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A Guide to International Litigation and Arbitration for Thai Businessmen

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Litigation in Thailand can be a frustrating experience for foreigners. There are several main reasons for this. Most foreigners are not familiar with the Thai legal system as it has several unusual features. Most surprising are that the court has a relatively wide power to determine whether or not

to accept the case on technical/procedural grounds, the slow pace of the proceedings, the necessity to produce original documents as evidence, that the judge asks many of the questions of the witnesses and records the testimony himself, and the litigants' lack of possible introduction of new evidence and supplementation of their original submissions with new legal theories. Foreigners not familiar with civil law systems generally also find the lack of reliance on prior cases as precedent difficult to understand.

Increasingly, however, as globalization proceeds, Thai businessmen may find themselves in an equally frustrating situation if they become involved in litigation outside Thailand or in an international arbitration.

While international arbitration and foreign litigation are not the same, many of the fundamental principles are very similar and both are in sharp contrast to Thai practice. This article will describe some of the basic features of foreign litigation and international arbitration so that Thai businessmen can know what to expect. For the sake of simplicity, we will concentrate on the common law system and specifically American practice in the US Federal District Courts. The rules in the US state courts are similar enough that if one understands how federal litigation works, the proceedings in state courts will not seem startlingly different. We will also discuss

the most popular sets of international arbitration rules, those of the International Chamber of Commerce (ICC), UNCITRAL, the American Arbitration Association (AAA), and the London Court of International Arbitration (LCIA). While there are some important differences between these sets of rules, arbitrations under all of them are more like litigation in the United States than litigation in Thailand.

While it is always advisable to include a method for resolving future disputes in international contracts, either by litigation in some mutually agreed country, or by some kind of international arbitration, each of these approaches has certain advantages and disadvantages. None are ideal. All are expensive. It is often not easy to choose among them. It is better to try to resolve disputes when they arise by negotiation, if possible, no matter what the parties agreed to in their contract.

Litigation

The United States follows the common law system, unlike Thailand, which follows the civil law system. There are many similarities between the two systems as both have large numbers of civil codes that contain elaborate rules on many topics.

However, the common law system is also based on customs and past practices. The courts follow not only the laws contained in the various codes but also the “precedents” or past decisions of the courts. These past court decisions authoritatively interpret the laws and contain codifications of customs and practices.

The common law court system is an “adversarial” system where each side tries to persuade the court that its legal arguments and its version of the facts are correct. The court decides which are the real facts and which legal principles correctly apply. Since most general legal principles have exceptions, the parties usually dispute both the law and the facts. The rules of civil procedure aim to facilitate this process and allow it to take place in an orderly way.

The United States is also a federal system where both the US Federal Government and the governments of each state have their own laws and their own courts. Because many of the functions of both governments are similar, they often overlap.

There are similar but different procedural rules prevailing in each of the various state courts in the US. The US Federal District Courts, located in “districts” in each state, follow essentially the same procedural rules. There may be advantages to one

of the parties to have its case considered by one or the other court even though they are both located in the same place. There are rules governing whether a particular case can take place in the state courts or the Federal District Courts. It is easier to understand the distinction by recognizing that certain types of cases cannot take place in the Federal District Courts and the certain kinds of cases cannot take place in the state courts. There are also many types of cases where a party may sue in either type of court. In litigation between private parties, the Federal District Courts will not accept a case where the amount in controversy is less than the amount fixed by Federal law, currently $75,000, nor where the parties live in the same state. If the case is a civil dispute that involves more than the minimum required amount ($75,000) and the parties reside in different states or one party resides outside the US, a party may bring it in either kind of court. The Federal District Court will apply state law as necessary. On the other hand, state courts may not judge cases involving most US Federal laws. To give a few examples, the Federal Courts are responsible for disputes involving intellectual property such as patents, trademarks and copyrights, as these are Federal laws. Another Federal law often involved in disputes between private parties is the so-called RICO law which relates to conspiracies and which only the Federal District Courts hear. In fact, it is not unusual where one party or the other

sees an advantage in being in the Federal District Court for the plaintiff to include such a federal law violation issue in his complaint or for the defendant to include one in its defense and counter-suit and then seek to have the case transferred ("removed") to the Federal District Court located in the same jurisdiction. All bankruptcies take place in special bankruptcy courts which are part of the Federal court system, all claims against the debtor must be filed in the Bankruptcy Court, and the filing of a bankruptcy petition will automatically stop all litigation against the debtor no matter whether it is taking place in the state or ordinary federal courts.

Once a party has decided where to bring his lawsuit, his lawyer will file a complaint on his behalf. The complaint in a civil suit in the US is very different from the complaint filed in a Thai court. In the Federal District Courts, the complaint must contain a short statement of why the court has jurisdiction of the case, a short statement of the claim, and a demand for judgment for the relief sought. The complaint must be "simple, concise and direct." (This kind of pleading is "notice pleading." Some states require similar "fact pleading" where more detail must be given.) A party may demand more than one kind of or alternative kinds of relief. The party does not include the details of the damages claimed. The plaintiff does not attach any other documents to the complaint or submit any to the court at this time. The attorney who prepared

the complaint, or the party himself, if not represented, will sign it. There is no requirement that there be a power of attorney signed by the plaintiff and this is not the practice in the US.

There is a very important Federal rule that by signing the complaint the signer represents to the court that he has investigated and that to the best of his knowledge the lawsuit is being filed for a proper purpose, is not frivolous and that there is evidence to support the party's claims. At a later stage of the case, if the court finds that a party violated this rule, the court may impose sanctions, including the payment of the other party's legal fees as well as penalties that the loosing party must pay to the court. This rule is strictly enforced and is one of the main reasons why many lawyers prefer litigation in the state courts.

At the beginning of the lawsuit, the plaintiff may also request the seizure or securing of the defendant's property. He may also request other temporary restraining orders to protect him against immediate harm. The court may grant these later orders without any notice to the defendant, subject to a hearing, normally within 10 days. The court grants these orders based on facts contained in a sworn affidavit or complaint of the party seeking them. Unlike practice in Thailand, the court usually grants such

orders if the moving party can show good cause.

Once he files the complaint with the court, the plaintiff may prepare a summons to the defendant that the court clerk will sign if it is in proper form and issue it to the plaintiff. If the plaintiff does not serve it within 120 days after filing the complaint, the court may dismiss the case– without prejudice to future filing of the complaint. This time limit does not apply to service outside the US. While the service process is similar in the state courts, many do not require that the plaintiff serve the complaint within any specific time after he files it with the court.

No judge first reviews the complaint or decides whether to accept it. The court clerk only reviews the form of the summons, not the contents of the complaint. The next step is for the plaintiff to serve the complaint on the defendant. This is the responsibility of the plaintiff, not the court. Any person who is not a party or a court officer known as a marshal makes the service on behalf of a party. This is up to the plaintiff to decide. In the case of suits brought against defendants living outside the US, the summons may be served according to the laws of the country of residence of the defendant, as provided under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents to which some countries, not including Thailand,

are parties, or, unless illegal in the home country of the defendant, by mail or personal delivery.

Instead, the plaintiff may notify the defendant of the filing of the lawsuit and request the defendant to waive service. The defendant has 30 days to return the waiver if he lives in the US or 60 days if outside. If the defendant lives in the US and refuses to do so, the court may hold him liable for the costs of effecting the service. Also, if the defendant waives service he is automatically granted an extra amount of time in which to answer the complaint, 60 days in the case of a defendant within the US and 90 days in the case of a defendant outside the US, as opposed to 20 days if he is served through the official process.

Once the lawsuit has been served upon or accepted by the defendant, the defendant must submit his first response. Here again, the system is quite different from the procedure in Thailand. The defendant has several choices. He can make a motion to the court to dismiss the lawsuit on the basis that the court lacks jurisdiction, the suit was brought in the wrong District Court, service was not correct, the complaint fails to contain a claim for which the court can grant relief, or that all the essential parties to the lawsuit have not been sued. If the defendant makes this type of motion, he is not

required to answer the substance of the complaint. By making a motion to dismiss for lack of jurisdiction, the party does not subject himself to the jurisdiction of the court. He may request and normally the court will hear these defenses in a preliminary hearing.

The defendant may also ask the court for a clarification of the complaint if he considers it so vague that cannot respond to it. He may also petition the court to strike out portions of the complaint. The court will also consider this in a preliminary hearing.

Either party may make a motion at any time after the beginning of the lawsuit for "summary judgment." This is a motion to the effect that there is no genuine issue as to any relevant fact and that the party is entitled to judgment as a matter of law.

If the defendant decides to answer the complaint, he will submit his defenses in a pleading. If he has counterclaims against the plaintiff that arise out of the same transaction, he must also include those in his response. The defendant must give a short statement of his defenses and admit or deny the assertions of the plaintiff. If he does not know about the plaintiff's allegations, he may so state which has the effect of a denial. If he includes counterclaims, the plaintiff may answer or may make a motion to have it dismissed for any of the same reasons.

Again, unlike Thai practice, each party may amend his pleadings many times. He may amend once automatically before the other party submits his response. He may petition the court to amend and the court must give permission "freely" "when justice so requires." In addition, either party may amend his pleadings to reflect the evidence and may even amend his pleadings freely during the trial itself based on additional evidence unless the other party convinces the court that the additional evidence would prejudice him.

After the pleadings are closed and at any time before trial, either party can make a motion or request for "judgment on the pleadings."

Once both sides have submitted their initial pleadings, the parties must meet together outside the court to discuss their claims and defenses, to attempt to reach settlement, to disclose certain evidence to each other and to fix the schedule for "discovery."

"Discovery" is in addition to the requirement that each party disclose to the other the names and addresses of all parties who might have information relevant to the dispute, give copies or descriptions of all documents relating to the disputed facts claimed by a party to the other party and to provide all documents showing the party's

damage calculations. “Discovery” is a process where either party may demand of the other disclosure of all information relevant to the dispute. The information that a party can demand does not even have to be admissible as evidence so long as it might lead to discovery of evidence. A party can conduct discovery by written requests and responses. These are “interrogatories.” A party may also conduct discovery by taking and recording the testimony of any person. These are “depositions.” This takes place before any person authorized to administer oaths. This could be a notary public (a private party) or, outside the US, an officer at the US Embassy. Each party may also make demands for the right to inspect and copy documents that the requesting party deems relevant as a form of discovery. These are “document requests.” Either party can also demand that the other party admit the truth of any matter the subject of the discovery. These are “requests for admission” and any matters admitted are conclusively established.

The parties normally arrange and conduct discovery themselves. The whole process of discovery is normally lengthy and the courts encourage the maximum disclosures of the parties in their rulings. It is also very costly. The court becomes involved when there is some dispute between the parties such as whether a party must disclose the information or the court should restrict its distribution in some way which

the parties cannot resolve between themselves. They court has the right to impose sanctions and may compel the testimony of witnesses whom a party wishes to depose. They may hold a witness who refuses to cooperate in contempt of court even though the court would not allow his testimony at the trial.

It is even possible to conduct discovery before the party files his lawsuit with the court if the court gives permission.

Once the parties have agreed on the plan for conduct of the discovery and have attempted to settle the case, they must submit a joint report to the court as to how they think the case should proceed. The court will then hold a scheduling conference. This can take place before the judge or before a "magistrate," a court officer acting under the authority of the judge, and may be in person or by telephone. The court will then issue appropriate orders including the fixing of the trial date.

Normally, as the parties will not have completed the discovery process by the time of the scheduling conference, the court will hold another scheduling conference close to the date of the trial.

Finally, when the case comes to trial, the judge will hear the case, with or without a jury depending on whether or not one of the parties has requested one. The parties have the absolute right to a jury.

The parties may use the oral depositions at the trial in order to contradict the testimony of that person at trial, in the case of a company officer, for any purpose, and for any purpose if the witness is dead or unable to or refuses to appear at the trial.

The trial itself will proceed during one or more continuous blocks of time fixed by the judge until it is completed. Although there are sometimes adjournments, most trials continue until complete without a break. During the trial, whether or not there is a jury, the parties will often submit motions to dismiss the case on some legal basis. Both parties will introduce evidence and present witness testimony, much of which will have been the subject of earlier disclosure during the discovery phase of the case. The court will apply the Federal Rules of Evidence in deciding which documents the parties can use in the trial. The Rules of Evidence are quite complicated. They do not require the original documents when they have been destroyed or lost, not obtainable or in the possession of the other party and not produced on demand of the opposing party.

In summary, the initial pleadings do not define and limit the issues in the case. The court cannot reject them without giving the parties the right to present their positions. Each of the parties has the right to obtain disclosure of the evidence in the possession of the others from the earliest stages of the case. The policy is to make sure that the fullest possible disclosures of relevant facts, whether or not harmful to either party, takes place. The discovery process takes place outside the courtroom with the court only intervening where necessary to ensure that the lawyers are following the rules. The court will also consider and rule on a variety of motions relating to the case before the trial takes place. Once the discovery process is complete and the trial takes place, the parties will present their respective cases as they see fit. The official court reporter will record the testimony verbatim. Throughout the process, the court will generally respond to and rule on motions and requests made by the parties themselves rather than taking the initiative. The court will not question the witnesses or direct the proceedings in the way Thai judges do. It will confine itself to rulings on legal issues and to enforcing the applicable rules, including the rules of evidence. It will interpret the relevant laws based on the prior decisions of the courts (known as “precedents”). The discovery process and the trial itself may result in court judgments based on evidence and legal theories that the party bringing the lawsuit did

not even know or did not originally consider at the time he filed it with the court. Because of the ease with which the parties can change their initial submissions, the normally long and thorough process of examination of witnesses and documents both before andduring the trial, and the practice of obtaining court rulings on many motions, litigation in the US can become very expensive. It is relatively easy for one party to force the other to great cost in order to force a settlement.

International Arbitration

Arbitration is a voluntary process of dispute resolution that uses a neutral third party to make a decision after both parties present their positions. Normally the parties agree to arbitration in advance of any disputes by including an arbitration clause in their contract. Occasionally the parties to a dispute will agree to have a specific dispute decided by arbitrators rather a court.

In both cases, the agreement of the parties is fundamental. The arbitrators must decide in accordance with the terms of the contract. They cannot decide a disputed issue not falling within the scope of the arbitration agreement or make an award that

contains matters beyond the scope of the arbitration agreement. The court cannot enforce the award if the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties.

There are several advantages claimed for arbitration. Proponents say that he arbitrators are impartial. As the parties select the arbitrators, they may choose arbitrators who are knowledgeable about the specific type of business dispute, especially if the issues are technical. This is in contrast to a court where the judge may well have no knowledge of the issues. Supporters say that he process is less formal, less expensive and more flexible than court proceedings. It is supposed to be faster than litigation. Technical rules of evidence do not apply. The parties and the arbitrators are free to call upon experts of all kinds to assist in resolving their dispute.

The parties do not realize many of these advantages in practice. Especially with arbitrations conducted under the ICC Rules, the parties may find that the process is expensive, slow and cumbersome, that the ICC bureaucracy is inefficient, and that the parties must use specialized lawyers as advocates and arbitrators because the whole process is complicated and is based on practices and customs only well understood by insiders.

Arbitration takes place outside the court system of any country. This means that neither must agree to accept a legal system which he is not familiar with or where he has concerns about the neutrality of the court. In practice, arbitration usually allows the parties to escape the legal system of any country. While the arbitrators are supposed to follow the law agreed upon by the parties, there may be little means of ensuring that they follow the law.

As the arbitrators may have backgrounds in civil law or common law, they may set their own rules, conduct the proceedings and make their decisions partly based on their own general ways of thinking, no matter which law the contract directs them to follow. Often, one or more of the arbitrators are nationals of some countries other than of the law agreed to be applicable who are not really very knowledgeable about the law they are supposed to apply.

If the parties to an international contract decide to include an arbitration clause they must agree on a minimum of four main points: what issues are to be decided by the arbitrators; what law will apply to the arbitration; where the arbitration is to take place; and what arbitration rules will apply. They should also agree on the number of arbitrators, the method of appointment of the arbitrators, and the language to use in

the arbitration, as these will also affect the way the arbitration takes place. They may also wish to agree in advance on other procedural rules to be followed by the arbitrators as otherwise the arbitrators are normally free to decide upon their own procedures within the general framework of the applicable rules and applicable law. The specific points that the arbitration clause should include will vary depending on the choice of arbitration rules. Each set of rules includes a recommended contract clause designed to correspond to the specific features of those rules.

Unless the arbitration clause is properly drafted, there are likely to be later arguments about how the arbitration is to take place, whether the dispute can be arbitrated and even whether the arbitrators have the authority to act. It is possible that the arbitrators may decide not to act or that their award may not be enforced in court. These problems are time consuming and expensive to resolve when there is a dispute. The parties can avoid them by including a suitable clause in the contract in the beginning.

Usually the parties will agree that all disputes under or relating to the contract will be arbitrated. Usually the parties will also agree that the law governing the contract and the law governing the arbitration proceedings will be the same although this is not required. The parties usually fix the place of the arbitration as some place equally

convenient (or equally inconvenient) to both parties although if one party has a very strong bargaining position he will insist on arbitration under his law and in his home jurisdiction. Some countries are considered particularly suitable for arbitration because of their facilities and legal system.

The parties have several choices of arbitration rules. US companies generally prefer arbitration under the domestic rules of the American Arbitration Association (AAA) at least in contracts wholly performed in the US. The American Arbitration Association also has rules for international arbitration. Other popular rules in international contracts are the rules of the International Chamber of Commerce (ICC), the UNCITRAL rules, and the rules of the London Court of International Arbitration (LCIA). Contracts between Thais and foreigners often provide for Thai law and use the rules of the Thailand Arbitration Institute. The rules of the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) are also popular. It is also possible and in fact quite common to combine rules, as for example, using the UNCITRAL rules and agreeing to the appointment of the arbitrators under some other rules such as the SIAC or HKIAC Rules.

There is no necessary direct connection among the points to be included in the arbitration clause. Almost any combination of the main elements is possible. For example, the parties could agree on arbitration of all disputes in Singapore under Thai law, using the rules of the ICC, or they could agree on using the SIAC following UNCITRAL rules.

A main purpose of all these rules is to create a mechanism which will ensure that the arbitration which the parties have agreed to in their contract will take place even though a party later decides it does not want to arbitrate the dispute which has arisen, for example, by refusing to appoint an arbitrator.

The distinction between the rules of the ICC, AAA, and the LCIA on the one hand, and the UNCITRAL rules on the other, is that the former provide an institutional framework for the arbitration. The ICC, AAA, and LCIA are permanent bodies and play a key role in the arbitration. There is no institution administering an UNCITRAL arbitration unless the parties have agreed to appoint one themselves as the UNCITRAL Rules permit.

There are some differences among these institutional rules of the LCIA, ICC and AAA, including different approaches to the question of appointment of the arbitrators.

The ICC Rules are the most specific and inflexible. Under the ICC Rules, if the parties have agreed upon three arbitrators, the parties each nominate their arbitrator whom the ICC must approve and confirm. If a party refuses to appoint its arbitrator, the ICC will appoint one. If they cannot agree upon the neutral arbitrator (the Chairman), the ICC will appoint him. The ICC will not appoint a national of either party as Chairman. Once the arbitrators prepare the draft award, they must submit it to the ICC for review and approval. Only after the ICC Court confirms it, does the ICC issue it as an ICC award and it becomes final.

Similarly, the LCIA appoints the arbitrator(s). The arbitration normally takes place in London. By agreeing to LCIA arbitration, the parties agree to accept the arbitrators and place of arbitration decided by the LCIA.

The AAA rules give the parties the choice of appointing their own arbitrators or using the arbitrators recommended or appointed by the AAA if they cannot agree. Under the domestic rules of the AAA, if the parties cannot agree on the arbitrators, the AAA provides a panel of arbitrators from which the parties make their choice and

if they cannot agree the AAA will appoint them. The AAA will also appoint the third arbitrator as a last resort. In AAA international arbitrations the AAA will also appoint the arbitrators if the parties have not been able to agree.

These institutions fix the fees of their arbitrations, including the fees of the arbitrators, according to a sliding scale based on the size of the claim plus any counterclaim. These fees are quite large, especially in big cases. For small disputes, the fees may be more than the amount in controversy. The fixed fee method of compensation sometimes results in the arbitrators spending as little time as possible on the case.

Under the UNCITRAL Rules, no institution administers the arbitration. The parties are free to appoint their arbitrators as they see fit. Normally, if there are to be three arbitrators, each party will appoint one and the arbitrators will appoint the third. If the parties cannot agree on the arbitrators or on the method of appointment of the neutral arbitrator or the arbitrators cannot agree on the third arbitrator, either party may apply to the Secretary-General of the Permanent Court of Arbitration in The Hague (a United Nations organization) who will designate the body who will appoint the arbitrators. For example, they could designate the Thailand Arbitration

Institute, or the SIAC or the ICC or AAA. The arbitrators fix their own fees for the arbitration. The only fees payable to the Permanent Court of Arbitration are their fees for designating the appointing body that may charge its own fees for appointing the arbitrators.

UNCITRAL arbitration is becoming increasingly popular and is often preferable because the rules are more flexible, can be less expensive, there is no need to deal with the institution's bureaucracy, or to appoint lawyers and arbitrators specializing in arbitrations held by these institutions. On the other hand, unless the UNCITRAL arbitrators are appointed by an appointing authority with rules regarding fees, they have the power to fix their fees and the parties have little, if any, recourse if they are excessive.

There are other differences in the procedures under each of these rules. However, all of them share more features with the common law litigation procedures described above than with the civil law litigation procedures of the Thai courts. The arbitrators are more likely to adopt the adversarial style in the proceedings, although there is nothing to prevent the arbitrators from making decisions based on their own ideas about the case rather than deciding between the contentions of the opposing

parties and they often do so.

All the commonly used arbitration rules have a mechanism for making a preliminary determination as to whether the arbitrators have jurisdiction over the dispute. In the case of the ICC, the ICC itself makes a first preliminary determination and then the arbitrators usually make their own determination as to whether they should proceed to hear the merits of the dispute as a next step. If they decide they have jurisdiction, then they will go forward with the substance of the arbitration. This is not, however, a requirement. Sometimes the arbitrators decide all the issues at once. Similarly, the UNCITRAL Rules recommend that the arbitrators decide on their jurisdiction as a preliminary matter.

To varying degrees, these rules permit amendments to the initial claims submission and response of the defendant. The ICC Rules require the party beginning the arbitration to submit a Request for Arbitration and the defendant has 30 days to submit an Answer. Once the arbitration panel has been appointed, the parties generally make further submissions which are then used by the arbitrators in drawing up the Terms of Reference which summarizes the parties' contentions. The arbitrators and the parties then sign the Terms of Reference. Once signed, it is necessary to obtain

the consent of the arbitrators to add new claims or counterclaims that fall outside the Terms of Reference.

Under the UNCITRAL Rules, the procedure is similar but more flexible. The party starting the arbitration submits a notice of arbitration including a description of the general nature of the claim. He may later submit a Statement of Claim and may include the relevant documents. The defendant then submits a Statement of Defense that can include his documents. The parties may further amend their Statement of Claim and Statement of Defense unless the arbitrators decide otherwise. The parties are also required to submit additional statements and documents as required by the arbitrators. The AAA Rules are similar.

Under the ICC, rules the parties may request a hearing. They may also submit witness testimony in writing or orally as decided by the arbitrators. The practice in ICC arbitrations tends to favor written testimony over oral. It is common practice for the arbitrators to decline to hear oral testimony. Unlike the practice in the US courts, the parties do not have the right to call witnesses and require them to testify. The UNCITRAL Rules do permit the parties to require the arbitrators to receive oral witness testimony and to hold hearings at the request of a party.

All the rules permit the appointment of experts by the arbitrators. The parties are also free to hire and use their own experts as witnesses. In complex arbitrations, they often do so.

The most significant difference between international arbitration and litigation in the US courts is that there is nothing in the ICC, AAA, LCIA or UNCITRAL rules requiring or providing for anything like the discovery procedures which exist in the US. Lawyers disagree strongly as to whether or not discovery is a good practice; many believe that it is too time consuming and expensive and can be abusive.

American lawyers tend to strongly favor discovery and often attempt to include provisions in the arbitration clause that permit discovery such as by requiring either party to make documents and witnesses available on the request of the other party. Other clauses even require that the parties may apply to a court in the US for an order requiring the other to produce documents and witnesses. There is nothing in the international rules to prevent the parties from agreeing to any of this in the arbitration clause.

In an effort to try to resolve this issue, the International Bar Association developed and published a set of rules for taking evidence in international arbitrations.

They are intended to supplement the normal international rules such as the ICC and UNCITRAL Rules. Some lawyers insist that the arbitration clause specifically mention these rules. As arbitrators generally have the power to fix their own rules, some arbitrators are willing to agree to follow these rules on a voluntary basis. The rules themselves attempt to strike a compromise between the US practice of having discovery of the opponent's documents and the lack of such a procedure in other courts and the fact that international arbitrations traditionally do not require disclosure. They provide that the parties may request the others to produce their internal documents but that they must make their request to and subject to the approval of the arbitrators who must give the other party an opportunity to object.

Finally, there is one other significant difference between ICC and UNCITRAL rules regarding the enforcement of the award. The ICC Rules state that by agreeing to ICC arbitration the parties agree to waive any rights of appeal insofar as such waiver can validly be made. The UNCITRAL Rules contain no such provision.

The practical effect of this difference is not clear as this also depends on the law where the winning party tries to enforce the award. In both Thailand and the US, the laws set out the grounds and rights of the parties to challenge an award, so that

the waiver provision is probably of no effect on the enforceability of an award in either country.

Enforcement of Arbitration Awards and Court Judgments

Judgments of courts may or may not be enforceable in the courts of other countries depending on the law of the country where the winner seeks to enforce the award. Often, the law follows the principle of reciprocity, as, for example, in the US where the courts will enforce judgments of courts which recognize US judgments. Thailand does not permit enforcement of foreign judgments in its courts.

The situation is different with international arbitration awards. Thailand, the United States and more than 130 other countries accepted the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Thus, an award rendered in another signatory country would be enforceable in Thailand, subject to the requirements of the Convention and the new Thai Arbitration Act of 2002.

The Convention and the Thai Arbitration Act limit the grounds for challenge to an arbitration award.

In summary, these are:

- A party to the arbitration was under some incapacity
- The arbitration agreement is invalid under the law agreed by the parties or, failing agreement, under Thai law
- The party was not given proper notice or otherwise could not present his case
- The award exceeds the scope of the arbitration agreement
- The composition of the tribunal or arbitration procedure was contrary to the arbitration agreement, the law agreed by the parties, or, failing agreement, under Thai law
- The award is contrary to "public order" or "good morals." (In the New York Convention, the equivalent phrase is "public policy.")

The New York Convention is intended to ensure that arbitration awards are final and binding and enforced so long as they are within the scope of the parties agreement, are not made unfairly or are grossly defective. The grounds for refusal to enforce are very limited and the vast majority of international arbitration awards are either

accepted by the parties or enforced by the courts of the countries that have accepted the Convention.

Previously, Thai law distinguished between awards made in Thailand and those made abroad. The criterion was where the arbitrators made the award. If the award were made abroad, it would be enforced as provided in the New York Convention. If the arbitrators made the award in Thailand, there would be additional grounds for challenging an award in court even if it was the result of arbitration under the established rules of institutions such as the ICC. The principal ground was that the arbitrators made an error of law. As the law did not define "errors of law," the practice developed of disgruntled parties raising challenges based on such errors as failure to follow § 171 of the Civil and Commercial Code requiring that contract clauses be interpreted according to their "true intention." Thus, in effect, it became possible for the loosing party to reopen many of the issues that the arbitrators had decided by claiming that they made errors of law.

The new Arbitration Act abolished the distinction between foreign and domestic awards. The courts will now enforce all arbitration awards according the standards of the New York Convention. However, it is not clear how much of a change in

practice this will make. It may well be that the "public order" exception contained in the new law will become the focus of new forms of challenge to arbitration awards. While the exception is not new, as it was applicable to enforcement of foreign arbitration awards, Thai courts did not have a great deal of experience in enforcement of foreign awards.

In other countries, the courts interpret the "public order" exception to enforceability of an arbitration award in a variety of ways. In practice, most countries interpret the exception narrowly and limit it to very serious defects. As one commentator puts it, "if the award is to be refused any effect on public policy grounds, it must violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the forum." Another commentator, speaking of China, which is also a party to the New York Convention, states, "In general, the grounds for refusing to enforce Convention and foreign-related awards are limited to procedural violations." Other countries, however, take a different view. For example, Indonesian law views "public order" much more broadly. The enforcing party must translate the complete award into Indonesian and deposit it with the court (as under the new Thai law). An Indonesian regulation defines "public order" as "the basic principles of the entire legal system and society in Indonesia."

In the United States, the courts differ among themselves. Some courts recognize another exception contained within the concept of "public order." These courts call this the "manifest disregard of law" exception. Apparently, in early drafts of the New York Convention, the exception included both "public policy" and "general principles of law." These courts believe that the reason the phrase "general principles of law" was dropped from the final version of the text was that the drafters assumed that it was unnecessary as it was included already within "public policy."

While in countries that subscribe to the New York Convention the courts enforce most awards, given the vagueness of the concept of "public policy," (or "public order" in the Thai version), any attempt at a strict definition is impossible. It seems to be in practice what the judge thinks it is (like pornography). Any award that the judge deems grossly unfair may not survive.

It may also be that a Thai court faced with a contested award may decide that it needs to determine whether the award is consistent with general principles of Thai law. There is some support for this in the new arbitration law itself. It elsewhere states that the arbitrators must decide in accordance with the rules of law agreed upon by the parties. If the contract specified Thai law as controlling, it is certainly arguable

that the court has a duty to see if the arbitrators applied Thai law correctly. If so, the court would presumably look at the same general provisions of Thai law contained in the Civil and Commercial Code which disgruntled parties to arbitration used to try to defeat enforcement under the old law.

The new law also left unresolved another issue. In litigation in the United States, unless the parties otherwise agree in their contract, the courts rarely award legal fees. The exception is that they may award some or all of them as sanctions when the offending party has grossly violated some rule such as the Federal Rule requiring that the parties must file legitimate claims and defenses.

In international arbitrations, the arbitrators commonly award legal fees in whole or in part to the winning party. Both the ICC Rules and UNCITRAL Rules, for example, both specifically give the arbitrators the right to award legal fees, as they deem appropriate. In the past, the practice had developed in Thai domestic arbitrations that the arbitrators did not award legal fees. The wording of the Thai Arbitration Act is not clear. Whether the Thai courts will enforce an award of attorneys' fees in an ICC or other international arbitration conducted under Thai law is not settled.

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