

## **Arbitration in ASEAN: Part One – What is arbitration?**

If you have entered any contracts in any of the Southeast Asia “ASEAN” countries, you might have already had some less than pleasant experience with the local court systems. An all too common complaint is that the court proceedings are often agonizingly slow. Furthermore, if you are not from the country in question it is unlikely that you will be able to understand the proceedings, since the language used in court is generally the official language of that country. What’s more, a domestic court ruling is generally not enforceable in another country. If you or your contract partner does not live in the country where the court is located and/or your contract partner’s assets are located in another country, your domestic court “win” might be a “hollow victory”. But what’s the alternative?

You may have heard of “alternative dispute resolution”. The “alternative” means “other than going to court”. One such longstanding alternative gaining evermore international recognition is formal arbitration. Formal arbitration is the most commonly used alternative to domestic court proceedings, especially for disputes between parties from different countries. By “formal” arbitration, we mean arbitration that is prescribed by law. But for the remainder of this three-part article we will also simply call it “arbitration”.

Arbitration proceedings offer several important advantages to court proceedings. For example, an arbitration proceeding is generally quite quick—often completed within 12 to 18 months. Furthermore, an arbitration award, unlike a normal court ruling, is generally final. This is because arbitration awards cannot be challenged or “appealed” on the basis of the proceeding’s determination of factual or legal issues. For example, Thailand’s Arbitration Act—and note, national arbitration laws throughout the world including Southeast Asia are surprisingly uniform as we will explain in part two of this article— makes this clear. Under Thailand’s Arbitration Act, a court there is allowed to set aside an arbitration award only if it finds one of the following:

- 1) *A party to the arbitration agreement was under some legal incapacity.*
  - 2) *The arbitration agreement is not binding under the governing law agreed to by the parties, or in the absence of such agreement, the laws of Thailand.*
  - 3) *The applicant was not given proper advance notice of the appointment of the arbitral tribunal, or of the arbitral proceedings, or was otherwise unable to defend the case in the arbitral proceedings.*
  - 4) *The award deals with a dispute outside the scope of the arbitration agreement, or contains a decision on a matter outside the scope of the agreement. If the part of the award that lies outside the scope of the agreement can be separated from the balance of the award, then the court will only set aside that part.*
  - 5) *The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the arbitration agreement or, unless otherwise agreed by the parties, the Arbitration Act. The award deals with a dispute not capable of settlement by arbitration under the law.*
  - 6) *The recognition or enforcement of the award would be contrary to public order.*
- but *not* if the court believes the arbitrator made a mistake—even an egregious one—about the law applicable to or regarding an essential fact that should have determined the outcome of the proceeding differently.

The reason that most countries in the world including those in Southeast Asia limit any challenge to an arbitration award is because they are signatories to an international treaty—the “New York Convention”. Pursuant to the New York Convention, any signatory country (currently 144) will enforce an arbitration award made in any other signatory country—except in essentially the same very limited circumstances outlined above where an arbitration award may be set aside.

Thus, arbitration can provide you with a relatively quick judgment, which is immediately enforceable almost anywhere in the world—a huge advantage over domestic court proceedings in ASEAN. But these are only two of the reasons we recommend that you consider including arbitration as your contract’s dispute resolution mechanism.

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