

CHAPTER 27 ARBITRATION

The present Arbitration Act came into effect in 2002, replacing entirely the earlier Arbitration Act of 1979. The new Act is largely based on the UNCITRAL Model Law on Arbitration, and is far more detailed than the Act that it replaced. It represents a further example of Thailand updating its laws to meet international standards.

The Arbitration Act (2002)

Definition of arbitration agreement An arbitration agreement means an agreement which the contracting parties agree to in order to resolve a dispute, either wholly or partly, that has already occurred or which might happen in the future. An arbitration agreement can be one clause in the principal agreement or be contained in a separate arbitration agreement.

Arbitration agreement to be in writing and signed by the parties An arbitration agreement must be in writing and signed by both parties, except that if it appears in a clause in a document which a party communicates via letter, facsimile, or email, or the clause is referred to in the claim or dispute and the other party does not object to it, then it is deemed that there is an arbitration agreement.

Where a written agreement refers to a document that contains an agreement to determine disputes by arbitration, with the intention that the agreement is part of the principal agreement, then it is deemed that there is an arbitration agreement.

Effect of death, incapacity, bankruptcy The performance of an arbitration agreement and setting up of the arbitration may not be avoided even though a party may be deceased, has lost the status of juristic person, has been placed in absolute receivership, or has been declared by a court to be incompetent or quasi- incompetent.

Transfer of rights When there has been a transfer of a right of action or liability, an existing arbitration agreement that relates to the right of action or liability transferred, is still binding on the transferee.

Where proceedings are issued in court Where a party issues court proceedings concerning a dispute that is subject to an arbitration agreement, without referring such dispute to the arbitration tribunal in accordance with the agreement, the defendant may apply to a court with jurisdiction not later than the date of presenting evidence or within the period in which he has a right to present evidence, for an order to direct the parties to proceed by arbitration. When the court has considered the matter and sees no reason for the arbitration

agreement not to be effective, inapplicable or having any grounds under which it does not apply, then the court proceeding will be dismissed.

Where the court is considering such an application, a party may commence arbitration, or the arbitration tribunal may proceed further and may rule on the dispute.

Arbitration agreement binding on government agencies As to agreements between government agencies and private sector entities, both parties can agree to use arbitration to determine disputes and such arbitration agreement is binding on both parties.

Application for interlocutory orders Where an arbitration agreement has been made, a party may apply to a court with jurisdiction to issue an injunction to protect his interests either before or during the course of the arbitration proceedings. If the court opines that such action is within the court's jurisdiction, then the court shall proceed in accordance with the application. In such a case, the provisions of the Civil Procedure Code will be applied, *mutatis mutandis*.

Where the court has issued an order to give effect to the application of a party under the above paragraph, if the applicant does not issue arbitration proceedings within 30 days from the date of the order, or within a time specified by court, then it is deemed that the order is rescinded.

Number of arbitrators An arbitration tribunal must consist of an odd number of arbitrators. Where the parties have specified an even number of arbitrators, the arbitrators must jointly appoint one more arbitrator to be the chairman of the tribunal. The procedure for appointing the chairman of the tribunal is as set out below. Where the parties cannot determine the number of arbitrators, there will be only one arbitrator.

Appointment of arbitrators Unless agreed otherwise, the arbitration tribunal shall be appointed in the following manner:

1. Where the tribunal is to consist of a single arbitrator, if the parties cannot agree who will be appointed, then any party may apply to a court with jurisdiction to order the appointment of an arbitrator.
2. Where the tribunal is to consist of more than one arbitrator, each party may appoint an equal number of arbitrators, and the arbitrators appointed shall jointly appoint an additional arbitrator. If a party does not appoint arbitrators within 30 days from the date he is notified by the other party to appoint them, or if both party's arbitrators cannot agree to jointly appoint the chairman within 30 days from the date that they are appointed to be arbitrators, then any party may apply to a court with jurisdiction to order the appointment of arbitrators, or the chairman of the tribunal.

Where the appointment of arbitrators does not specify any other means to enable appointments to be made, then any party may apply to a court with jurisdiction to appoint arbitrators as may seem appropriate, if it appears that:

1. a party has not proceeded in accordance with the required procedure;
2. the parties or the arbitrators are unable to agree in accordance with the required procedure; or
3. a third party has not proceeded in accordance with the required procedure.

Qualifications of arbitrators An arbitrator must be neutral and independent, and have the qualifications specified in the arbitration agreement. Where both parties agree that an arbitral organization is to have authority, the arbitrator must have the qualifications required by that organization.

Foreign arbitrators and foreigners appearing as representatives in arbitrations Foreign arbitrators are still obligated to obtain appropriate visas and work permits (see *Chapter 19 Work Permits* and *Chapter 20 Immigration*). Foreigners who appear to represent parties in an arbitration may do so provided that:

- the law governing the dispute is not Thai law;
- the advocate represents the Defendant not the Plaintiff
- the award will not be enforced in Thailand

Duty of arbitrator to disclose interests A person who is appointed as an arbitrator must disclose facts that may be cast doubt on his neutrality and independence, and from the date of being appointed and throughout the period of the arbitration proceedings, such person must disclose such facts to the parties without delay, unless the parties have been notified in advance.

Objecting to arbitrators An arbitrator may be objected to, if there is doubt about his neutrality, independence or lack of qualifications, as agreed by the parties; but a party may not object to an arbitrator appointed or jointly appointed, except where he did not know or could not have known the grounds for objection at the time of the arbitrator's appointment.

Unless otherwise agreed, a party who wishes to object to an arbitrator must submit an objection to the arbitration tribunal within 15 days of his knowledge of the appointment of that arbitrator, or knowledge of facts that enable him to object.

Where there is an objection, if the arbitrator does not withdraw or another party disagrees with the objection, then the tribunal shall decide the matter.

If an objection by means agreed by the parties or as prescribed in the previous paragraph is without effect, or where there is only one arbitrator, the objecting party may apply to a court with jurisdiction within 30 days from: either the date of receiving the objection, from the date that he knew of the appointment of the arbitrator, or from the date of knowledge of facts that enable him to object. Whilst the court is considering the objection, and is in the course of making its judgment, then the tribunal including the challenged arbitrator, may proceed with the arbitration until its conclusion, unless there is a court order providing otherwise.

In the case of necessity, the arbitration tribunal may extend the period for objection to the arbitrators for up to 15 days.

Termination of arbitrator's appointment An arbitrator's term of office expires upon death.

Where a person who is due to be appointed, or has been appointed and is unable to perform his duties, regardless of the reason for refusal to accept such appointment, is under absolute receivership, has been declared by a court to be incompetent or quasi-incompetent, or does not perform his duties within a reasonable time for other reasons, that person's term as arbitrator shall terminate upon his withdrawal, or when both parties agree to end his appointment. If there is a disagreement, a party may apply to a court with jurisdiction for an order for the termination of his appointment.

If an arbitrator's appointment is terminated, the arbitrator withdraws, or both parties agree to terminate his appointment, or his appointment is terminated on other grounds, an arbitrator will be appointed as a replacement using the same procedure for appointing an arbitrator.

Liability of arbitrators An arbitrator does not incur civil liability in performing his duties as arbitrator, except in the case of intentional or gross negligence causing loss to any of the parties.

Anti-corruption measures An arbitrator who requests, accepts, or agrees to accept, property or any other benefit for his own or another person's benefit in consideration of performing or not performing his duty, is liable to imprisonment not exceeding 10 years or a fine not exceeding 100,000 Baht, or both. Any person who gives, solicits, or agrees to give property or any benefit to an arbitrator to induce him to do or not to do or delay any action contrary to his duty, shall be liable to imprisonment not exceeding 10 years or a fine not exceeding 100,000 Baht, or both.

Determination of the authority of the tribunal, survival of arbitration

agreement The tribunal has authority to decide their own scope of authority, including the existence or completeness of the arbitration agreement, the validity of setting up the tribunal, and the issues in dispute that are within the scope of their authority. For this purpose, it is deemed that an arbitration clause which is part of a principal agreement, is a separate clause from the principal agreement.

A judgment of the tribunal holding that the principal agreement is void or invalid, will not affect the arbitration clause.

Objections to jurisdiction Any objection to the authority of the tribunal to determine any dispute, must be raised not later than the date of submitting an objection to the issues in dispute. A party shall not be deprived of the right of objection because he has appointed or jointly appointed the arbitrator. In order to contend that the arbitration tribunal has exceeded the scope of its authority, a party must raise the issue immediately when the matter occurs during the arbitration, except where the tribunal considers that the delay is reasonable, then the tribunal may allow a party to raise the issue after the specified time has expired.

The tribunal may exercise the scope of its authority by giving judgment or ruling on issues in dispute, but if it does not have authority to give judgment on the matters that may be ruled on by it, a party may apply to a court with jurisdiction to determine such issue within 30 days from the date of receiving the judgment. Whilst the application is being considered by the court, the tribunal may proceed with the arbitration and make an award.

Equal treatment of the parties The parties shall be treated equally by the tribunal, and given the opportunity to adduce evidence and put forward their claims and defences.

Procedure in absence of agreement Where the parties have not agreed or the Act is silent, the tribunal shall have authority to proceed as appropriate. The authority of the tribunal shall include authority to give judgment, to hear the evidence and consider the evidence. The tribunal may apply the rules of the Civil Procedure Code governing evidence.

Arbitration venue The parties may jointly agree to specify the venue for the arbitration proceedings. In the absence of agreement, the tribunal may determine the venue, taking into account the nature of the dispute and the convenience of the parties. Unless otherwise agreed, the tribunal may select any venue other than that chosen under the last sentence for the purpose of discussions, to hear evidence of a witness, specialist or a party, or to investigate any thing, place or document.

Commencement of arbitration proceedings In order to determine a dispute by arbitration, it shall be regarded that the dispute is referred to arbitration subject to the provisions of the Civil and Commercial Code, and the arbitration proceedings shall commence as follows:

1. When a party has received a letter from another party to determine the dispute by arbitration.
2. When a party notifies the other party in writing to convene the arbitration or to approve the setting up of an arbitration to determine the dispute.
3. Where the arbitration agreement stipulates the tribunal, when a party gives written notice to the tribunal, with details of the dispute required to be determined,
4. Where a party has referred the dispute to an agreed arbitration organisation.

Language of arbitration The parties may specify the language to be used in the arbitration. Unless otherwise agreed, the language will be chosen by the tribunal. Unless otherwise agreed, such agreement shall apply to written requests, objections and applications by the parties, evidence, rulings, judgment or any communication made by or to the tribunal. The tribunal may order a translation of a document used in evidence by a party into a language as agreed by both parties or as specified by the tribunal.

Burden of proof Within a period agreed or as specified by the tribunal, and unless otherwise agreed, the applicant must show evidence to support his claim on the issues in dispute and the remedy applied for; and the respondent must show grounds for his defence, by attaching relevant documents or a list of documents or other evidence.

Amendment of pleadings Unless otherwise agreed, a party may apply to amend his claim or defence, including during the proceedings, unless the tribunal opines that such alteration is inappropriate, due to any delay that may arise.

Hearing on the documents or oral evidence Unless otherwise agreed, the tribunal shall decide whether they will take evidence or listen to oral or written statements, or proceed by accepting documents or other evidence. The tribunal has authority to accept evidence at any stage during the proceedings, as seems appropriate on the request of a party, except where the parties agree not to adduce oral or written evidence. The tribunal may give notice to adduce evidence and fix an appointment to investigate any thing, place or documents, to the parties.

Disclosure of evidence including expert reports Any claim, defence, application, document or facts submitted by a party to the tribunal, must be submitted to the other parties; this also include reports by experts or documents.

Powers of the tribunal Unless agreed otherwise, the tribunal has the following powers:

1. To order discontinuance of the proceedings, if the applicant does not apply to the court as required under the Act.
2. To continue the proceedings, if the respondent does not file a defence. The failure to file a defence shall not be regarded as acceptance of the claim.
3. To continue the proceedings, if a party does not appear on the day evidence is taken or the date of trial, or does not put forward any evidence, and continue with its determination.

Expert evidence Unless agreed otherwise, the tribunal may:

1. appoint one or more experts to give opinions on any issue to be determined;
2. request the parties to provide facts to the experts, or to arrange or proceed to acquire documents or any thing concerning the issues in dispute to be considered by the expert.

Unless otherwise agreed, when the expert has given an oral or written opinion, if a party has requested, or the tribunal considers it appropriate, the expert must be summoned to answer questions from the parties, unless that party is bringing his own expert witness to consider the issues.

Issue of subpoena The tribunal, any member of it, or a party with the consent of the majority of the tribunal, may apply to a court with jurisdiction to issue a witness subpoena, or to issue an order to submit documents or any thing.

Application of relevant law The tribunal shall issue its rulings in accordance with the law specified by the parties to apply to the dispute. Where it is a requirement of the law or legal system of any country, if the position is not clear, this means the substantive law excluding the law governing conflicts of law of that country.

Where the parties do not specify the law to be applied to the dispute, the tribunal shall decide the dispute in accordance with Thai law, except in the case of conflicts of law, where it shall make a decision on any conflict of law as seems appropriate.

Good faith, compliance with contract The parties may stipulate that the tribunal has authority to decide the dispute based on principles of good faith and justice.

The final award of the tribunal must comply with the contract terms. If it is a commercial dispute, customary commercial practice that applies to that transaction shall be taken into account.

Majority decisions Unless otherwise agreed, orders and judgments on any matter by the tribunal shall be made by majority decision and if a majority cannot be formed the chairman shall solely make a decision to issue an order or judgment.

The chairman shall decide on the method of proceeding, if the disputing parties or all the arbitrators have given such authority.

Settlement during proceedings During the course of the arbitration, if the parties agree to a compromise, the arbitrators shall discontinue the proceedings if the parties so request. If the tribunal opines that such agreement or compromise is not illegal, then the tribunal shall make an award in accordance with the compromise. A final judgment after a compromise shall comply with the requirements below, and shall have the same status and effect as a judgment on the issues.

Making of the award The arbitrator's award shall be in writing with the signatures of the tribunal. Where there is more than one arbitrator, the signatures of the majority are sufficient, but those who do not sign must be noted.

Unless agreed otherwise, the award must give reasons for the determination, and no award may be given that is beyond the scope of the arbitration agreement or the claims of the parties, except for an award made by compromise, or an award for fees, costs or arbitrators' fees.

The award must stipulate the date and venue of the arbitration. The award shall be regarded as having been made at the venue stipulated.

Upon completion of the award, the tribunal must send a copy of its decision to each party.

Conclusion of proceedings The arbitration proceedings end when an award is made, or an order is made on any of the following grounds:

1. The applicant has requested withdrawal, except where the respondent has contested withdrawal, and the tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute.

2. The parties have agreed to end the proceedings.
3. In the opinion of the tribunal, there is no need to proceed further or it is unable to proceed further.

The authority of the tribunal ends at the same time as the proceedings end.

Correction of the award Unless otherwise agreed, within 30 days from the date of receiving the award:

1. A party may request the tribunal to correct calculations, errors, typing errors or minor mistakes in the award. A copy of such request must be forwarded to the other party.
2. If so agreed by the parties, a party may request the tribunal to interpret an issue or part of the award. A copy of such request must be forwarded to the other party.

If the tribunal determines that a request under either of the above grounds is reasonable, it must complete such correction or interpretation, within 30 days of a request. Any interpretation and explanation is regarded as part of the award.

The tribunal may also rectify mistakes or minor mistakes of its own motion within 30 days of making a decision.

Claims not determined Unless otherwise agreed, a party may apply for a ruling on a claim that has been omitted from the award within 30 days of receiving the decision. When the other party has been notified of the request, the tribunal shall rule on the application. If the tribunal opines that the application is reasonable, it shall make an additional award within 60 days of receiving the application.

Where necessary, the tribunal may extend the time for correction, interpretation, explanation or additional award.

2016 changes to the arbitration rules In December 2016, a number of changes were made to the arbitration rules. These are in the following areas:

- Challenging the appointment of an arbitrator
- Procedure where a sole arbitrator is appointed
- Right to apply for injunctions (“interim measures”)
- Filing and service of proceedings by email
- A timetable must be fixed for the arbitration

- Power to order consolidation of arbitrations
- Confidentiality of arbitration proceedings
- The format of the arbitration award
- Language of the arbitration
- The power of the arbitrators to dismiss a case
- Disclosure of communications with an arbitrator or prospective arbitrator

Setting aside an award An award may be set aside by applying to a court with jurisdiction within 90 days of receiving the award, or, in the case of requesting the tribunal to rectify or interpret the award, or make an additional award, 90 days from the date that the tribunal has rectified or interpreted the award or made an additional award.

An award may be set aside on the following grounds:

1. Where a party can prove that:

- a party to the arbitration agreement lacked capacity under the law applicable to that party;
- the arbitration agreement was not binding under the law of the country chosen by the parties or under Thai law, where there was no agreement;
- subject to a requirement of good faith, no advance notice was given of the appointment of the arbitrators or of the arbitration proceedings, or a party was unable to contest the arbitration for any other reason;
- the award was not within the scope of the arbitration agreement or is beyond the scope of the submission to arbitration, provided that if the part of the award that is outside the scope can be separated from that that is within the scope, the court may revoke the part that is outside the scope of the agreement;
- the composition of the tribunal or the proceedings was not in accordance with the agreement of the parties, or, unless otherwise agreed, the composition was illegal under this Act.

2. Where the court finds that:

- the award concerns a dispute that cannot be determined by means of arbitration, in accordance with the law, or
- acceptance or enforcement of the award is contrary to public order or good morality.

In considering whether to set aside an award, if a party has applied and the court decides that it is reasonable, the court may stay the application as seems appropriate, to enable the tribunal to reconsider and continue with the proceedings as seems appropriate, in order to eliminate the grounds for setting aside.

Enforceability of award An arbitral award, regardless of the country in which it is made, shall be binding upon the parties and upon applying to a court with jurisdiction, such award will be enforced.

Where an award is made outside Thailand, a court with jurisdiction shall enforce the award only when it is enforceable under a treaty, convention or international agreement to which Thailand is a party, and enforcement shall take effect, only so far as Thailand agrees to be bound.

When a party requires enforcement of an award, that party shall apply to a court with jurisdiction within three years from the date of the award. Having received an application for enforcement, the court shall proceed expeditiously to enter judgment.

Documents to be lodged with the Court A party who requests enforcement of an award must submit the following documents to the court:

1. An original copy of the award or a certified true copy.
2. An original copy of the arbitration agreement, or a certified true copy.
3. A Thai translation of the award and the arbitration agreement by a translator who has been sworn before the court, or a competent person in certain other categories including the Thai Consulate in the country where the award or arbitration agreement was made.

Grounds to refuse enforcement The court may decline to enforce an award on the following grounds, if the party against whom the award is invoked proves that:

1. A party to the arbitration agreement lacked capacity under the law that applies to that party.

2. The arbitration agreement is not binding under the law of the country that the parties have agreed will apply, or under the law of the country where the award was made, where there was no such agreement.
3. There was no notification to the party against whom the award is invoked to know in advance of the appointment of the arbitration tribunal or the arbitral proceedings, provided such party acts in good faith; or such person was unable to contest the arbitration for any other reason.
4. The award deals with a dispute that is not within the scope of the arbitration agreement, or the award is beyond the scope of agreement to submit to arbitration. If the award that is outside the scope can be separated from that which is within the scope, the court may enforce the part of the award that is within the scope of the arbitration agreement.
5. The composition of the tribunal or the proceedings was not in accordance with the agreement of the parties, or does not accord with the law of the country in which the award was made, unless otherwise agreed.
6. The award has not yet become binding, or has been set aside or suspended by a court with jurisdiction, under the law of the country in which the award was made; except that upon an application to set aside or suspend the award, the court may stay proceedings for enforcement as seems appropriate. If the party applying for enforcement of the award requests, the court may order the party against whom the award is invoked to deposit appropriate security in advance.

The court has power to refuse enforcement of an award on any of the above criteria, if it appears to the court that such award concerns a dispute that cannot be settled by arbitration in accordance with the law, or enforcement of the award is against public order or good morality.

Rights of appeal There is no right of appeal against an order or judgment under the Act, except in the following cases:

1. Where acceptance or enforcement of the order or judgment is against public order or good morality.
2. The order or judgment is contrary to public order.
3. The order or judgment does not accord with the rulings of the tribunal.
4. The arbitrators considering the case have made conflicting opinions in their judgment, or
5. The appeal is against an order for interlocutory relief.

Any appeal is made to the Supreme Court or the Supreme Administrative Court, as the case may be.

Fees and costs Unless otherwise agreed, fees, costs and arbitration fees, excluding attorney's fees and costs, shall be as specified in the award. Where fees, costs or arbitration fees are not referred to in the award, a party or the tribunal may apply to a court with jurisdiction for an order regarding fees, costs and arbitration fees, as seems appropriate. An arbitration organization may claim its fees and costs in the proceedings.

Transitional provisions The provisions of this Act shall not affect the validity of an arbitration agreement, or any arbitration proceedings entered into prior to the date that this Act comes into force.

Any arbitration proceedings that have not been brought into effect and which are not statute barred under the law existing prior to this Act, shall proceed within the time stipulated under this Act.

The New York Treaty Thailand is a signatory to the New York Treaty for the Recognition and Enforcement of Foreign Arbitral Awards (1958). In addition to compliance with the requirements of the Arbitration Act, an arbitration award made outside Thailand may generally be enforced in Thailand subject to the requirements of either the Geneva Convention of 1927 or the New York Treaty.

Stamp duty Arbitration awards issued in Thailand or brought into Thailand are liable to stamp duty at the rate of 0.1%, i.e. not necessarily the amount awarded.

Arbitration and government contracts In 2004 and 2009, the Thai Cabinet passed resolutions declaring that any agreement between the Thai government or a ministry and a Thai or foreign entity may not contain an arbitration clause, and must be in Thai language. Although such a resolution may not have the force of law, it is suggested that it would be difficult to enforce any arbitration award through the Thai courts if these requirements were not observed.

In 2015, these provisions were liberalised to a certain extent by a further resolution. But the following contracts where the Thai government or a ministry is a party may still not contain an arbitration clause:

- *Public- Private Partnerships* The Private Investment in State Undertaking Act (2013) sets out a framework for private sector participation in developing infrastructure and public services. It applies to PPP projects with a value of more than Baht 1 billion, or where ministerial regulations prescribe.

- *Concession agreements* There is no definition of what constitutes a "concession agreement." It is suggested that a fair definition is agreements granting the private sector the right to operate public services for a limited period at their own risk and using their own fund.
- *Any contract that requires Cabinet approval under Royal Decree 2005*
This covers all contracts that require Cabinet approval, and includes any large-scale investment (Baht 1 billion or more) projects involving the public sector.

Arbitration in practice Culturally, and in business, Thais tend to adopt a non-confrontational approach and prefer to compromise conflicts and disputes. Thus one would expect that arbitration would tend to be more popular than litigation. However, statistics show that arbitration, mediation and conciliation are rarely used as methods of dispute resolution, and parties in dispute prefer to use the courts to decide their differences.

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