Chapter 7: Alternative Dispute Resolution in Thailand

著者	Thailand. Central Intellectual Property and International Trade Court
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Chapter 7

Alternative Dispute Resolution in Thailand

1. Court-Annexed Conciliation

Alternative Dispute Resolution is a new terminology of an old concept. Non-aggressive, non-confrontational approach to dispute settlement has been the teachings and practice of eastern philosophers since time immemorial. It is only recently since the method of ADR has been the subject of critical and scientific analysis. Ironically it is the academics in the West who bring ADR, with its famous *'win-win solution'* trademark to world attention. Society, commerce and trade all over the world are the beneficiaries of alternative dispute resolution. In Thailand as well as everywhere in the world, ADR represents a refreshing approach to litigation. It represents a new challenge to the legal profession. This Research proposes to examine some of the lessons we have learned from introducing or perhaps more accurately, reintroducing court-annexed ADR into dispute resolution mechanism in Thailand.

1.1 Practice Guidance on Court-Annexed Conciliation and Arbitration

Similar to the English practice where the Lord Chancellor may issue *Practice Directions*, the President of the Supreme Court in Thailand may issue *Practice Guidance* for judges in order to achieve uniformity and fair dispense of justice. Influenced by the much-publicized use of ADR in the United States[45], in 1996, the President of the Supreme Court issued the Practice Guidance on court-annexed conciliation and arbitration.[46]The Practice Guidance may be summarized as follows:

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[45] Chief Judge Clifford Wallace formerly of the US Court of Appeals for the Ninth Circuit was a major stimulant in Thailand for this influence.

[46] *Practice Guidance Concerning Conciliation dated 7 March B.E.2539 (1996).* The Practice Guidance was issued by

(a) In cases where the presiding judge is of the opinion that there is a reasonable chance of amicable settlement between the parties, the court shall initiate the conciliation process.

(b) In cases where the conciliation fails and the issue in dispute involves technical point of fact where the assistance of a neutral or an expert may be helpful in the speedy resolution of the case, the court, with the approval of the parties may appoint an arbitrator to rule on the matter given. The award thus rendered by the arbitrator, if approved by the court, shall be incorporated in the final judgment.

(c) In cases where the conciliation fails and the presiding judge considers that it might not be appropriate for him or her to continue sitting in the case, he or she may withdraw from the case except where it is contrary to the intention of both parties.

(d) Each court may designate a special room for conciliation purposes. The atmosphere shall be informal. The judge and the lawyers shall not put on their gowns.

(e) Where a speedy settlement is achieved, the court may consider returning the court fees to the parties. At present the court fees stand at 2.5% of the amount in dispute but not exceeding 200,000 baht (approximately US$ 4,650 @43฿ per $) payable at the filing of the Claim. This is designed as an incentive for settlement in certain cases.

Conciliation is now practised by courts of justice throughout the country with encouraging figures of success. Even cases at the appellate level may be settled by conciliation. It is widely used in the Civil Courts in Bangkok, in the civil jurisdiction of provincial courts throughout the country, in the juvenile and family courts for cases concerning family law, in the Central Labour Court for cases of labour disputes and in the Central Intellectual Property and International Trade Court for cases of intellectual property and international trade disputes.

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virtue of s 1 of the Statute of the Court of Justice (then in force) whereby the President of the Supreme Court was empowered, in the capacity as head of the Judiciary to lay down ‘directions’ for judges. In practice these ‘directions’ are invariably termed ‘Practice Guidance’.

1.2 Role of the Judge: Inquisitorial V. Adversary

Although the Thai legal system may be classified as belonging to the civil law tradition whereby the German *Bürgerliches Gesetzbuch* (BGB), the French *Code Napoléon* and the Japanese Civil Code played a dominant part in the formation of its Civil and Commercial Code. The English common law had a significant influence on the Thai Commercial law in particular on Book III of the Civil and Commercial Code entitling Specific Contracts. On the procedural side, with the influence of the English Inns of court and legal educational institutions where Thai judges of earlier times were exposed to, Thai procedural law may be described as adversary. This predicament may raise some jurisprudential problem.

There are two conflicting views as to the role of a civil court. The traditional English view is that the court should play a passive role and leave the conduct of the case to the parties; the court should act as an umpire to see that the parties play the game of litigation according to its rules and to give an answer at the end to the question 'who's won?' The continental view is that once the parties have invoked the jurisdiction of the court it is its duty to investigate the fact and the law and give a decision according to its view of the justice in the case with regard to any public interest that may involved.

The question to ask is if a judge on the bench attempt to lead a negotiation towards settlement of the dispute, would he in any way be compromising or be seen as compromising his role as a passive neutral?

The truth is judges in Thailand have little or no difficulties on the problem raised. The reason may be based on the fact that on the true analysis, the Thai legal system is a blend between the civil and common law family. Thai judges are familiar with conciliation. The Civil Procedure Code, since its promulgation in 1935, prescribes in section 20 that the Court shall have the power, at any stage of the proceedings, to attempt compromise or conciliation between the parties on the issue in dispute.

The Thai courts, when conducting a conciliation process, will depart from their traditional passive role of a judge in the adversary system, to the role of a more active judge in the inquisitorial system. However, when the judge feels uneasy or inappropriate for him or her to continue sitting in the case, he or she shall withdraw. Otherwise the judge may be challenged on the ground of bias. However, the instance is very rare. The status of a judge, being in a position of respect, may actually assist the process of conciliation. In a case in the remote part of Thailand, the plaintiffs and the defendants are brothers and sisters involving in a bitter dispute on the matter of an inheritance

where the father died intestate. After some lengthy session of arguments and allegations, the presiding judge, who acted as the conciliator, asked the parties in earnest. “Do you folks still offer merits to your father?” Both parties answered in an empathic “Yes”. It is common indigenous belief that when one’s elder dies, the living relatives shall offer merits to the dead for him to get on to a better life after death. The judge said in a loud voice. “Then don’t bother to do any more merits. Your father cannot go anywhere. Actually, he is crying and suffering at the moment because you lots are fighting over his assets. He cannot rest in peace because of you.” The dosage of “shock therapy” did catch the attention of the parties and led to amicable settlement. This is hardly the role of a judge in an adversary system. But the important thing is that it works.

In the process of conciliation, it is always helpful for the conciliator to refrain from making a statement or opinion. It is always more prudent to form a question than to make a statement. For examples, You don’t suppose to have any problems on the Statute of Limitation? I suppose you can justify on the amount of damages claimed? Where does the burden of proof lie? Etc.

1.3 Some Techniques Used in Court-Annexed Conciliation

Recently, section 20 of the Civil Procedure Code[47] which initiated court-annexed conciliation since 1935, has been amended to incorporate further modern techniques in conciliation. Three more paragraphs are added as follows:

> *For the purpose of conciliation, where the court deems appropriate or where on request of a party, the court may order that the conciliation be conducted behind closed doors in the present of all or any of the party with or without attorney.*
>
> *Where the court deems appropriate or where on request of a party, the court may appoint a sole conciliator or a panel of conciliators to assist the court with the conciliation.*
>
> *Rules and means of court-annexed conciliation, the appointment, powers and responsibilities of conciliators shall be governed by Ministerial Regulations.*[48]

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[3] As amended by the Civil Procedure Amendment Act (No. 17) B.E. 2542 (1999).

Furthermore, section 19 of the Civil Procedure Code empowers the court, for the purpose of conciliation, to order litigants in the proceedings to be present in court, although legal representation is appointed. The sanction for disobeying the court order to make a personal appearance is contempt of court. (section 31(5))

There are some practical points used in court-annexed conciliation where the judge acts as conciliator in Thailand:

- Conciliation is conducted in a conference room not in the courtroom. Formalities are dispensed with. Secrecy is enforced. Public and the press are barred from witnessing the conciliation proceedings.
- Non-disclosure agreement is made. Without prejudice condition is added to facilitate the invention of options for compromise.
- Although the law allows conciliation without attorney, in practice the conciliator never discourages the present of an attorney. Attempt to do so is likely to have an adverse effect on the trust of the parties in dispute towards the conciliator. The decision to exclude attorney should come from the party itself. It is the conciliator who should say, attorneys are welcome.
- Caucuses with each of the parties to the exclusion of the other are helpful; sometimes to dilute some of the less-than-reasonable claims or to increase some of the more-reasonable offers. Although the law allows the use of caucuses, it is best policy to obtain the consent of the parties first.
- An atmosphere of joint effort to solve the problem is perhaps the best environment to create in conciliation. Parties are invited to present options to settle the dispute. Each option caters for the mutual interests of the parties. Conciliator to be sensitive to the need and legitimate interest of each party.
- Conciliator to be careful about objectivity and neutrality. Instead of making a statement in the affirmative. Asking a question is more “politically correct” and may achieve the same result.
- Refreshments, coffee breaks, (good) working lunch or even a few jokes of the day do help the atmosphere in a negotiation. Miracles sometimes happen during these “time-out”.

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[48] No such regulations have yet been formulated.

- It is arguable the wisdom of forcing litigant to appear in conciliation with the threat of contempt of court. The devise is sometimes used in consumer claims where the defendant is a corporation.
- Under a recent amendment to the Civil Procedure Code, conciliation is compulsory in small claims disputes[49].

1.4 Court-Annexed Arbitration

Court-annexed arbitration is a welcome development of 'case management'. It helps solve the problem of backlog of cases. It is particularly useful in construction cases where the services of an expert are of great importance. It can save days, weeks or even months of court time in the testimony of expert witnesses. Court-annexed arbitration often occurs at the pre-trial conference where a difficult question of fact is singled out for special consideration by a specialized arbitrator.

Court-annexed arbitration has been included in sections 210 - 222 of the Civil Procedure Code since its publication in 1935, but the provisions have never been used until very recently when ADR is seriously considered and practised. Court-annexed arbitration arises when the parties fail to put an arbitration clause in the contract and later bring a civil action in court. At the pre-trial conference when considering the issues in dispute, the judge may, in consultation with and by consent of the parties, refer complicated technical issues on question of fact to arbitration. This is seen as a means of involving a judge in case management. Most of the advantages of arbitration as a means of dispute resolution can be obtained by court-annexed arbitration. However since the award is incorporated into the final judgment of the court, it loses the enforceability of the award abroad under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958. Since the incorporation of arbitration clause in a contract is of recent phenomenon in Thailand, many commercial disputes that would have gone to arbitration were brought to courts of justice creating a great amount of backlog. Referring some of the issues to arbitration is a welcome option for judges at the pre-trial conference.

2. Arbitration in Thailand

Phenomenal success in economic growth and the rapid expansion of

[49] Section 193 paragraph two of the Civil Procedure Code as amended by the Civil Procedure Amendment Act (No.

international trade and joint ventures in Asia and the Pacific in the 1980s and the early part of 1990s contributed to the mushrooming of new international commercial arbitration centres across the region from Vancouver to Sydney. While ICC Rules are still predominant in the international commercial arbitration 'market', businesses and the legal profession are looking to alternatives. Newer countries to the arbitration scene view the establishment of a 'national' arbitration centre as something akin to the pride of a nation. Foreign investors, particularly in the government contracts involving more often than not, huge infra-structural constructions are faced with the problems of, among others, means of dispute resolution, choice of forum, choice of applicable substantive law etc.

2.1 International Commercial Arbitration

Schmitthoff, in his celebrated book *The Export Trade*, observes:

> *It is almost a truism to state that arbitration is better than litigation, conciliation better than arbitration, and prevention of legal disputes better than conciliation.*[50]

The advantages of arbitration compared to litigation are traditionally listed as follows:

(a) privacy.
(b) tribunal of the parties' choice.
(c) informality of proceedings.
(d) speed and efficiency.
(e) lower costs.[51]
(f) finality of the award.

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17) B.E. 2542 (1999).

[50] Schmitthoff, *The Export Trade* (6th edn), Steven & Sons, p 365.

[51] In many cases whether arbitration incurs lower costs than litigation is debatable. With respect to one of the direct costs -filing fees and other tribunal fees-arbitration can be more expensive than all other forms of dispute resolution including litigation. Since in most jurisdictions filing fees and court fees are nominal. The International Chamber of Commerce (ICC) Court of Arbitration's filing of registration fee is $ 2,000 and an additional administrative charge, a percentage of the amount in dispute is added. In an apparent effort to counter its reputation for being too expensive, the ICC announced that the administrative charge is now capped at $ 50,500 regardless of the amount in contention. Attention must also be given to the fact that while judges work may be described as public service, most arbitrators charge for fees. Two other factors must also be taken into consideration. First, attorney fees can be huge if the trial lasts a long time. Secondly, in comparing arbitration costs to litigation costs, one must remember that arbitral awards are not themselves enforceable and if the losing party does not voluntarily pay additional costs for a judicial enforcement proceeding will be incurred.
See McDermott in an excellent article, *'A Comparison of Arbitration Conciliation and Litigation for Resolving International Trade Disputes'*, a paper presented at the 1989 Bangkok Conference on International Arbitration organized jointly by the Thai Law Society, the International Bar Association, the Law Association for Asia and Pacific and the Asia-Pacific Lawyers Association.

Effective enforcement of foreign judgments and foreign arbitral awards plays an important part in global promotion of international trade. The ultimate end of both litigation and arbitration from the plaintiff's or claimant's point of view is the effective enforcement of the judgment or award. The most certain method to ensure the enforceability of a judgment is to litigate in the national court of the defendant. But most international businessmen and their lawyers are reluctant to sue in the defendant's national court. The alternatives are arbitration or litigation in the national court of the plaintiff or, possibly, in a neutral country. Unless the defendant has sufficient assets in the place where the litigation takes place, the plaintiff will have to seek enforcement of the judgment in another country. In case of arbitration, if the respondent does not voluntarily pay, the claimant will have to seek judicial assistance in the enforcement of the award regardless of where the arbitration took place.

2.1.1 Enforcement of Foreign Arbitral Awards

In purely domestic disputes, the debate whether to arbitrate or litigate may be finely balanced, much may depend upon the circumstances of each case. However, where the dispute is set in an international context, the balance comes down firmly in favour of arbitration. The main reason being while there are no international conventions on the global basis for the enforcement of foreign judgments, there is a widely accepted international convention governing the enforcement of foreign arbitral awards, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention of 1958, a convention under the auspices of the United Nations to replace the League of Nations' Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, is easily the most important international treaty relating to international commercial arbitration. The New York Convention is generally regarded as a major force behind the rapid development of arbitration as a means of resolving international trade disputes in recent decades. As of to-day, a total of 125 nations have acceded to the convention including the major trading nations e.g. the USA, USSR, Japan, France, Switzerland, the Federal Republic of Germany and the UK as well as African countries such as Nigeria and Ghana, Arab countries such as Kuwait and Egypt and Latin American countries such as Chile, Cuba and Mexico. In the Asean region: Thailand acceded to the New York Convention in 1959, Cambodia in 1960, Philippines in 1967, Indonesia in 1981, Malaysia in 1985, Singapore in 1986, Vietnam

in 1995 and Brunei Darussalam in 1996.

2.1.2 Scope of the New York Convention

Article I of the Convention provides that the Convention shall apply to:

> *arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ... it shall also apply to arbitral awards not considered as domestic awards...*

However, Article I also provides that:

> *any State may on the basis of reciprocity declare that it will apply the Convention to ... awards made only in the territory of another Contracting State... to differences arising out of legal relationships ... which are considered as commercial under the national law of the State making such declaration.*

The two exceptions are referred to as the '*reciprocity reservation*' and the '*commercial reservation*' respectively. The Convention requires a minimum of conditions to be fulfilled by the party seeking enforcement. The enforcing party need only supply the duly authenticated original award or a certified copy thereof and the original arbitration agreement or a certified copy of it. After submitting the described documents, the party submitted will have established a *prima facie* right to obtain enforcement of the award. It is up to the other party against whom enforcement is sought to prove the existence of one or more of the grounds for refusal of enforcement enumerated in Article V of the Convention. These are the only grounds upon which enforcement may be refused, the court before which enforcement is sought may not review the merits of the award. The grounds for refusing to enforce an award are:

(a) invalidity of the arbitration agreement.
(b) violation of due process.
(c) arbitrator exceeded his authority.
(d) irregularity in the composition of the arbitral tribunal or arbitral procedure.

(e) award not binding, suspended or set aside by a competent authority of the country in which, or under the law of which, that award was made.

In addition, under Article V (2), there are two other grounds for refusal of enforcement, which can be raised by a court on its own motion:

(a) non-arbitrability of the subject matter.

(b) public policy of the enforcing country.[52]

2.1.3 Thailand and the Enforcement of Foreign Arbitral Awards

Thailand is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The New York Convention is plainly a considerable improvement upon the Geneva Convention, since it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards. It replaces the Geneva Convention as between States, which are parties to both Conventions. At present all State Parties to the Geneva Convention have joined New York and thus rendering the significance of the Geneva Convention more academic than practical.[53]On the bilateral basis, Thailand has entered into a bilateral treaty with the United States of America - the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America 1968. Article II, 3 of the Treaty provides that arbitration agreements between nationals, including companies, of the two countries shall not be unenforceable merely because the arbitration is to be held in the other country or because one or more arbitrators are not nationals of the country where enforcement is sought. Treaty, convention and international agreement on arbitration of which Thailand is a party are ratified by Parliament in the Arbitration Act B.E. 2530 (1987). Section 29 of the Act provides:

Foreign arbitral awards shall be recognized and enforced in the Kingdom of Thailand only if it is made in pursuant to the treaty, convention or international agreement to which Thailand is a party and it shall have effect only as far as Thailand

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[52] See McDermott, *A Survey of Methods for the Enforcement of Foreign Judgments and Foreign Arbitral Awards in the Asia-Pacific Region*, in conjunction with the article cited in note 25 *supra*, this paper is presented by the learned author at the 1989 Bangkok Conference. See also Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (2nd edn, 1991) Sweet & Maxwell.

[53] The last two countries of the Geneva Convention which acceded to the New York Convention were Portugal on 18 October 1994 and Mauritius on 19 June 1996.

accedes to be bound.

Foreign arbitral awards made in pursuant to the treaty, convention or international agreement to which Thailand becomes a party after the effective date of this Act shall be recognized and enforced in the Kingdom of Thailand in accordance with this Act, subject to the conditions prescribed in the Royal Decree.

One of the most interesting features of the Arbitration Act 1987 concerning ratification is that the Act not only gives ratification to treaty, convention and international agreement on the recognition and enforcement of foreign arbitral awards to which Thailand is already a party *before* the enactment of the Act, but also to the same *after* the enactment of the Act. That is, the Act, in essence, gives a *carte blanche* to foreign arbitral awards in the future. This may be understood as a very positive attitude towards international commercial arbitration by the Parliament. The Thai Supreme Court shares a similar attitude by enforcing foreign arbitral awards long before the enactment of the Arbitration Act 1987.[54]

2.1.4 Scope of the Arbitration Act 1987

The Arbitration Act B.E. 2530 (1987) covers both domestic and international commercial arbitration. Under section 6, an arbitration agreement must be evidenced in writing in order to be enforceable. The writing may be in the form of correspondence, telegram, telex or other similar documents. If any party to an arbitration agreement commences any legal proceedings in the court against the other party contrary to the arbitration agreement, the other party may apply to the court, before the day of hearing of evidence or the day of judgment if there is no hearing of evidence, to stay the proceedings. If the court is satisfied that there is no ground to render the arbitration agreement null or unenforceable, the court shall make an order staying the proceedings. In the arbitral process, an arbitrator may seek judicial assistance in compelling the testimony of witnesses, production of documents or other evidence, granting interim measures to protect the interests of the parties prior to the award or the ruling of the court on question of law.

The arbitral award must be made in writing signed by the arbitrator or umpire, as the case may be, stipulating clearly the reason given for the award. Unless otherwise agreed by the parties, the award must be given within 180 days from the day of the

[54] See, for examples, Supreme Court Decision Nos. 465/2478 (1935) and 698/2521 (1978).

appointment of the arbitrator or umpire. The period, if not extended by mutual agreement, may be extended with leave from the court.

There are two sets of provisions for the enforcement of arbitral awards, one for the domestic awards and the other for foreign awards.

2.1.4.1 Domestic Awards

The court may refuse to enforce a domestic award if the award is contrary to the law applicable to the dispute, or derived from an unlawful act or means, or falls outside the scope of the arbitration agreement. Appeal against the order or judgment of the court is prohibited unless:

(a) there is allegation that the arbitrator or umpire did not act in good faith or one of the parties used fraud ;

(b) the order or judgment is contrary to public order ;

(c) the order or judgment does not conform with the arbitral award ;

(d) the inquiring judge made a dissent or certified that there is good cause for appeal ; or

(e) the order is made provisional pending arbitral process for the protection of interests of the party.

2.1.4.2 Foreign Awards

Foreign arbitral awards mean awards made by arbitration conducted abroad or mainly abroad and one of the parties is not of Thai nationality. To enforce a foreign award, the party seeking the enforcement must submit its application to the court of competent jurisdiction within one year of the delivery of the award to the other party. The application must be accompanied by the following documents:

(a) the original award or a certified true copy thereof ;

(b) the original arbitration agreement or a certified true copy thereof ; and

(c) a Thai translation of both the award and the arbitration agreement to which the translator has sworn as to the correctness and duly certified by an officer of the Ministry of Foreign Affairs, a Thai consulate or diplomatic delegate abroad.

The Act has a separate provision relating to the enforcement of awards under

the Geneva Convention and under the New York Convention. Since all members of Geneva are now members of New York, hence the difference is now purely academic. It is proposed to deal only with the enforcement to the awards made in pursuant to the New York Convention. Sections 34 and 35 of the Arbitration Act 1987 provide that the New York Convention awards may be denied of enforcement upon proof that[55]:

(a) either party is incompetent according to the law applicable to the party ;

(b) the arbitration agreement is not legally binding according to the law of the country agreed upon or of the country of the award where no such agreement exist ;

(c) the adverse party was not given adequate notice prior to the appointment of the arbitrator or the commencement of arbitration proceedings or was unable to participate in the arbitration for other reasons;

(d) the award is outside the scope of the arbitration agreement ;

(e) he arbitrator was not appointed in compliance with the arbitration agreement or, if no agreement was made on the appointment procedure, under the law of the country where the award was rendered;

(f) the award is not final or has been revoked or suspended ;

(g) the subject matter of the dispute is not arbitrable under Thai law ; or

(h) enforcement of the award would be contrary to public order or good morals or the principle of international reciprocity

Public order, *ordre public* or public policy may be cited by the court to deny enforcement of foreign judgments in Thailand much in the same way that judges in the Continent of Europe enlarge the scope of the defence to the enforcement of foreign judgments by revoking *ordre public*. It is feared, albeit no court decisions have confirmed it, that the award given without reason and contrary to Section 20 (the award must be accompanied by reason clearly stated), may be unenforceable as contrary to natural justice and hence against public policy. It is always advisable to have the awards fully reasoned in order to seek enforcement in the civil law countries.

Harmonization of the enforcement of arbitral awards is one thing but the harmonization of the law relating to the enforcement of foreign judgments is a much

[55] The enforcement of Geneva Convention awards is provided in ss 32 and 33.

more difficult matter. There are no international conventions on the global basis for the enforcement of foreign judgments. It is suggested that any achievement on this matter in the Asean region will best be conducted on the bilateral basis. Considerations must be given to the extent of jurisdiction claimed by each Party State and the judgments for reciprocal treatment confined to specific areas. A good example of legal harmonization in the Asean region, an encouraging starting point, is the Agreement Concerning Judicial Cooperation between Indonesia and Thailand in 1978 which falls short of reciprocal enforcement of judgments.

2.1.5 A Critique of International Commercial Arbitration in Thailand[56]

In recent times, commerce and industry have often found arbitration as the preferred means of dispute resolution to litigation in law court. More and more businessmen and lawyers with international dealings often find the inclusion of an arbitration clause in their contracts almost a standard practice. In recent past, the arbitration clause invariably incorporated the rules and the service of arbitration centres abroad. Thailand has thus been the receiving end of the enforcement of foreign arbitral awards. It was thought, in many quarters, that as a matter of economic interest, if not national pride, Thailand should establish an arbitration centre of its own to promote and administer domestic arbitration with the capability of undertaking international commercial arbitration. The Thai Board of Trade had the first attempt. The Law Society had also a similar scheme. Law professors and academics attempted with *ad hoc* arbitration too. All with little success. The principal factor thought to be underlining the above predicament was unacceptance from the public. The public found it hard to accept the forum as a replacement for the court of justice in terms of integrity, acceptability and enforceability of the awards.

The first serious attempt to deal collectively and effectively with international commercial arbitration in Thailand was the establishment of the Arbitration Office, Ministry of Justice in 1990. The Ministry of Justice, which is entrusted by the Arbitration Act B.E. 2530 (1987) to oversee its administration took pains in explaining its role and the assurance of independence and neutrality of an arbitration centre administered by a government organ. In the booklet introducing the Arbitration Office,

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[56] See Hutter, 'International Commercial Arbitration in Thailand' *Botbandit* (Journal of the Thai Bar Association) December 1992, at 1, for a critical analysis of the legal environments of international commercial arbitration in Thailand.

it states:[57]

The role of the Ministry in this Office is to lend the creditability of the Ministry of Justice to the Office and hence, hopefully, the acceptability from the public.

The Arbitration Office has its own conciliation and arbitration rules. These rules are based upon the UNCITRAL and AAA rules. At present the Office has enlisted 128 eminent lawyers and other professionals in its list of arbitrators. Parties are free to nominate qualified professionals from outside the list as arbitrators. The list of arbitrators is classified into 15 categories, for example, international trade, investment, intellectual property, carriage of goods by sea, malpractices, construction contracts etc. While Thai and English are the languages often used in arbitration at the Arbitration Office. Parties are free to choose any other languages of their preference. Chinese is sometimes used in the arbitral process. Foreign lawyers are welcome either as arbitrator or legal adviser in the arbitration which involves foreign party. Albeit a body sponsored by the Government, the Arbitration Office maintains its independence and integrity intact by the Thai Government. The Office has no control over the discretion of the arbitrators in each case. It merely acts as secretariat to the arbitral process...

Laos has now an arbitration office within the Ministry of Justice. Ironically, in Thailand a special committee has been set up to 'privatize' the Office from the Ministry of Justice. A calculated move after assurance that the Arbitration Office has created a reputation on its own and can administer without budgetary support from the Government.

2.2 Problems Obstacles and Remedies for the Development of Arbitration in Thailand[58]

The problems, obstacles and remedies for the development of arbitration in Thailand can be viewed from three perspectives: the Executive, the Legislature and the Judiciary.

From the Executive point of view, one would like to see governmental departments and state enterprises resort more to alternative dispute resolution. Heads of governmental departments and state enterprises tend to take their grievances to court or defend their cases until final judgment of the highest court in the land. The trend derives

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[57] Ministry of Justice, *The Thai Arbitration Institute, Arbitration under the Auspices of the Ministry of Justice*, at 4.
[58] See The Arbitration Office, 'Report on the Promotion and Development of Arbitration in Thailand' *Botbandit* (Journal of the Thai Bar Association) June 1994, at 21.

from the fact that these heads of governmental departments and state enterprises try to avoid personal responsibility of any alleged 'wrong decision'. The policy is that it is always safer to wait and observe only the final judgment of the court. This lack of courage to settle the dispute at an early stage or to attempt out-of-court settlement for fear of criticism of lack of transparency may work against the reputation of the government. A recent dispute between the Express and Rapid Transit Authority of Thailand, Ministry of Interior and Bangkok Expressway Company Limited, a consortium led by Kumakai Kumi of Japan on the Second Stage Expressway Agreement whereby the Express and Rapid Transit Authority took Bangkok Expressway to the Civil Court on the face of an arbitration clause in the contract between them. The case brought serious repercussion on the Thai-Japan relationship on investment of infra-structure constructions and the reputation of the embryonic arbitration system in Thailand.[59] Another criticism one might raise against the attitude of governmental departments and state enterprises is the tendency to defer payment under the arbitral award until the final judgment enforcing the award has been pronounced. To remedy these problems and obstacles to arbitration, the Arbitration Office, through the Ministry of Justice has recently proposed to the Cabinet to issue a resolution to the effect that governmental departments and state enterprises shall resort more to alternative dispute resolution and shall exercise their discretion to have an early resolution to the dispute. It is hoped that the Cabinet resolution, when issued, will give more courage to heads of governmental departments and state enterprises to end their dispute quickly and constructively by whichever means which is fair, speedy and efficient.

From the Legislature point of view, the most urgent piece of legislation which needs to be looked at in order to create a more congenial atmosphere to international commercial arbitration is the law governing the practice of foreign lawyers in Thailand: the Alien Occupation Act B.E. 2521 (1978) and clause 39 of the Schedule to the Royal Decree B.E. 2522 (1979) regarding occupations and professions which are prohibited to aliens. In essence the law prohibits aliens from 'providing legal service'. The Ministry of Justice has proposed an amendment to exclude the 'service of a foreign arbitrator or a foreign attorney in an arbitral proceedings where the case involves a foreign party, regardless of the applicable law, provided that the party engaging the foreign arbitrator or attorney has also engaged a local attorney in the case'. A slight modification of the

[59] See Maolanont, 'If You Have a Client Like 'Ninomiya' of Kumakai Kumi' *Botbandit* (Journal of the Thai Bar

Singapore experience after the *Turner's case*[60] and the amendment to the Legal Profession Act thereafter.

The present predicament is that the Arbitration Office has successfully persuaded the Ministry of Labour and Social Welfare to issue work permits to foreign arbitrators to practice in Thailand on the contention that the work of an arbitrator is not that of giving legal service but he or she is working in a quasi-judicial capacity. The work of a judge is not giving legal service but dispensing justice, likewise the work of an arbitrator. As far as the attorney is concerned, he or she is treated as a representative of the party so no legal qualification is asked. In practice, foreign arbitrators and attorneys are active at the Arbitration Office of the Ministry of Justice. However, the proposal for the amendment to the Act is now taking seriously in the relevant circles.

The requirement under the Revenue Code for an arbitrator to 'affix and cancel' a stamp duty in the amount of 0.1% of the award is also proposed to be canceled for creating unwarranted burden on the arbitrators.

Lastly, when one looks at the Judiciary's perspective, there are certain reforms that one wishes would happen. It is very fortunate that the enforcement of arbitral awards and the motions filed under the Arbitration Act concerning intellectual property and international trade disputes are now under the jurisdiction of the Intellectual Property and International Trade Court. With the mechanism of the 'rules of the court', it is hoped that the practice of arbitration law will be more unified and consistent in view of the specialized Bench and Bar.

However, one would hope that the court will construe more leniently the existence of a valid arbitration clause. In a number of court decisions,[61] the Supreme Court held that since an arbitration clause is an agreement which restricts the right of a party to resort to the court of justice and hence the clause must be construed narrowly and strictly. In a number of cases, loosely worded arbitration clauses: *'If an arbitrator will have to be appointed, the party shall be obliged by the award', 'amicable arbitration in Hamburg', 'If an arbitration has to be set up, it shall be in Bangkok' etc*. are held to be unenforceable and hence the court entertains jurisdiction over the dispute. It is feared that the word *may* as in the clause, *the party may submit the dispute to arbitration,* may be unenforceable for the word *may* denotes a choice to the party and

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Association) December 1993, at 31.

[60] [1988] 2 MLJ 280.

[61] For examples, See Supreme Court Decision Nos. 945/2498 (1955), 49/2502 (1959), 3429/2530 (1987).

not a strict restriction on the parties. Here is an example:[62]

Clause 27: Settlement of Disputes

27.1 Reference to Arbitration

Unless otherwise stated in this Agreement, any dispute, controversy or claim arising out of or in connection with this Agreement shall first be submitted to the Panel in order to ascertain whether an amicable settlement can be achieved, and in the event that no such resolution can be achieved within 60 days or such other period as may be agreed between the parties, either party may settle such dispute or controversy by submitting it to arbitration in accordance with the Arbitration Act of Thailand.

The caveat is that, for the moment, it is always prudent to draft in a more mandatory form e.g. the claimant shall submit the dispute to arbitration.

2.3 Conclusion

With the expansion of trade and investment in the Asia-Pacific region and the growing needs for effective mechanism and management for international commercial litigation, arbitration and other forms of alternative dispute resolution; many arbitration centres have been established in the region in direct competition with the more established centres in Europe and America. One sees less, but increasing attempt to create or promote international litigation as an alternative to arbitration. Both forms, of course, incorporate conciliation or settlement conference in their agenda. Prospective clients will have more opportunity than in the past for forum shopping. A predictable phenomenon in the climate of free market economy. The more difficult question is 'quality control'.

In Thailand, a serious attempt is being made by the Arbitration Office to reform the existing Arbitration Act which, following the old English tradition, treats domestic and foreign arbitration in different regimes. It is now in the process of drafting a single Act applicable to both domestic and foreign arbitration. Attitudes of people having interest in arbitration are also changing, in a more congenial way. The Ministry of Finance is drafting the implementation Act for the Convention on the Settlement of

[62] This example is taken from the Second Stage Expressway Agreement between Expressway and Rapid Transit

Investment Disputes Between States and Nationals of Other States (ICSID Convention) of which Thailand has signed on December 6, 1985 but has failed to ratify so far.

With the 1991 amendment to the Civil Procedure Code, a more extensive claim of jurisdiction has been made. This will inevitably or naturally be followed by the introduction of reciprocal enforcement of civil and commercial judgments agreements, bilaterally or multilaterally. Something dreaded only in recent past. With the establishment of the Intellectual Property and International Trade Court, it seems to be the only logical solution if one were to give a full meaning to the word *'International Trade Court'*

Authority of Thailand Ministry of Interior and Bangkok Expressway Company Limited.