

PROPOSED AMENDMENTS TO THE THAI ARBITRATION ACT B.E. 2545 (2002)

VICTOR SMITH

Historically Thailand has not been perceived as being an “arbitration friendly” jurisdiction by foreign investors and those involved in arbitration proceedings. Two of the current significant obstacles to arbitration in Thailand are:

- o Foreign arbitrators are required to obtain a work permit to sit as an arbitrator in arbitration proceedings in Thailand, and
- o Parties can only appoint foreign counsel to represent them in arbitration proceedings under very limited circumstances (where they acting in defence of a case, where the governing law is not Thai law and where the award will not be required to be enforced in Thailand).

Both of the above obstacles often deter foreign parties from holding arbitration proceedings in Thailand and encourage them to include provisions in their contracts for arbitration proceedings to take place in other more “arbitration friendly” jurisdictions such as Singapore and Hong Kong.

The process for foreign arbitrators to obtain a Thai work permit is but both difficult and time consuming deterring many foreign arbitrators from accepting appointments to sit as an arbitrator in Thailand. The reluctance of foreign arbitrators to accept appointments in Thailand severely restricts the parties’ choice of arbitrator. The restriction on the choice of counsel by the parties goes against the consensual nature of arbitration and severely limits the freedom of choice for the parties to choose who they wish to represent them in arbitration proceedings.

The Thai government has taken on board that the arbitration environment in Thailand needs to be improved with a view to attracting greater foreign investment in Thailand and promoting Thailand as a regional center for international arbitration. With this in mind a draft Arbitration Act is currently under consideration and has been publically circulated. The full text of the draft Act is available on the Thai Arbitration Institute (TAI) website at www.tai-en.coj.go.th

The current Arbitration Act does not differentiate “domestic” and “international” arbitration. The main purpose of the draft Act is to differentiate “domestic” and “international” arbitration and make international arbitration in Thailand more convenient by:

- o Allowing foreign arbitrators to sit as arbitrators in international arbitration proceedings without having to obtain a work permit, and
- o Allowing parties to be represented by foreign counsel in international arbitrations.

Under the draft Act, subject to the law on foreign persons working in Thailand and law on immigration, in international arbitration cases a foreign arbitrator or foreign party representative is entitled to:

- o Perform their duties under such regulations,
- o Reside provisionally in Thailand, and
- o Be permitted to work in the capacity of an expert according to his or her position in the arbitration proceedings.



Whilst it is not clear at this time how the draft Act will be applied in practice or when the draft Act will be implemented the draft Act is seen as a positive indicator of the Thai government's desire to improve the arbitration environment in Thailand. Once enacted the draft Act will no doubt be welcomed by foreign investors and those involved in international arbitration proceedings in Thailand and encourage more foreign parties to hold international arbitrations in Thailand.

The draft Act clearly shows the Thai government's support for arbitration. This should encourage Thai parties to include arbitration agreements in their contracts for both domestic and international arbitration transactions.

Other international arbitration hubs in the region such as Singapore and Hong Kong benefit from "arbitration tourism". Thailand will also benefit from arbitration tourism when more international arbitrations are held in Thailand. The revenue from arbitration tourism can be substantial as the foreign arbitrators, foreign parties, foreign lawyers and witnesses will all need to come to Thailand and use local services such as hotels, restaurants and travel services.

By holding more international arbitrations in Thailand both Thai arbitrators and Thai lawyers should also benefit from the experience of being exposed to more international arbitration proceedings resulting in the

services they provide both in domestic and international arbitrations being improved.

Whilst the draft Act will considerably improve the arbitration environment in Thailand there remains some other issues that will need to be addressed to bring the standard of arbitration in Thailand up to an international standard. These issues include:

- o Greater judicial support for arbitration by the Thai courts,
- o Improving Thai court procedures for enforcement of awards,
- o Improving the arbitration rules of the local Thai arbitration institutions,
- o Increasing the limited pool of Thai arbitrators that can deal with international arbitrations in terms of procedures and language,
- o Increasing the level of fees paid to arbitrators by the local Thai arbitration institutions.

Both the TAI and Thailand Arbitration Center (THAC) have a goal to become international arbitration centers. To achieve this goal they will need to ensure their arbitration rules are of an international standard. Additionally they will need to provide more education and training for Thai nationals wishing to become arbitrators and increase the level of fees they pay arbitrators to encourage Thai nationals to become arbitrators.

Whilst the draft Act will make it more convenient for foreign arbitrators to sit as arbitrators in Thailand it is unlikely foreign arbitrators will be willing to accept appointments by Thai arbitration institutions as this is not economically viable given the low level of fees the TAI and THAC currently pay arbitrators. Currently the fees paid to arbitrators by the TAI are less than 10% of the fees paid by the Singapore International Arbitration Centre (SIAC) and the fees paid by THAC are less than 20% of the fees paid by SIAC. Clearly if the Thai arbitration institutions wish to attract more foreign arbitrators they will need to substantially increase the level of fees they pay to arbitrators.

Summary

The draft Act should be applauded as it will substantially improve the arbitration environment in Thailand. It should increase the willingness of foreign parties to invest in Thailand and allow Thailand to benefit from arbitration tourism and increased familiarity of international arbitration.

Whilst the effects of the draft Act cannot be understated the arbitration environment in Thailand can still be improved if the other issues affecting arbitration in Thailand are also addressed. The Thai government, the judiciary and the Thai arbitration institutions are actively encouraged to address these issues.

About the author



Victor Smith
Chartered Arbitrator

Victor is recognised as one of the leading arbitrators in Thailand. He graduated from Kingston Polytechnic with a BSc Degree in Quantity Surveying and from Northumbria University with an LLM in International Commercial Law (Distinction).

He has worked in the construction industry in Europe, the Middle East, Africa, South America and Asia. He regularly sits as an arbitrator in both international and domestic arbitrations and assists parties in arbitration proceedings.

To request the appointment of Victor Smith contact the Registrar: registrar@nziac.com