

Arbitration in ASEAN: Part Three — Why arbitration?

In part one of this blog we introduced you to formal arbitration. We told you that formal arbitration is way for you to resolve your dispute with your contract partner without having to take them to court. Further we told you that the former has many advantages over the latter. One reason for that is the worldwide recognition and enforceability of your arbitration agreement and award—as we explained in part one and part two of this blog. In this part of our blog we will tell you some of the other reasons why you should strongly consider using arbitration to resolve any intractable disputes with your contract partner and slightly about how you should do so.

It is not uncommon that disputes between parties require specialized knowledge to understand the nature of the dispute. A local court judge may not have such knowledge. Arbitration proceedings, however, provide you with the opportunity to have the dispute settled by a specialist who understands the issues surrounding your claim from a practical point of view. This enhanced adjudicatory flexibility is reflected in, for example, Thailand’s Arbitration Act, which defines a qualified arbitrator as one who is “(...) *impartial, independent and possess the qualifications prescribed in the arbitration agreement (...)*”.

Furthermore, in arbitration preceding you are not only able to select a qualified arbitrator, but you also have the right to choose the place and the language of the arbitration proceedings. If you are doing business in a foreign country, to be able to: (i) select a convenient venue for the proceedings; (ii) understand the proceedings without the necessity of a translator; and (iii) submit all documentation without having to translate them into a foreign language—are all major advantages to settling disputes by arbitration.

Another procedural advantage of arbitration over normal court proceedings relates to “Service of Process” or how you formally notify your contract party against whom

you wish to begin proceedings—without this, there is no proceedings, no judgment and no justice. Service of Process in court proceedings is time consuming and can be quite expensive. In Southeast Asia this can be particularly true in disputes involving a defendant who is located outside of the country in question, which then requires a lengthy notification process. In arbitration proceedings, however, it is not necessary to involve any government agency. An arbitration service provider, pursuant to you and your contract party's arbitration agreement, is able to serve your contract party directly and to commence proceedings through to a worldwide enforceable award even if your contract party does not acknowledge the service or participate in the proceedings.

In order for you to submit a dispute to arbitration, it is required that both parties agree to it. Usually this requires something like what Thailand's Arbitration Act requires—*"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement might be in the form of an arbitration clause in a contract or in the form of a separate agreement."* The arbitration agreement needs to be in writing and signed by both parties.

Note that it is not possible for one party to unilaterally and without the approval of the other party to submit a dispute to arbitration. If you failed to include an arbitration clause in your agreement and a dispute arises, the dispute must be settled by the local courts unless you *both* later agree to arbitration proceedings. Therefore, it is advisable to include a well-drafted arbitration clause in your agreement, preferably in the initial contract document, *before* any dispute that requires a third party adjudicator arises. In our experience, once such a dispute arises, getting the parties to agree on anything—including how to resolve the dispute—can be very difficult, if not impossible.

Formal arbitration is often an outstanding alternative to domestic court proceedings. And for international parties it is almost always highly advisable to include such as your dispute resolution mechanism—particularly in Southeast Asia. However, there are a multitude of factors to consider and apply prior to and in the course of selecting and using arbitration to resolve any potential or actual dispute with your contract party. Before doing so, consult a competent arbitration specialist.

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