Kluwer Arbitration Blog

Thawing the Restrictions on International Arbitration in Thailand

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There have been some false dawns but Thailand has become significantly more arbitration-friendly in recent years. This post briefly canvasses the recent developments and identifies potential areas for further development.

Amendments to the Thai Arbitration Act – Arbitrators and Representatives Allowed to Work in Thailand

Previously, foreign arbitrators were required to undergo an onerous process to obtain a work permit that would allow them to act in arbitrations in Thailand.[1)] This deterred them from accepting arbitral appointments in Thailand. Further, foreign counsel were prohibited from acting in arbitrations in Thailand where the dispute is governed by Thai law or the award would be enforced in Thailand.[2)] This restriction discouraged parties from engaging foreign counsel in international arbitrations.

On 15 April 2019, the Arbitration Act (No. 2) B.E. 2562 (the **"Amendment"**)[3)] came into effect. Under Section 23 of the Amendment:

- A foreigner who is residing outside Thailand or is entitled to reside in Thailand, and who has been appointed as a foreign arbitrator or representative in an arbitration in Thailand that is to be conducted by a government agency or organisation (in practice, this would be either the Thai Arbitration Institute ("**TAI**") or the Thailand Arbitration Center ("**THAC**")), may request from such government agency or organisation a certificate to support the consideration of Thai officials on the immigration and working of aliens ("**Certificate**"). To be clear, the Amendment is not limited to arbitrations conducted under the THAC or TAI rules. The THAC and the TAI have indicated their willingness to issue Certificates in respect of arbitrations conducted under the other institutional rules as well as *ad hoc* arbitrations, so long as the hearings are held at the THAC or TAI;
- The government agency or organisation will issue to the foreign arbitrator or representative the Certificate, which must contain the: (1) name of the issuer, (2) arbitration case number, (3) name and passport number of the foreign arbitrator or representative and (4) approximate duration of the arbitration proceedings;

- A foreign arbitrator or representative who obtains a Certificate can use that to obtain a work permit, which will allow him reside in Thailand during the time period specified in the Certificate (subject to the relevant immigration laws); and
- A foreign arbitrator or representative is also entitled to begin work in accordance with the applicable arbitral rules once he has obtained a Certificate, even while his work permit application is pending (subject to the relevant laws on the management of working aliens).

Going forward, cooperation between THAC, TAI and the Thai immigration and labor authorities will be required to streamline the processes and ensure that work permits are obtained efficiently. More detailed guidelines from the relevant agencies on the application procedures and requirements would also be helpful.

Smart Visas for Alternative Dispute Resolution Industry

Another laudable development that can be expected to attract more international talent to act in arbitrations in Thailand is the extension of Smart Visas to foreign experts working in "Alternative Dispute Resolution" ("**ADR"**). This was announced by the Thailand Board of Investment (the "**Board**") on 18 December 2018.[4)]

The Smart Visa is a new type of visa designed to attract highly-skilled foreign experts by removing their difficulties in obtaining work or re-entry permits. A Smart Visa holder and his or her spouse and children are entitled to stay in Thailand for a maximum of four years. The Smart Visa also appears to be renewable for the duration of the holder's service contract. However, it should be noted that the template recommendation form[5)] required for a Smart Visa application, where the applicant works in ADR, has to be filled out with reference to a specific arbitration case.

The applicant must produce documents showing his or her expertise in ADR including, among others, a confirmation from either the TAI or THAC of such expertise. While the Board has not defined the category of ADR experts, the Office of the Judiciary has announced[6)] that it includes arbitrators, representatives, legal practitioners, speakers and tribunal secretaries. Additionally, the original Thai announcement refers to supporters of the arbitration (instead of secretaries) which potentially includes transcribers. However, further clarification on this front is required.

To date, the arbitral institutions report that the Smart Visa process has yet to be used in connection with an arbitration conducted in Thailand. However, this is expected to change soon when more guidelines are issued.

Changes in Judicial Attitudes

Pro-arbitration changes are also seen at the judiciary level.

On 21 March 2019, Thailand's Supreme Administrative Court reinstated the arbitral award awarded in favour of Hopewell Holdings Limited ("**Hopewell**"), against the Thai Ministry of Transport ("**MoT**") and the State Railway of Thailand ("**SRT**").[7)] This ruling comes five years after Thailand's Central Administrative Court had, on 13 March 2014, annulled the award on the

ground that Hopewell's claim was barred by prescription. This decision was previously reported on Kluwer Arbitration Blog.

Briefly, the dispute concerned the alleged wrongful termination of a 30-year concession agreement between Hopewell and the SRT, under which Hopewell was to build a 60-kilometre elevated highway and rail line. The Supreme Administrative Court disagreed with the Central Administrative Court's retroactive application of a shorter prescription period, which was based on a legislative enactment that came into effect in 1999 after the alleged wrongful termination in 1998. The Supreme Administrative Court therefore ordered the MoT and SRT to comply with the USD 815 million award[8] within 180 days.

This decision represents a welcomed shift in the Court's attitude towards arbitration awards. As previously reported on Kluwer Arbitration Blog, the Thai courts, particularly the Administrative Court, have often given the concept of "*public order and good morals of the people*"[9] an overly broad interpretation to set aside high-profile arbitration awards involving the State or State-related entities. The Thai courts' surprising and vague reasoning in such cases has undermined investors' confidence in Thailand's dispute resolution system.

Potential Areas for Further Development

Other laudable developments in Thailand's arbitration scene have been previously reported on Kluwer Arbitration Blog. These and the above developments all indicate Thailand's intent to become more arbitration-friendly.

That said, there remain other potential areas of improvement.

First, the pool of arbitrators in Thailand, particularly arbitrators who have the language skills and procedural knowledge required to handle international disputes, is still limited. More arbitration-related training should be provided by international and local arbitral institutions and associations, as well as law firms, to practitioners, arbitrators and the judiciary. Also, Thai arbitral institutions should more closely align their prescribed arbitrator fees with that of other regional arbitral institutions. This would incentivise Thai nationals to be arbitrators and foreign arbitrators to accept appointments in arbitrations administered by Thai arbitral institutions. While the THAC has recently revised its prescribed fees so that they are comparable to that of the Singapore International Arbitration Centre ("**SIAC**"**),** the TAI's prescribed fees remain less than 15% of the SIAC's.

Second, the TAI and THAC need to develop their IT systems to improve the dissemination of relevant information and enhance the efficiency of arbitrations. For example, the THAC does not yet allow for electronic filing and the TAI's recently adopted electronic filing system is not user-friendly.

Third, there remain restrictions on foreign representatives and arbitrators that should be repealed. For example, foreign representatives and arbitrators are still required to obtain a pre-entry visa prior to arriving in the Kingdom. The THAC has reported that it is working to eliminate this requirement. It also remains unclear whether the Decree, which has not been officially repealed, applies to foreign representatives and, if so, whether it has been superseded by the Amendment.

That said, the THAC and TAI have been quick to issue Certificates to foreign representatives generally, and it would in practice be difficult for opposing parties to challenge the appointment of a foreign representative who has obtained a work permit pursuant to the Amendment.

Fourth, the efficiency of arbitration and the enforcement of arbitral awards in Thailand should be improved. Guerrilla tactics such as challenging the appointment of arbitrators or the arbitration agreement with parallel proceedings are still regularly deployed to delay and disrupt the arbitration process. Arbitral institutions could consider adopting measures such as requiring fees for challenging arbitrators to prevent frivolous challenges.

Lastly, although the Thai courts have increased their efficiency in enforcing arbitral awards and are now generally capable of doing so within a year or less, appeals relating to the enforcement or setting aside of arbitral awards, which are heard by the Supreme Court, may still take up to five years or more to be resolved. To reduce that delay, specialised courts can be set up to hear arbitration-related applications, such as challenges to arbitrators and requests for interim orders, and appeals.

References

?1 Section 9 of the Alien Occupation Act B.E. 2551 (2008); for an urgent work permit not exceeding 15 days, *see* The Regulation of the Department of Employment regarding Receipt of Necessary and Urgent Notice B.E. 2546 (2003).

?2 The Royal Decree of 11 May 1979 enacted under the Alien Occupation Act (the "**Decree**").

?3 The original text is in Thai.

?4 Announcement of the Board of Investment P. 12/2018 regarding Qualification, Rules and Conditions for Smart Visa pursuant to Section 13 of the Investment Promotion Act.

?5, ?6 This is an unofficial English translation.

?7 Supreme Administrative Court Case No 410-412/2557 (2019).

?8 This sum includes annual interest for 21 years.

?9 Section 44(2)(b) of the Thai Arbitration Act 2002 empowers the court to set aside an award if "*the recognition or enforcement of the award is contrary to public order or good morals*."

This entry was posted on Tuesday, December 17th, 2019 at 10:00 am and is filed under Arbitration Institutions and Rules, Arbitrator Challenges, Arbitrator's Fees, Public Policy, Set aside an arbitral award, Thai Arbitration Act, Thai Arbitration Institute, Thailand, Thailand Arbitration Center
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