Kluwer Arbitration Blog

Making the Case for Ad Hoc Arbitration in Thailand

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Ad hoc arbitration, in which the proceedings are administered by the disputing parties, their counsel and the arbitral tribunal without the involvement of an arbitral institution, can perhaps seem a daunting prospect in any jurisdiction. Thailand has arbitral institutions on hand to provide their services — including the well-established Thai Arbitration Institute ("**TAI**") and the new Thailand Arbitration Center ("**THAC**") — so why might parties go down the ad hoc route?

The advantages of ad hoc proceedings

Perhaps the most immediately obvious advantage of ad hoc arbitration (sometimes called "non-administered" arbitration) is that the parties will not have to pay fees to an institution in addition to the fees of their counsel and the arbitrator(s). This is likely to amount to a savings of at least several thousand dollars, which can be particularly significant in the context of lower value disputes.

Assuming that the parties select an appropriately experienced arbitrator, he or she should be capable of performing many of the functions of an arbitral institution, such as scheduling hearings and distributing documents. It may therefore prove economically beneficial for the parties to negotiate their arbitrator's fees with these additional functions in mind, rather than paying an arbitral institution to complete the same tasks. Indeed, in Thailand, because the TAI caps arbitrators' remuneration according to the value of the claim (though the cap is subject to adjustment by the TAI), it is possible that some highly competent arbitrators may be more willing to participate in an ad hoc process where their fees are more freely negotiable.

Ad hoc arbitration may also be especially suited to sophisticated commercial parties who will benefit from the flexibility of managing their own proceedings. In these circumstances, the potential bureaucracy involved with institutional arbitration in Thailand may be perceived as causing delays in a process which could be more easily timetabled and progressed by the parties themselves, in agreement with the arbitrator.

In particular, a large dispute involving several international parties may take significantly longer to arbitrate if each party is required to file documents with an arbitral institution, which could then require time to process and distribute them (depending on the efficiency of the administrator). In Thailand, it is not uncommon for

an institutional arbitration to become a lengthy and drawn out experience. The process for getting dates scheduled can sometimes take longer than expected. A less formal, more flexible approach may be a commercially sensible option for the parties in this type of case.

Of course, it is possible that the parties' increased control over the arbitration timetable may have a negative effect if used by one party to tactically delay proceedings. However, in such a situation the arbitrator should use their supervisory capacity to 'police' the proceedings and keep things moving.

Moreover, in some circumstances this issue will not arise if the parties involved will be required to behave cooperatively, for example because they are involved in ongoing commercial dealings outside of the arbitration. If, however, the other party completely refuses to participate in the proceedings, an ad hoc arbitration might be the fastest way to obtain a default award.

Finally, it should be recognized that the flexibility of ad hoc arbitration presents the potential for abuse, but also, in the authors' opinion, creates more opportunities for the parties to settle their dispute. It may well be that, when confronted with the need to organize proceedings and appoint an arbitrator, the parties will re-evaluate their positions and find themselves more open to negotiations. The impetus to reach a settlement is arguably lessened when an arbitral institution is involved because the parties may be more inclined to 'go through the motions' of the arbitration in accordance with the directions of the institution.

"**Assisted arbitration**"

Notwithstanding the above, it is understandable that parties may be willing to pay for the services provided by an arbitral institution. There are many aspects of the ad hoc arbitration process which have the potential to cause problems for parties who are already involved in a dispute. For example, the need to select an arbitrator who is approved of by both parties may stall the proceedings if the parties cannot agree on a candidate.

Nevertheless, such problems are not insurmountable as many arbitral institutions, e.g. the Singapore International Arbitration Centre ("**SIAC**"), will provide an arbitrator-selection service for a one-off fee. Or, if called for in an arbitration clause, a relevant trade association, e.g. the Thai General Insurance Association ("**TGIA**") in a Thai reinsurance dispute, may select an arbitrator if the parties cannot agree amongst themselves. Parties who are particularly concerned about the selection of their arbitrator can therefore outsource this important decision to an arbitral institution or a trade association while still pursuing ad hoc arbitration. Indeed, there has been a significant rise in the provision of 'one-off' services by arbitral institutions in recent times.

For example, the CPR Institute for Dispute Resolution now provides "assisted arbitration" services, which allows parties to utilize a variety of individual services, including arbitrator selection, provision of meeting rooms and so forth. The range of services available perhaps demonstrates a shift from a defined choice between ad hoc

and institutional arbitration to a spectrum of institutional involvement which allows the parties to choose the level of assistance required from a 'menu' of options.

It is clear that paying for a large number of one-off services from an arbitral institution will be less cost-effective than engaging in institutional arbitration in the first place. However, the option of assisted arbitration should give parties some comfort when agreeing to ad hoc proceedings, as institutional involvement can still be resorted to if the parties reach an impasse. Parties in Thailand should therefore feel confident when providing for ad hoc arbitration in their contractual arrangements, subject to the following suggestions.

Final recommendations

First, it is important to ensure that the arbitration clause in the contract is drafted to incorporate a set of rules designed for ad hoc proceedings, such as the UNCITRAL Rules or the CPR Non-Administered Arbitration Rules. The incorporation of these rules provides a non-negotiable framework for the proceedings, which is essential when disputes arise. By using rules designed with ad hoc arbitration in mind, parties will also avoid difficulties such as interpreting references to an institution's role (for example, if the ICC rules were used) or filling gaps which may be left if a bespoke clause is drafted.

The latter issue is particularly problematic when the seat of the arbitration is to be Thailand, because the Thai Arbitration Act of 2002 (the "**Act**") will be relied upon in the absence of a contrary agreement in the arbitration clause. The Act was well-received in Thailand and abroad, but has its shortcomings. For example, under the Act, the successful party is not entitled to an arbitration award which includes the payment of their legal fees unless this was provided for in the arbitration agreement. To ensure that parties cover off all of their concerns, a set of arbitration rules should ideally be incorporated into the arbitration clause.

Second, parties should appoint legal counsel with experience in ad hoc arbitration. Many practitioners will be familiar with guiding clients through an ad hoc arbitration and can provide strategic advice regarding settlement during the proceedings. This advice will be invaluable to parties who have not previously participated in non-institutional arbitration. A good choice of law firm at the outset will also enable parties to benefit from the flexibility of ad hoc proceedings while avoiding potential pitfalls involved in organizing and progressing the arbitration.

We do not adopt a formal stance on any form or procedure for arbitration, especially given that the circumstances of each business relationship (and potential disputes arising out of such relationship) are different. Our suggestion is merely that contracting parties need not exclude the possibility of going down the ad hoc arbitration route in Thailand. Given that Thai arbitration is known for being a beneficial but sometimes costly and time-consuming affair, the flexibility of ad hoc proceedings can potentially offer parties a chance to minimize cost and time to a greater degree than is possible with institutional proceedings. In the realm of dispute resolution in Thailand, we might say that the option of ad hoc arbitration is often overlooked and somewhat under-utilized.

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