbitrator in the Kingdom, which is an arbitration proceedings by a government agency or by an agency established by law and there are missions in connection with settlement of disputes by arbitration, the said foreigner may apply for a certificate from said government agency or agency for consideration by the competent officers under the law governing immigration and the law governing management of working of aliens.

A foreigner who performs the duty of an arbitrator and who is already entitled to reside in the Kingdom may apply for the certificate under paragraph one.

Section 23/3. The government agency or the agency under Section 23/2 shall issue a certificate so that the foreign arbitrator may perform his/her duties under the rules or regulations of arbitration proceedings as agreed upon under Section 23/4 and Section 23/5.

The certificate under paragraph one shall at least contain the following details:

(1)Name and address of the government agency or the agency issuing certificate.

(2)Reference no. of the dispute or code of dispute.

(3)Name, surname, and nationality of the arbitrator.

(4)Passport no. of the arbitrator.

(5)Estimated period of arbitration proceedings.

In the case the arbitration proceedings is not yet complete within the estimated period of time under paragraph two (5), the arbitrator may apply for a new certificate.

Section 23/4. Subject to the law governing immigration, the arbitrator who has received the certificate under Section 23/3 shall be entitled to being permitted to enter and reside in the Kingdom temporarily according to the period specified in the certificate, but it must not exceed by the period specified in the law governing immigration.

Section 23/5. Subject to the law governing management of working of aliens, the arbitrator who has received the certificate under Section 23/3 and permitted to reside in the Kingdom shall be entitled to work in the Kingdom according to his/her position and duties.

The registrar under the law governing management of working of aliens shall issue a work permit to the arbitrator under paragraph one, and during the period of processing of work permit, the arbitrator may perform his/her duties for the time being.

Section 23/6. For arbitration proceedings in the Kingdom, the parties to the dispute may appoint one or several foreigners to be their representatives to act on their behalf, and the provisions of this Chapter shall apply to the said representatives mutatis mutandis."

Countersigned by

General Prayuth Chan-ocha
Prime Minister