JUDICIAL ASSISTANCE FOR ARBITRATION UNDER SECTION 14 OF THAI ARBITRATION ACT B.E 2545

BY

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THESIS

BY

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ENTITLED

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International Commercial Arbitration has become one of the most favored dispute resolution methods in this era with an increasingly globalized world economy. The benefits of the international commercial arbitration are substantial, but one of the most significant benefits is the neutrality of the forum, which means the ability to stay out of the other party’s court.

Judicial assistance is proved to be crucial to every aspects of the arbitral proceeding. Courts have coercive power—that is, the ability to make someone do something, while arbitral tribunals do not have such power. Although arbitration is a private system of justice that parties can design their own arbitral proceeding, it is still governed by law, usually by the law of the seat of the arbitration or the law chosen by parties to govern the agreement.

This thesis analyzes the law and method that should be applied to international arbitration agreement and the focus is on the judiciary. When national courts need to determine the applicable law on the validity of the international arbitration agreement, there are two different approaches which are the substantive rules approach and the Convention approach in which courts apply Article V of the New York Convention mutatis mutandis to the case.
Thai Arbitration Act is a single act which means it governs both domestic and international arbitration. Generally, Thai courts apply section 14 of the Arbitration Act when dealing with the validity issue and the provision provides courts to deny the case if there is a valid arbitration agreement. However, the provision is silent on the applicable law of the validity of the international arbitration agreement and there is no Supreme Court decision as guidance to such case, nevertheless, Thailand is a signatory to the New York Convention, courts can approach by applying Article V read into Article II(3) of the Convention to the validity issue.

This thesis recommends courts to apply the New York Convention to the validity of the international arbitration agreement issue. In order to promote international arbitration in Thailand. Law makers are not the only ones promoting international commercial arbitration. National courts also play an essential role by setting up the standards of practice on international arbitration in Thailand.

Keywords: International Commercial Arbitration, Arbitration, Thai Arbitration, Judicial Assistance for Arbitration
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<td>B.E.</td>
<td>Buddhist Era</td>
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<td>CPC</td>
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<td>EU</td>
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CHAPTER 1
INTRODUCTION

1.1 Background and Problems

1.1.1 Background

In recent decades, international commercial arbitrations have increased significantly due to foreign investments, based on a contract and treaty. Thailand has come to play a greater role in world trade and investment. This has resulted in a dramatic rise in the number of international commercial arbitrations in Thailand.

Arbitration is a private system of adjudication. Parties often choose arbitration because they do not want their dispute to be subject to a State’s judicial system. In arbitration, the parties can control the process that will be used to settle potential disputes. However, the support of a court can prove crucial. Unlike arbitration tribunals, courts have coercive powers - the ability to compel a party to do something. Parties tend to call on the court for assistance when they are seeking to enforce an agreement to arbitrate, to compel a party to carry out an order, to render an award, etc.

The power of the court to enforce the parties’ agreement to arbitrate has been stipulated in many international treaties and national laws. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is a key stone agreement and the model law for many states. Under Article II(3) of the New York Convention, when one party to an arbitration agreement has begun litigation, the other party may ask the court to refer the matter to arbitration. “. . . unless [the court] finds that the said agreement is null and void, inoperative or

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2 Id.
incapable of being performed."

Section 14 of the Thai Arbitration Act substantially adopts the language of Article II(3) of the Convention, stating that, if any party to the arbitration agreement commences a legal proceeding in court against the other party, and the court finds that there are no grounds for rendering the arbitration agreement void or unenforceable, he shall dismiss the case.³

Article II(3) of the New York Convention and section 14 of Thai Arbitration Act deal with the validity of the arbitration agreement. Both provisions stipulate that if such arbitration agreement is valid, courts shall dismiss the case for the parties to arbitrate. However, the provisions do not provide the applicable law that shall be applied in determining the validity of the international arbitration agreement.

1.1.2 Problems

1.1.2.1 Validity of the Arbitration Agreement

In general, when parties have contractually agreed upon arbitration as a dispute resolution mechanism, if a dispute arises, and one of the parties commences litigation, the court would dismiss the case in order to force the parties arbitrate. However, if the court finds the arbitration agreement is null and void, inoperative or incapable of being performed, the court proceeding would proceed. Thus, the first step for the court would be to determine whether or not the arbitration valid.

The first stage of determining whether the arbitration is valid is significant, because it is the root for the whole arbitral process, if the arbitral clause

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³ Section 14 - In case where any party to the arbitration agreement commences any legal proceedings in court against the other party thereto in respect of any dispute which is the subject of the arbitration agreement, the party against whom the legal proceedings are commenced may file with the competent court, no later than the date of filing the statement of defense or within the period for filing the statement of defense in accordance with the law, a motion requesting the court to issue an order striking the case, so that the parties may proceed with the arbitral proceedings. Upon the court having completed the inquiry and found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform, the court shall issue an order striking the case.
is invalid, then there is no legal basis for arbitration at all. Many national laws and states do not adopt the model laws uniformly leaving national courts determine the validity issue.

When a court makes a ruling on the validity of an arbitration agreement in its jurisdiction, it must be determined which jurisdiction’s law shall be applied to a particular issue. Additional complications develop when more than one national’s laws may properly apply to the arbitration.\(^4\)

The determination of which law governs the arbitrability of a dispute is of considerable significance. Despite the generally prevailing tendency to increase the scope of arbitrable disputes, national laws may differ from each other significantly. A number of disputes, which are not arbitrable under the law of one country, may be arbitrable in another country where the interests involved are considered to be less important.\(^5\) For example; in the Arab world, state and public bodies may submit to arbitration under Tunisian law, Algerian law and express provisions of Omani law. Under Swiss law, all rights relating to property, real estate or personal, tangible or intangible, are arbitrable,\(^6\) In the Netherlands, claims against the estate in bankruptcy are arbitrable, if the arbitration is pending at the time of the declaration of bankruptcy but in Belgium, bankruptcy issues are not arbitrable.\(^7\)

So what happens if an arbitration agreement is considered to be against the laws and public policy standards of the country of one disputant, but compatible with the laws and public policy in the other disputant’s country? In such a scenario, the parties may agree that the seat of the arbitration is to be in country A, but the arbitration procedure is to be governed by the


\(^5\) Loukas A. Mistelis SLB, *Arbitrability International & Comparative Perspectives* (Kluwer Law International 2009)

\(^6\) Id.

\(^7\) Jean-François Poudret SB, *Arbitration (International law)* (Sweet & Maxwell 2007)
law of country B. If one of the parties to the agreement commences litigation in country C, an opposing party might ask a court to dismiss the case. This then raises the issue of which law should apply in making determination to dismiss? Country C’s court, using its own law, might rule that the arbitration agreement is null and void, and permit the litigation to continue. On the other hand, if country B’s laws were applied, a court may find the arbitral clause to be valid and enforceable.

Section 14 of the Thai Arbitration Act B.E. 2545(2002) has not explicitly stated or provided which law should be applicable, and no cases addressing this issue have yet been reported.  

National courts normally rule and apply their national laws to cases in their own jurisdiction. Thai courts treat foreign laws by the evidentiary weight under consideration. The party relying on a foreign law needs to prove the law to the satisfaction of the court. To do that, documentary evidence or expert witnesses may be needed. Failure to do so, may lead to the application of Thai law.

Every arbitration agreement relies on the Competence doctrine which states that the arbitrators are competent to determine their own competence. This means that when parties have appointed their own arbitrators, the appointed arbitral tribunals are empowered to decide their own jurisdiction. When courts interfere with the arbitral process at the commencement of

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The arbitration process, the power has shifted to the courts. This is considered to be in contrast with the arbitration principles.

### 1.1.2.2 Thailand as an Arbitration-Friendly Country

Foreign investment has played a significant role in the economic development of Thailand. It can provide a source of capital, products, new technologies, and employment opportunities. In order to attract and promote international business in Thailand, the country needs to be an arbitration-friendly jurisdiction. Foreign investors concerned about exposure to the differences in a host state’s political and social environment, its legal system and possible interference by the host state, seek fair and equal treatment between the parties. They may find themselves entangled in costly and time-consuming legal proceedings. Because the best solution to settle the disputes; is often the solution that costs the least amount of money and time, arbitration’s popularity as an alternative dispute resolution mechanism is increasing.

Professor George Bermann of Columbia University School of Law has defined and outlined the characteristics of an arbitration friendly jurisdiction as follows:


11 Id.

12 Greenwood L, ‘The Rise, Fall and Rise of International Arbitration: A View from 2030’ Chartered Institute of Arbitrator 436

• it promoted international arbitration’s efficiency aspirations in terms of time and cost
• it rendered international arbitration ‘effective’
• it enabled party autonomy and supported the general principle of consent
• it promoted flexibility and allowed the arbitral tribunal procedural discretion
• it reduced as reasonably as possible the intervention of national courts
• it ensured the validity and enforceability of awards
• it maximised the categories of claims that could be considered arbitrable.¹⁴

The examples of arbitration-friendly countries such as Hong Kong and Singapore have dominated international arbitration cases as well as international business seated in Asia.¹⁵ They are the examples of the nations which use arbitration to develop and obtain economic growth. The international Court of Arbitration of the International Chamber of Commerce (ICC) has located their Asian offices in both Hong Kong and Singapore. This gives both countries opportunities to continue promoting their respective jurisdictions as pro-arbitration and business-friendly communities¹⁶ and helps to bring increasing foreign investment into the countries.

Arbitration is still developing in Thailand. Before the first Thai arbitration act B.E.2530(1987), many Supreme Court decisions had rulings which negatively impacted arbitration. One example is Supreme Court case no. 812/2482

¹⁶ Prasad P, ‘Arbitration in Singapore and Hong Kong’ Chicago Unbound, University of Chicago Law School 3
which stated that parties may not prohibit each other from litigating cases, despite the presence of a valid arbitration agreement.17

Awareness and usage of arbitration has increased over the last two decades but it has not yet been widely adopted in all circles. Businesses are becoming more willing to accept arbitration, especially in foreign-related contracts. Courts have become more supportive, although they remain occasionally unpredictable. Political support has wavered, and there has recently been political opposition to the use of arbitration in the context of contracts involving the public sector.18

After the first Thai Arbitration Act, judicial attitudes towards arbitration began changing. Courts started promoting arbitration, as Thai Arbitration Institute (TAI) under Office of the Judiciary established in B.E. 2533(1990).19 On May 22, 2017, the Office of the Judiciary announced a public hearing on the amendment of Thai Arbitration Act B.E. 2545(2002).20 The announcement was part of an effort by the Thai government to amend the Thai Arbitration Act B.E. 2545.21 The Thai government wanted to improve the arbitration environment by making the process more convenient, and ensuring that Thailand is perceived as an arbitration friendly jurisdiction. In narrow circumstances, the Thai legal framework has limited the parties’

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17 เสาวนีย์ อัศวโรจน์, คำอธิบายกฎหมายว่าด้วยวิธีการระงับข้อพิพาททางธุรกิจโดยการอนุญาโตตุลาการ (3 edn, สํานักพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduay Kamrangabkorpipat Thangthurakij Doyaniyatotularkam (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))
19 Thai Arbitration Institute (TAI) (B.E.2542)(1999)
21 Wichit Chaitrong, ‘Arbitration law reform gains business ’ The Nation (February 14, 2018)
ability to appoint foreign arbitrators to represent them in arbitral proceedings. The draft bill, which is still in the legislative process, should remove such obstacles allowing parties in international arbitral proceedings to appoint foreign arbitrators, further encouraging foreign investment in Thailand and increased trade with Thai counterparts.

Since there are still no standard business practices in Thailand related to international arbitration agreements, it may be hard for Thailand to attract foreign investors as the country has not yet to be perceived as an arbitration friendly jurisdiction.

1.2 Hypothesis

Generally, international commercial arbitration agreements contain the primary details, such as the seat of arbitration and the governing law. A problem arises when one party brings a trade dispute to the court, and such court is not the seat of the arbitration, and its law is not a law that governs the arbitration contract.

If such case come before a Thai court, Thai Arbitration act section 14 provides courts the obligation to deny the case in order to promote the arbitration, but there is still the first step that courts would have to consider, the issue of whether such arbitration agreement is valid or not and the applicable law on such issue of validity. Moreover, when dealing with the validity of the arbitration issue, there are still some controversial topics and many factors that need to be considered.

Since Thailand is a signatory state to the New York Convention and Thai Arbitration Law has adopted a substantive amount of the convention, the most suitable approach to the problem is to apply and interpret the Model Law to the case.

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24 The accession to the convention on December 21, 1959
Although, there is no law even for the Model law that clearly states which country’s law shall apply when there is a conflict of law on the validity of the international commercial arbitration issue, but Article V(1)(a) of the New York Convention\(^{25}\) stating that the arbitration agreement is under the law of the country where award was made shall apply.\(^{26}\) This principle can be applied *mutatis mutandis*\(^ {27}\) to the law that shall govern the validity of the arbitration agreement issue.

1.3 Objectives of Study

1) To explain background and problems on the validity of the international arbitration agreement and specify the scope of issue.

2) To analyze the New York Convention and use its provisions to apply to the validity of the international agreement issues.

3) To analyze judicial assistance on international arbitration and give an alternative solution by judicial interpreting or judicial assistance on the validity of the arbitration agreement issue, in order to promote international arbitration in Thailand.

1.4 Scope of Study

This study focuses on the arbitral procedure and the law that governs it. However, understanding international commercial arbitration as a whole is the key to

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\(^{25}\) The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

\(^{26}\) ธวัชชัย สุวรรณพานิช, ‘กฎหมายที่ใช้บังคับแก่สัญญาอนุญาโตตุลาการตาม พ.ร.บ.อนุญาโตตุลาการ พ.ศ.2545 มาตรา 14’ 17 วารสารกฎหมาย คณะนิติศาสตร์ มหาวิทยาลัยอุบลราชธานี (Thawatchai Suvanpanich, ‘Law Applied to the Arbitration Agreement under the Thai Arbitration Act B.E.2545’ 17 Ubon Ratchathani University Law Journal 81)

\(^{27}\) Means that matters or things are generally the same, but to be altered, when necessary, as to names, offices, and the like.
further understanding arbitration proceedings. Layers of laws are involved in the process and they are more complicated when it comes to international commercial arbitration. The study begins with the overview of the proceeding and then continue to point out the specific issues of the problem.

The primary source for principles of international commercial arbitration are mostly in international academic journals and online data. This is due to the fact that the issue has a critical impact on international commercial dealings. As for Thai laws, the legal research will be the current Thai Arbitration Act and practice, the new proposed law, and the treaties.

1.5 Methodology

The methodology of this study is documentary analysis which is a primary method, by collecting information from both Thai and foreign documentaries, such as laws, cases, international conventions, journals, news, books etc. as well as online data. The research is a comparative study focusing on international standards of practice and laws between Thailand and other countries.

1.6 Expected Results

1.) The scope of issues that need to be considered are the complication of having the third party in arbitral proceedings, for example; countries that have different laws and public policy standards, so that the arbitration clause that is valid in a country of the seat of arbitration might be deemed invalid because it is not arbitrable under Thai laws, public order, and the good morals of the people. Moreover, in such cases when an arbitration agreement is invalid, Thai courts would not dismiss, thereby destroying the arbitral procedure and upending the parties’ intentions clearly specified in the written agreement.

And also the issue of the incompatibility to the arbitration principles, for example; an arbitration agreement is an underpinning for the whole arbitral process,
when parties have chosen their own law in an arbitration clause, it only means that their intention is to have such law govern their arbitral proceedings. Thus, when using other laws that are not specified in an arbitration agreement, it would be considered as incompatible with the parties’ legitimate expectations or even against the parties’ freedom of contract.

2.) Thai court should approach the problem by using the New York Convention applying to the case. Due to the fact that Article II(3)\(^{28}\) and Article V(1)(a)\(^{29}\) of the New York Convention both stipulated in order to avoid the complication when there is a conflict of law in the arbitral proceedings. While Article II(3) is dealing with the stage of recognizing of the arbitration agreement, Article V(1)(a) is dealing with the last stage when the prevailing party wants to enforce the arbitral award or the stage of recognizing of the arbitral award. Thus, at the end when the award was made, the prevailing party would seek the award’s enforcement in courts where the compelled parties’ have assets. Then the courts would consider whether such award had made under the valid arbitration agreement according to the law where the award was made. Therefore, Article V of the New York Convention that should be read into Article II(3).

\(^{28}\) **Article II(3)** - The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

\(^{29}\) **Article V(1)** - Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
3.) Judicial interpretation is critical in resolving the issue of which law shall apply in determining the validity of the arbitration agreement. National courts trying to resolve the dispute, typically use domestic law and general principles of contract interpretation, aimed at neutrally ascertaining the parties’ intentions.\textsuperscript{30}

Even though, if the arbitration agreement clearly specifies the method of selecting a forum or the choice of law governing the contract, it should be more suitable for courts to apply such law to the validity of the arbitration issue, so that would be consistent with the parties’ intentions and this would be considered as a standard of practice on the international arbitration in Thailand.

Thus, standards of practice for international commercial arbitration in Thailand would promote Thai business and encourage foreign investment. This would benefit the Thai economy and increase support for the new amendments to the Thai Arbitration act whose legislative purpose is to make Thailand into an arbitration-friendly jurisdiction.

CHAPTER 2
VALIDITY OF THE ARBITRATION AGREEMENT

2.1 Introduction

Arbitration has a long history and has been accepted by the commercial world as the most preferred method, or at least an appropriate system, for dispute resolution of international trade disputes. The most significant reasons are the neutrality of the forum and the likelihood of obtaining enforcement.31

Arbitration is a private system of justice. Parties who agree to arbitrate want their disputes to be resolved privately outside any court system. Almost all arbitrations contained in a clause that are in Commercial contracts generally contain an arbitration clause. The arbitration clause establishes the rights of parties to design their own process in which they select the rules that will govern the procedure, the seat of the arbitration, the language of the arbitration, the members of the arbitral tribunal, etc.32

In determining the validity of the arbitration agreement and the arbitralbility, we have to understand three important elements of an arbitration: the essential characteristics of arbitration, the regulatory framework and some essential clauses for arbitration agreements. If any arbitration agreement lacks of one of these factors, it can cause the arbitration agreement to be deemed invalid.

2.2 Essential Characteristics of Arbitration

2.2.1. Consent

Both parties must have expressed their consent to submit any dispute to arbitration in a written agreement, generally, a clause in the contract. The

32 Id.
parties’ consent is necessary for the validity of the arbitration agreement, and also underpins the power of the arbitrators. The parties’ arbitration agreement defines the arbitrators’ jurisdiction which law shall be applied to the dispute, and how to proceed.

2.2.2 Non-governmental Decision Makers

Arbitrators do not act as government representatives, but are individuals chosen by the parties to act on their behalf. Compared to judges, arbitrators weigh less heavily on the public interest because their primary responsibility is to be an administrative agency serving the parties’ interests.33

2.2.3 A Final and Binding Award

Finality is an important characteristic of arbitration that attracts many parties to choose arbitration as their dispute resolution mechanism. An award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties.34 The award generally cannot be appealed to a higher level court; however, a party may challenge an award if there was some defect in process. When the award is made, the prevailing party will have the award recognized and enforced by a court in a jurisdiction where the losing party has assets. On the other hand, the losing party may challenge the award on very narrow grounds such as a defect in the arbitral procedure, or claim that the arbitrators exercised their power beyond the parties’ consent.


2.3 Regulatory Framework

Arbitration is the jurisdiction selected by the parties. Parties can choose any laws or rules, places of arbitration etc. but every arbitration must be situated within some legal and regulatory system.\textsuperscript{35} For arbitration to be succeeded there must be regulatory framework which controls the legal status and effectiveness of arbitration in a national and international legal environment.

Determining of the law governing arbitrability is of considerable importance. The law governing the arbitrability of a dispute may depend on where and at what stage of the proceedings the question arises.\textsuperscript{36}

There are several laws, rules, and guidelines that govern and involve the arbitral process. The regulatory framework of arbitration can be described in the form of an inverted pyramid, in which the point of the pyramid faces down. The point is the arbitration agreement.\textsuperscript{37}


\textsuperscript{37} Moses ML, The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2012)
2.3.1 Arbitration Agreements

The arbitration agreement is the basis for the entire arbitral process. If the arbitration agreement is invalid, there is no legal basis for arbitration at all.

Almost all international arbitrations occur pursuant to arbitration clauses contained in commercial contracts. Sometimes parties agree to submit an existing dispute to arbitration and the resulting agreement is called a ‘submission agreement’ or ‘compromise’. However, it is difficult to negotiate a submission agreement once a dispute has arisen, so most disputes are arbitrated because of pre-existing arbitration agreement.38

Parties are free to draft their arbitration agreement in whatever terms they wish and in practice this freedom is often liberally exercised, arbitration

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agreement are largely considered as a product of the parties’ interests, negotiations and drafting skills.39

International arbitration agreement can be very short or very long. National courts have upheld arbitration clauses that have been as brief as ‘English law-arbitration, if any, London according ICC rules,’ 40 or ‘arbitration-Hamburg, Germany.’41 On the other hand, detailed arbitration agreements, where there are multi-party transactions sometimes take the form of separately-executed documents running and executing every steps of arbitral proceeding until the end of procedure. One step above the arbitration agreement are the arbitration rules chosen by the parties.42 But in the case where the arbitration clause is silent as to the arbitration rules, an arbitration act generally establishes a set of default terms.43

2.3.2 National Laws

At the next level of the pyramid are the national laws. If parties have chosen the substantive law or the national law, then it shall be the law that will be used to interpret the contract, to determine the merits of the dispute, and to decide any other substantive issues as well as the arbitralbility.44 Arbitralbility is depend on commercial and legal expectations, cultural approaches, political ramifications and geographic situations in each country and it is to be measured by national laws.

40 Alan Redfern MH, Law and Practice of International Commercial Arbitration (Sweet & Maxwell 2004)
43 Arbitration Rules Definition (Duhaime)
Many countries including Thailand have adopted as their arbitration law the UNCITRAL Model Law on International Commercial Arbitration. The UNCITRAL Model Law for Arbitration was prepared by the United Nations Commission on International Trade Law (UNCITRAL) (from now on will be called ‘the UNCITRAL Model Law’) to promote international commercial arbitration by assisting states in reforming and modernizing their arbitration laws. Its structures contain all areas of arbitral process from the commencement of the arbitration agreement, to the last stop of enforcing the award.

The primary source of Thai arbitration law is the Arbitration Act of 2002, the Act was drafted to be congruent with the standards of the UNCITRAL Model law for Arbitration as well as the New York Convention, with minor variations. The Act came into force on April 30, 2002 replacing the Arbitration act B.E.2530 (1987), it

45 The following countries, territories have adopted the UNCITRAL Model Law on International Commercial Arbitration: Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia, Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark, Dominican Republic, Egypt, Estonia, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mauritius, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, the Philippines, Poland, Republic of Korea, Russia Federation, Rwanda, Serbia, Singapore, Slovenia, Spain, Sri Lanka, Thailand, Tunisia, Turkey, Uganda, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; Bermuda, an overseas territory of the United Kingdom; within the United States of America: the states of California, Connecticut, Florida, Illinois, Louisiana, Oregon, and Texas; Venezuela, Zambia, and Zimbabwe. Available at www.uncitral.org.


47 the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
governs both domestic and international commercial arbitration under the same rules. The secondary sources are the Civil Procedure Code (CPC), which provides that disputes submitted to arbitration out of court will be governed by the law relating to arbitration, and academic commentary and decisions from other jurisdiction that may sometimes be considered where the case in hand raise similar issues.

2.3.3 International Arbitration Practice

The next step above the national laws is international arbitration practice. Arbitrators and parties may agree to use some of these practices as their mandatory framework, or arbitrators may use them as guidelines. These various practices have developed from time to time in the international arbitration world and some were even codified as rules or guidelines. There are rules that came from old practices for example, A Code of Ethics for Arbitrators, co-produced by the American Arbitration and the American Bar Association, and Notes on Organizing Arbitral Proceedings produced by UNCITRAL etc.

2.3.4 International Treaties

Lastly, at the top of the inverted pyramid are international treaties. The cornerstone of international commercial arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.

The New York Convention established an international regime to be adopted in national laws which facilitates the recognition and enforcement of both arbitration agreements and awards. The success of the Convention is well illustrated

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48 CPC section 221
49 Michael J. Moser JC, Asia Arbitration Handbook (Oxford University Press 2011)
50 The core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 50 years, UNCITRAL’s business is the modernization and harmonization of rules on international business.
51 The New York Convention was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959.
by three factors. First, there are 159 contracting states (including Thailand) in the Convention\textsuperscript{52}, Very few private law conventions that have achieved such a wide international acceptance.\textsuperscript{53} Second, for the purpose of interpreting and applying the New York Convention, it is now common for national courts to look to the decisions of other foreign courts to see how specific provisions have been interpreted and applied. The Convention has had a direct influence on the development of international arbitration practice and law, which is increasingly of significant influence on parties, arbitrators, and national courts, regardless of nationality.\textsuperscript{54} Third, according to the Convention requirement that courts in one contracting state have to recognize and enforce arbitration awards made in other contracting states. So it is now generally accepted that agreements to arbitrate and arbitration awards will be enforced by the courts of most countries since most states have been contracting states to the Convention.

Besides the New York Convention, there are other conventions that take significant roles in the international arbitration world:

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States. It is also known as the ICSID Convention, and is promoted by the World Bank in order to encourage investors to make investments in developing countries.\textsuperscript{55}

The European Convention on International Commercial Arbitration 1961. It was intended to promote east-west trade and developed by the United Nations Economic Commission for Europe. It covers general issues of parties’ rights to

\textsuperscript{52} As of year 2018
\textsuperscript{54} Id.
\textsuperscript{55} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
submit to arbitration, who can be the arbitrator, how arbitration proceedings should be organized, how to determine the applicable law etc.\textsuperscript{56}

\textbf{2.4 Essential Clauses in the Arbitration Agreement}

Parties who want to make an arbitration agreement are free to choose their own arbitral method because there is no mandatory law. If one party does not want to enter into an arbitration agreement, the other party cannot force him to do so. An arbitration agreement provides a roadmap for administering the arbitration, parties need to shape and frame the details in arbitration clause to match their expectation and select the most suitable arbitral proceeding. Thus, when drafting an international arbitration agreement, the following clauses are some essential clauses that parties must address in order to make the arbitration agreement the most effective.

\textbf{2.4.1 Agreement to Binding Arbitration}

It is elementary that any arbitration clause must clearly set forth the parties’ agreement to arbitrate. Parties’ agreement should expressly refer to arbitration rather than any ADR\textsuperscript{57}, mediation, settlement etc. The requirement that the parties agree to arbitrate also means that a defined category of disputes should be referred to arbitration for a binding or final disposition.\textsuperscript{58}

Here are some examples of an agreement to binding arbitration language:


\textsuperscript{57} \textbf{Alternative Dispute Resolution} ("ADR") refers to any means of settling disputes outside of the courtroom. ADR typically includes early neutral evaluation, negotiation, conciliation, mediation, and arbitration.

“We, the undersigned parties, hereby agree to submit to arbitration administered by...”, or

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration...” or

“All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement, or the subject matter of this Agreement, shall be finally resolved by arbitration.”

2.4.2 Choice of Arbitrators

There are two choices for parties to decide whether they want their arbitration to be administered by an institution or ad hoc. There are advantages and disadvantages for each choice.

Institutional arbitration is conducted pursuant to procedural rules promulgated by a particular arbitration institution, which generally also administers the arbitration. The administration of an arbitration typically involves performing functions such as selecting and removing arbitrators (whenever the parties default or fail to reach an agreement on these issues), serving requests for arbitration and other submissions, and dealing with the arbitrator’s and institution’s fees. The advantages of this kind of arbitration are that the arbitration rules of the institution are time-tested and are usually quite effective in dealing with most situations that arise. An award rendered


61 Id.
under the auspices of a well-known institution may have more credibility in the international community and courts.\textsuperscript{62}

Ad hoc arbitration are proceedings administered by the disputing parties. As they make their own arrangements for selection of arbitrators, they have discretion to designate rules, applicable law, procedures and administrative support.\textsuperscript{63} The advantages of ad hoc arbitration are that the parties are not paying the fees and expenses of the administering institution, and the parties have more opportunity to craft a procedure carefully tailored to the particular kind of dispute.\textsuperscript{64}

2.4.3 Seat of the Arbitration

Choosing the seat of the arbitration is crucial. It determines the \textit{lex arbitri} - the arbitration law of the arbitral \textit{situs}\textsuperscript{65} that will be the law that governs the arbitration.\textsuperscript{66} The seat of the arbitration is where the arbitration is tied, it tends to be a country that is neutral for both parties. A seat of arbitration is not only a place where the arbitration proceeding is held but also where any court intervention is needed during or after the arbitration, the national law in such country is applied to the proceeding.

Parties want an arbitration friendly regime because it means that courts in such country would not unduly interfere with the arbitral process.\textsuperscript{67} The level of court intervention is different based on the seat of arbitration. An arbitration-friendly

\begin{thebibliography}{9}
  \bibitem{62} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
  \bibitem{63} \textit{Ad hoc Arbitration Law and Legal Definition} (US Legal, Inc.)
  \bibitem{64} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
  \bibitem{65} In law, the \textit{situs} (Latin for position or site) of property is where the property is treated as being located for legal purposes.
  \bibitem{66} Capper P, \textit{When is the ‘Venue’ of an Arbitration its ‘Seat’?} (2009)
  \bibitem{67} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
\end{thebibliography}
jurisdiction allows parties the fullest possible extent in arbitration proceeding with the least court interference, for example, in Switzerland, the extent for challenging the award is very narrow.

When choosing an appropriate seat, there are some recommendations that parties should take into account such as a seat should be in a contracting state to the New York Convention, to ensure enforcement of the award, and to ensure the infrastructure is sufficient etc.

2.4.4 Language of the Arbitration

In international commercial arbitration, parties have different nationalities, languages, cultures etc. so the language of the arbitral proceeding is very important in order to create the mutual understanding between the parties and to make the proceedings efficient. Parties should address the language of the arbitration in the arbitration clause to avoid the ambiguities in an agreement.

2.4.5 Substantive Law

It is not mandatory for parties to put the substantive law that govern the contract in arbitration clause, but if parties choose to do so, they shall state it in the clause in order to avoid unnecessary disputes.

Under Thai law, parties are able to choose other substantive laws besides Thai law to govern the arbitral proceeding and Thai courts have confirmed such acts in many Supreme Court decisions.

In Supreme Court decision 2602/2533 the court stated that an arbitration agreement between debtor and creditor stipulating use of Singaporean law was arbitrable. And when the award resulted from the rightful arbitral proceeding without any grounds of misconduct or wrongful acts, such award was enforceable, the creditor can enforce the award against the assets of the debtor. However, a recent
Thai arbitration act 2002 section 34, has already clearly stated that parties may choose any law as the substantive law in an arbitration agreement. 68

2.5 Factors of the Validity of Arbitration

When parties agree to arbitrate, the question of the arbitration agreement’s validity is critical. Because of the main characteristic of arbitration, that it is the mechanism based upon the parties’ consent, so the question is what is the clearest way to show such consent?

The formal validity of an arbitration agreement is closely related to the issue of whether the party actually consented to arbitration. As a consequence, to fulfill the form requirements, and establishing the necessary consent, are often interwoven and treated jointly. However, there are cases where national courts despite an agreement to arbitrate have accepted jurisdiction over a dispute because the arbitration agreement did not fulfill the necessary form requirement. 69

Most international conventions and national arbitration laws contain substantive conflict of law provisions in relation to form requirements. Few national laws allow for an oral arbitration agreement such as French law which is an exception with regard to international arbitration. 70 However, the majority of arbitration laws, including the Model Law, in line with the international conventions, require arbitration agreements to be either in writing or at least to be evidenced in writing. 71

References:
68 Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatatulakarn PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015)
69 Michael J. Moser JC, Asia Arbitration Handbook (Oxford University Press 2011)
70 See Cour d’appel Paris, 8 June 1995, Sarl Centro Stoccaggio Grani, Rev Arb 89 (1997); Fouchard Gaillard
71 Michael J. Moser JC, Asia Arbitration Handbook (Oxford University Press 2011)
2.5.1 Writing Requirement

Contracts are frequently entered into orally or literally without many formalities, except for certain specific contracts which the law requires to be in writing. The New York convention states in article II that Contracting States must recognize arbitration agreements in writing. The Convention contains two alternative requirements of form in order to comply with its definition of “in writing”. An arbitration agreement must be either (1) signed by the parties or (2) contained in an exchange of letters or telegrams.

Thailand is a contracting state to the Convention, and Thai Arbitration Act has adopted the Convention as its model law. When parties agree to arbitrate, they can demonstrate their agreement via their conduct or trade practice. Although such an arbitration agreement is effective, under section 11 of the Thai Arbitration Act, a party needs to prove its intention of resolving their dispute by arbitration by any written agreement.

2.5.2 Defined Legal Relationship

Most arbitration agreements are by their nature contractual, but the defined legal relationship could be a non-contractual one. Disputes between the

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72 Article II (1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration

73 Concise International Arbitration (Kluwer Law International 2010)

74 เสาวันี เอกวิจิตร, คำอธิบายกฎหมายว่าด้วยวิธีการระงับข้อพิพาททางธุรกิจโดยการอนุญาโตตุลาการ (3 edn, สานักพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduay Kamrangabkorpipat Thangthurakij Doyaniyatotulkarn (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))

75 Legal relationship between contracting-parties
parties mostly based on contractual relationship, but some can be non-contractual ones for example; disputes based on tortious acts or unfair business practices.⁷⁶

2.5.3 Capable of Being Settled by Arbitration

Arbitrability is to be considered and measured by the national law and public policy. Each jurisdiction has stipulated the details on arbitrability law different from each other, depending on its government policy and economy.⁷⁷

All nations treat some categories of claims incapable of resolution by arbitration – as, ‘non-arbitrable’. Article III(1) and V(2)(a) of the New York Convention do not require enforcement of arbitration agreements concerning a subject matter not ‘capable of settlement by arbitration’.⁷⁸

In most countries issues such as criminal matters, child custody, and bankruptcy are not arbitrable because it would be against the law or public policy. Moreover, it is accepted worldwide that issues on the validity of patents shall not be arbitrated because they are considered to be issues that must be considered by a local regulatory agency.⁷⁹

Thai Arbitration Act of 2002 is silent on issues of arbitrability. In general it has been accepted that only commercial disputes are arbitrable. This is also

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⁷⁷ เสาวนีย์ อัศวโรจน์, คำอธิบายกฎหมายว่าด้วยวิธีการระงับข้อพิพาททางธุรกิจโดยการอนุญาโตตุลาการ (3 edn, ส้านพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduay Kamrangabkorpipat Thanthurakij Doyaniyatularkarn (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))
⁷⁹ เสาวนีย์ อัศวโรจน์, คำอธิบายกฎหมายว่าด้วยวิธีการระงับข้อพิพาททางธุรกิจโดยการอนุญาโตตุลาการ (3 edn, ส้านพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduay Kamrangabkorpipat Thanthurakij Doyaniyatularkarn (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))
stated in section 5 of the first version of Thai Arbitration Act.\textsuperscript{80} However, the only guidance on arbitrability under the Arbitration Act is section 11 which defines arbitration agreement in terms of disputes concerning ‘a defined legal relationship, whether contractual or not’.\textsuperscript{81}

Thus, in Thailand only issues of a commercial nature and those arising from contractual relationship disputes are capable of being settled by arbitration. On the other hand, matters such as criminal acts, divorce, bankruptcy, business rehabilitation, and appointment of the administrator of an estate are not capable of being referred to arbitration because they are matters for the courts or government officials to decide since they are involved with the moral and public policy.\textsuperscript{82}

\subsection*{2.5.4 Null and Void, Inoperable, or Incapable of Being Performed}

Article II(3) of the New York Convention states that “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” Thus, in addition to the conditions required for enforceability or the validity – a writing, a legal relationship, and a subject matter capable of being arbitrated – the Convention provides certain defenses to enforcement of an arbitration agreement.\textsuperscript{83}

Firstly, an arbitration agreement can be null and void the same as other contractual agreements for example, if one party misunderstood an arbitration agreement because it was misrepresented as a compromise agreement, then such

\begin{itemize}
  \item \textsuperscript{80} Thai Arbitration Act B.E.2530
  \item \textsuperscript{81} Michael J. Moser JC, \textit{Asia Arbitration Handbook} (Oxford University Press 2011)
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} เสาวนีย์ อัศวโรจน์, คำอธิบายกฎหมายว่าด้วยวิธีการระงับข้อพิพาททางธุรกิจโดยการอนุญาโตตุลาการ (3 edn, สำนักพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduoy Kamrangabkoripat Thangthurakij Doyaniyatotularkarn (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))
\end{itemize}
arbitration agreement might be considered a nullity\textsuperscript{84} under section 156 of Thai Commercial and Civil Code.\textsuperscript{85} Another cause that might cause an arbitration agreement to be ruled null and void, is if the consent to arbitrate was given by fraud, duress, misrepresentation, under influence, or waiver.\textsuperscript{86}

Secondly, an arbitration agreement can be inoperable, for example, if one of the parties has raised the dispute in one legal forum and the arbitration has been decided, but later the same parties raise the same dispute in another legal forum, then the latter case is barred by \textit{res judicata}\textsuperscript{87}. Alternatively, if there is a "time bar" clause in an arbitration agreement setting a deadline to arbitrate, and such time period had expired so that the agreement would be considered inoperable.\textsuperscript{88} However, courts in many countries have ruled that time barred arbitration clauses were inoperable, in order to promote the practice of arbitration.\textsuperscript{89}

The last certain defense to enforcement of an arbitration agreement is incapability of being performed. An arbitration agreement could be incapable of being performed if, for example, the place of the arbitration was no longer available due to the political upheaval, the arbitrators were deceased or unavailable, or that

\textsuperscript{84} ธวัชชัย สุวรรณพานิช, คําอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) (Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakarn PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015))

\textsuperscript{85} Section 156 of Thai Civil and Commercial Code, a declaration of intention is void if made under a misapprehension as to an essential element of the juristic act.

\textsuperscript{86} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)

\textsuperscript{87} A matter that has been adjudicated by a competent court and may not be pursued further by the same parties.

\textsuperscript{88} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)

\textsuperscript{89} ธวัชชัย สุวรรณพานิช, คําอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) (Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakarn PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015))
the arbitration clause in the contract is ambiguous, or contradictory to the parties’ intentions. However, the parties can agree upon new conditions as an amendment to the arbitration agreement if both parties still wanted to arbitrate.90

2.6 Conclusion

Parties can design their own arbitration agreement, but there are still some essential clauses and framework that should be taken into account. The most important thing is that an arbitration clause must be in writing according to the model law. Issues such as the seat of arbitration, the language of the arbitration, choice of arbitrators etc. are up to the parties’. The greatest advantage of arbitration, is that the resulting award is final and binding.

Validity of an arbitration agreement is the key stone to the arbitral proceeding because without the right foundation, the whole process would collapse. Thus, parties have to state their own intentions clearly when drafting the arbitration clause and draft it in accordance with the regular framework, in order to avoid unnecessary disputes at the time of the arbitration, as well as, additional difficulties in enforcing the award.

Requirements for a valid arbitration agreement are quite familiar in most national laws because most countries, in governing arbitration, have substantially adopted the provisions from the UNCITRAL model law as well as the New York Convention. Although, there are some exception requirement standards that some countries have regulated in accordance with their own domestic laws and other cultured, political, geographical influences, but their main significant factors are still similar to other countries.

However, arbitrability is the most significant factor of the requirement of the arbitration agreement, because the concept varies in each national law. Besides,

there are no provisions in- either the Model law-, or any conventions, that stipulate which law is applicable when there is a conflict of law issue on the aspect of arbitrability, thereby leaving a final determination to the national courts or judicial assistance.
CHAPTER 3
JUDICIAL ASSISTANCE FOR ARBITRATION

3.1 Introduction

Although arbitration is a private system of justice, it is still governed by law. Therefore, arbitration cannot be completely separated from courts because, in order to make arbitration effective, judicial assistance has been proved to be crucial.

In international commercial arbitration, the dispute can be arbitrated in a neutral third country to which neither party belongs. Because of the involvement of many sovereign States, there are frequently overlapping powers between the arbitral tribunals and the domestic judges and such issue is still an ongoing debate in international stage as well as national.

Validity of the arbitration agreement issue is the first step that judicial assistance is needed because courts have coercive powers (– power acquired by suppressing free will, and/or use of illegal punishment or the ability to make someone do something) while individuals like parties or ad hoc/institutional arbitrators do not. When one party to the arbitration agreement has commenced the court proceeding, the opponent party need to seek judicial assistance in order to compel the resistant party to arbitrate by the court order.

Moreover, not only the commencement of arbitration that the judicial assistance is needed but also during the proceedings when parties need the protection

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92 Parallel State and Arbitral Procedures in International Arbitration (ICC Publishing 2005)
93 The Law Dictionary (https://thelawdictionary.org)
for the potential arbitral awards—‘the interim measures’, or even when the parties are seeking evidences, or enforcing the awards.

Thus, judicial assistance can play a significant role in every steps of the arbitration proceeding. However, the extent of assistance, the overlapping powers between courts and private arbitrators and the court intervention issues are still debatable among those who favored arbitration and those who disfavored.

3.2 Enforcement of the Arbitration Agreement

It has long been a controversial topic as to who has the power to decide the validity of the arbitration agreement, and even the arbitral tribunal’s jurisdiction. Those who favor arbitration, argue that the arbitral tribunal shall have the power to decide the validity of the arbitration agreement. Because the parties gave their permission in the arbitration agreement, courts often have some bias against arbitration and trend to make such arbitration agreements invalid. Moreover, bringing such cases to court would waste money and time for both parties. Because at the award enforcement step, the court is the one that decides whether the arbitral tribunal has exercised beyond its jurisdiction or not.

On the other hand, for those who disfavor arbitration, the court should be the entity that rules on validity issues, because it is more likely to prevent a defective arbitration agreement from ultimately causing an award to be vacated, resulting in a waste of time, money, effort and resources. In addition, it would be too risky to let the arbitral tribunal decide on the validity issue for a party who denies the validity of the arbitration clause, because if he does not appear in the arbitral proceeding, the arbitral tribunal would proceed ‘ex-parte’.

95 อนันต์ จันทรโอภากร, กฎหมายว่าด้วยการระงับข้อพิพาทโดยอนุญาโตตุลาการนอกศาล (1 edn, ส้านพิมพ์นิติธรรม 2536) (Anan Chantara-opakorn, Kodmai Waduai Kamrangabkorpipatnoksam (Arbitration Law) (1 edn, Nititham 1993))

96 An ex parte judicial proceeding is conducted for the benefit of only one party
The New York Convention article II(3), imposes upon Contracting States the obligation to recognize an arbitration agreement in writing and for the courts to step aside if such agreement is valid. The legislative purpose of Article II is to make international arbitration agreement enforceable.

For Thailand, before the first Thai arbitration act 1987, if parties agreed to submit their disputes to arbitration, but one party did not comply with the agreement, the other party could not force him to arbitrate, because of the lack of power given by law, and numerous prior Supreme Court decisions had ruled negative on the arbitration.97

For example; in Supreme Court Decision No. 812/2482, the parties had agreed upon on the arbitration agreement that if dispute arose under the main commercial contract, such disputes would be settled by Director-General of the Department of Civil Affairs as their arbitrator. The court ruled that, although there was an arbitration clause in the contract that prohibited the parties to file a lawsuit when there was a breach of the contract, such arbitration clauses were deemed to be void because they were considered to be against the public order and the good morals of people.98

Or the Supreme Court Decision No. 1732/2503 ruled in similar direction, stating that when any obligation occurred in accordance to the contract, any arbitration clause in the contract that prohibited any parties from bringing a case to court was considered invalid.99

97 เสาวนีย์ อัศวโรจน์, คำอธิบายกฎหมายว่าด้วยวิธีการระงับข้อพิพาททางธุรกิจโดยการอนุญาโตตุลาการ (3 edn, ส้านักพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduay Kamrangabkorpipat Thanqthurakij Doyaniyatularkarn (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))
98 Thai Supreme Court case no. 812/2482 ( DEKA.in.th 1988) <https://deka.in.th/view-82585.html>
99 Thai Supreme Court case no. 1732/2503 ( DEKA.in.th 1970) <https://deka.in.th/view-48217.html>
In case no. 182/2521 which followed those judgments, the court ruled that parties to the arbitration agreement still have rights to file a lawsuit when defined disputes arisen.\footnote{Thai Supreme Court case no. 182/2521 (DEKA.in.th 1970) <https://deka.in.th/view-41044.html>}

However, with the first Thai arbitration act 1987, the Court has developed a new perspective on the arbitration. Under Thai arbitration act 2002, section 14 has required courts to enforce an arbitration agreement when there are specific circumstances. The act states that if a party to an arbitration agreement commences proceeding in court against the other party to the agreement without submitting the dispute to arbitration in accordance with the agreement, the party against whom the case is commenced may apply to the court to strike down the case. The application must be made no later than the date of filing the defense or within the period allowed by law for filing a defence. In practice, Thai courts are increasingly likely to uphold and enforce arbitration agreements and to dismiss litigation brought in breach of such an agreement.\footnote{Michael J. Moser JC, Asia Arbitration Handbook (Oxford University Press 2011)}

As can be seen in all of the Supreme Court cases, Thai courts have dealt with mostly in the scope of domestic arbitration agreement but in the case when the conflict of law happens on the validity issue of the international commercial arbitration agreement, it has not been reported yet. However, in determining on such issues, courts should consider the following important elements.

### 3.2.1 Extent of Judicial Review

The extent of judicial review of the arbitration agreement’s validity, or in other words the degree of review, is different in interpretation and the amount if review required. There are two different viewpoints on this issue. One believes that courts should have full review of the facts and circumstances, and the other one
believes that courts should have only power to verify the ‘prima facie’\textsuperscript{102} of the agreement.\textsuperscript{103}

For the first view, courts generally apply applicable contract rules governing most questions regarding the validity of arbitration agreements, including doctrines such as mistake, fraud, unconscionability, duress, and lack of capacity.\textsuperscript{104} The argument in favor of a complete review is that it is more likely to prevent a defective arbitration agreement rather than dragging on the wrong process and wasting effort, time and resources. The sample of courts having the full judicial review such as United States Courts in the case of \textit{Hall Street Associates, L.L.C. v. Mattel, Inc.}\textsuperscript{105} the court ruled that the scope of judicial review of arbitral awards is exclusively determined by the Federal Arbitration Act (the “FAA”).\textsuperscript{106}

In the latter view, courts would only verify the prima facie validity of the arbitration agreement without conducting a full examination. This view sees international arbitration as superior to national courts, leaving the jurisdiction to review the validity issue to the arbitral tribunals. For example, French courts are under Article 1458 of the Code of Civil Procedure which states that ‘[i]f a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State

\textsuperscript{102} [Latin, on the first appearance.] A fact presumed to be true unless it is disproved.


\textsuperscript{104} Born, GB, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (second edn, Kluwer Law International 2006)


court, it shall declare itself incompetent.107 The Full Court of the Federal Court of Australia adopts the ‘prima facie’ approach standard of review to applications of court proceedings brought in the face of an arbitration agreement.108 In the case of Hancock Prospecting Pty Ltd v. Rinehart [2017] FCAFC 170, the trial court found that claims that the deeds should be set aside because of the various alleged misconduct did not fall within the scope of the arbitration clauses, this judicial review is considered as a full approach. However, the Full Court held that a court entertaining a stay application was not mandated to hear and determine any proviso109 issues.110

For Thailand, section 10 of the Thai arbitration act 1987 stated that if any party to the arbitration agreement files a lawsuit against another party, the other party can file a motion before the date of hearing of evidence, or the date of decision to the court to dismiss the case. This provision had given power to the court to the extent of full review on the validity of the arbitration agreement.

Such an approach to judicial review can be seen in Supreme Court case no. 3712/2545. The plaintiff and defendant had an arbitration clause under Article 13 of the contract stating that ‘This agreement is to be interpreted and applied to the laws of Quebec, Canada and any dispute arising herefrom shall be for settlement by a single arbitrator, in accordance with articles 940 and following of the Civil Code of


109 A condition attached to an agreement.

110 Id.
So when the defendant had filed a motion to dismiss the case in order to arbitrate, the court determining the case under section 10 of the Arbitration Act seeking the grounds of nullity and voidness of the agreement and found that there were no grounds for rendering the arbitration agreement void or unenforceable, he dismissed the case under section 10 of the arbitration act.

The latest arbitration act 2002 section 14 has been updated from the section 10 version of the first act. It has the same purpose of dealing with the enforcement of an arbitration agreement but also includes more conditions which ariseduring the trial on the validity issue, the opposing party can commence the arbitration and the arbitral tribunals can continue to proceed with the arbitration.\textsuperscript{112}

3.2.2 Competence-Competence

The doctrine is frequently referred to by the German term \textit{kompetenz-kompetenz}, it states that the arbitrators are competent to determine their own competence. It means that the appointed arbitral tribunals are empowered to decide their own jurisdiction to hear and determine the dispute before them.\textsuperscript{113} (Besides, when one party asks the court to refer the dispute to the arbitration, rather than the competence-competence doctrine applied but also the extent of judicial review would come along, whether it is the full or prima-facie review.)

There are pros and cons for this doctrine, the opponent argues that, if the tribunals decide their own jurisdiction or on the validity of the arbitration agreement, it would be against the \textit{‘natural justice’} doctrine because they are the one who determines the validity of the agreement.

\begin{itemize}
\item \textsuperscript{111} Thai Supreme Court case no. 3712/2545 ( DEKA.in.th 1970) < https://deka.in.th/view-41044.html>
\item \textsuperscript{112} เสาวนีย์ อัศวโรจน์, คำอธิบายกฎหมายว่าด้วยวิธีการระงับข้อพิพาททางธุรกิจโดยการอนุญาโตตุลาการ (3 edn, สานักพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduay Kamrangabkorpipat Thangthurakij Doyaniyatotularkam (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))
\item \textsuperscript{113} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
\end{itemize}
who have the conflicts of interest. However, Professor Schmittoff argues against such remarks, because under the natural justice doctrine, a person who has conflicts of interest is not the same definition of this event.

For example, A and B are parties in a sale of goods contract, and they both agree to make A an arbitrator when any dispute arises between them. In such case, A is a person who has a conflict of interest because A is also a party who is involved in a dispute, unlike the arbitral tribunals, which are outsiders and are not involved in the dispute.

The solution for these debatable aspects of jurisdiction is the compromise of the two jurisdictions which is first let the arbitral tribunals decide on the validity issue and then have courts review the result when award was made whether the tribunals abused their own conferred power or not.

Such a compromised solution has been adopted in UNCITRAL model law as stated in Article 16(3), the arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

In addition, the supporting explanation for the principle of competence-competence is that when parties have agreed to arbitrate, the parties’ consent provides the underpinning for the power of the arbitrators to decide the

114 ธวัชชัย สุวรรณพานิช, คำอธิบายพระราชบัญญัติอนุญาตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) (Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakarn PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015))

dispute. Thus, it shall be assumed that the arbitrators can exercise their powers and decide their own jurisdiction, otherwise it would be too much complexity in the process. For example, A and B has appointed C as their arbitrator but also appoints D to decide on the validity of the arbitration agreement. Therefore, the power has shifted from C, the arbitrator to D, the one who decides the power of the arbitrator. This would add more work and confusion to the arbitral process.

The competence-competence doctrine is adopted differently in each country, some countries might regulate their own arbitration act without relying on the Model law but still have the doctrine underlined in their arbitration law. However, many countries including Thailand have adopted this method as well as Article 16(3) of the UNCITRAL model law.

Section 24 paragraph 1 of the Thai Arbitration Act 2002 clearly states both the doctrine and the model law that underneath the provision saying that the arbitral tribunal shall be competent to rule on its own jurisdiction, including the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal, and issues of dispute falling within the scope of its authority. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the main contract. A decision by the arbitral tribunal that the contract is null and void shall not affect the validity of the arbitration clause.\textsuperscript{116}

The jurisdiction in which its national arbitration law is not adopted from the model law, have the competence-competence concept in its provisions, such as English Arbitration Act 1996 that has been stipulated in section 30 – ‘Competence of tribunal to rule on its own jurisdiction’ in (1) which is;

\(1\) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,
(b) whether the tribunal is properly constituted, and

\textsuperscript{116} Thai Arbitration Act B.E.2545 (2002), translated by the Office of Arbitration, Thailand
(c) what matters have been submitted to arbitration in accordance with the arbitration agreement\textsuperscript{117}

3.3 Anti-Suit Injunctions

Anti-suit injunction is an effective device for locating the competent court when dealing with duplicative proceedings. An anti-suit injunction is an order from a court that has jurisdiction to prohibit the party from filing a claim in a foreign jurisdiction or not to proceed with a claim that has already been filed. When one party has raised the same disputing issues to arbitrate or litigate while such issues already are being arbitrated or litigated, the court within that jurisdiction may issue an order. Because generally by setting up obstacles to the arbitral procedures, it can be assumed that the party is working in bad faith by using judicial measures to try to stop the arbitration or to nullify arbitral clauses\textsuperscript{118}.

There is no known instance of a Thai court issuing an injunction to restrain a foreign court or arbitral proceeding, such an order might be possible in theory, subject to the court having jurisdiction over the parties, but in practice it is considered unlikely that a court would make such an order in most circumstances\textsuperscript{119}.

3.4 Interim Measures

An interim measure is a temporary relief granted by courts before the final award, to ensure that once the award is rendered, relief would still be possible\textsuperscript{120}.


\textsuperscript{118} Baptista LO, ‘Parallel Arbitrations-Waivers and Estoppel’ Dossiers of The ICC Institution of World Business Law

\textsuperscript{119} Michael J. Moser JC, Asia Arbitration Handbook (Oxford University Press 2011)

\textsuperscript{120} Artit Pinpak, ‘Anti-suit injunction in Arbitral proceeding’ 1 Assumption Law Journal
Because during the arbitral proceeding, there could be any problems that cause the award or even for the evidence to be damaged.\textsuperscript{121}

The interim measures such as an order to maintain or restore the status quo\textsuperscript{122} pending determination of the dispute, to take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself, to provide a means of preserving assets out of which a subsequent award may be satisfied and to preserve evidence that may be relevant and material to the resolution of the dispute.\textsuperscript{123} Additionally, according the amendment of Article 17 of UNCITRAL model law in 2006\textsuperscript{124}, it is possible for parties

\begin{itemize}
  \item[(a)] Maintain or restore the status quo pending determination of the dispute;
  \item[(b)] Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
  \item[(c)] Provide a means of preserving assets out of which a subsequent award may be satisfied; or
  \item[(d)] Preserve evidence that may be relevant and material to the resolution of the dispute.
\end{itemize}

\textsuperscript{121} Artit Pinpak, ‘Anti-suit injunction in Arbitral proceeding’ 1 Assumption Law Journal 167

\textsuperscript{122} \textbf{Status quo} generally refers to the existing state of affairs or circumstances. A \textit{status quo} order may be issued by a judge to prevent any of the parties involved in a dispute from taking any action until the matter can be resolved.

\textsuperscript{123} The definition of interim measures under UNCITRAL Model Law Article 17(2) 2006

\textsuperscript{124} \textbf{Article 17}. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

\begin{itemize}
  \item[(a)] Maintain or restore the status quo pending determination of the dispute;
  \item[(b)] Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
  \item[(c)] Provide a means of preserving assets out of which a subsequent award may be satisfied; or
  \item[(d)] Preserve evidence that may be relevant and material to the resolution of the dispute.
\end{itemize}
to agree upon the arbitration agreement to expressly grant the arbitral tribunal power to award interim or conservatory measures according.\textsuperscript{125}

Because interim measures involve overlapping powers between national law and arbitral power, in order to compromise between them, the UNCITRAL model law has provided Article 17\textsuperscript{126} which deals with interim measures and preliminary orders.\textsuperscript{127} The main goal for this article is to protect the ability of a party to obtain the final award. The model law defines ‘preliminary order’ with just one difference from ‘interim measure’ which is that it can be obtained \textit{ex parte}\textsuperscript{128}- that is, the arbitral tribunal has heard from only one party. So it is unlike a regular interim measure that would be enforceable by a court, a preliminary order is binding on the parties, but is not an award and cannot be enforced by a court.

However, the UNCITRAL Model Law Article 17 has been amended in 2006\textsuperscript{129} and so countries have not adopted uniformly since they already have in place some version of the model law. Additionally, many countries whose arbitration laws are not based on the model law often take diverse approaches to interims measures.\textsuperscript{130} Thus, it is challenging for parties to obtain interim measures in international arbitration, since it depends on the jurisdiction and national laws.


\textsuperscript{126} See Id. Para.26

\textsuperscript{127} Tucker LA, ‘Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty’ 1 Arbitration Brief 16

\textsuperscript{128} Id.

\textsuperscript{129} ธวัชชัย สุวรรณพานิช, คำอธิบายพระราชบัญญัติอนุญาตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) (Thawatchai Suvanpanich, \textit{Khamathibai Phrarajabunyut Anuyatotulakarn PorSor 2545 (Concise Arbitration Act B.E.2545}) (1 edn, Nititham 2015))

\textsuperscript{130} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
Section 16 of Thai Arbitration Act 2545 states that-

“A party to an arbitration agreement may file a motion requesting the competent court to issue an order imposing provisional measures to protect his interest before or during the arbitral proceedings. If the court views that such proceedings had been conducted in court, the court would have been able to issue such order, the court may proceed as requested. The provisions governing provisional measures under the Civil Procedure Code shall apply mutatis mutandis.\(^\text{131}\)"

Where the court issues an order at the party’s request pursuant to paragraph one, if the party filing the motion fails to carry out the arbitral proceedings within thirty days from the date of the court’s order or within the period prescribed by the court, that order shall be deemed cancelled upon the expiration of such period of time.\(^\text{132}\)"

Thai law has adopted Article 9 of UNCITRAL model law\(^\text{133}\) for interim measures which states that the power to grant interim measures belongs to courts. The most significant effect of this section is that a party can ask the court before or during the arbitral process for such an order. And for the court to consider whether to grant an order or not depending on the normal court procedure, if it can be done as this matter is bought to the court then it shall be done in the same way.

\(^{131}\) The necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered, when necessary, as to names, offices, and the like.

\(^{132}\) Thai Arbitration Act B.E.2545 (2002), translated by the Office of Arbitration, Thailand

\(^{133}\) Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.
Some could argue that if this request of an interim measure considered to be the case that the party has waived his own right to arbitrate. For such case, under Article 9 of the model law has clearly stated that it is not assumed to be incompatible with an arbitration agreement for a party to request. Thus, the request under section 16 is not to be considered as incompatible with an arbitration agreement as well.

Furthermore, Thai arbitration act also provides the permission for the party to appeal the interim measure to Supreme Court or Supreme Administrative Court, as the case may be, under section 45(5). On the other hand, the Act is silent on whether the court can order interim relief in aid of foreign arbitration. There are no known instances of such applications being made. In practice, Thai court would be willing to grant such measures (except, perhaps, in relation to property situated in Thailand.)

3.5 Court Assistance in Obtaining Evidence

The amendment of article 17 of the UNCITRAL model law only provides an interim measure or preliminary order and its definition. Although this definition can

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134 Section 45 No appeals shall lie against the order or judgment of the court under this Act unless:
(1) The recognition or enforcement of the award is contrary to public policy;
(2) The order or judgment is contrary to the provisions of law concerning public policy;
(3) The order or judgment is not in accordance with the arbitral award;
(4) The judge who sat in the case gave a dissenting opinion
(5) The order is an order concerning provisional order measures for protection under Section 16.

The appeal against the court’s order or judgment under this Act shall be filed with the Supreme Court or the Supreme Administrative Court, as the case may be.

seem vague, one definite meaning of its term would be to ‘preserve the evidence’. On the other hand, the act of ‘taking the evidence’ is not in the frame of definition in article 17. ‘Taking the evidence’ involves a procedure order about evidence needed for the arbitration hearings.

The model law stated in article 27 provides that ‘[T]he arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Normally, in arbitral procedure, when a tribunal orders a party to produce its evidence, generally a party would give it to a tribunal in order to prove that it has nothing to hide. Thus, compliance is usually the first step, then to resort to the court to enforce such an order which does not occur often.

From a practical standpoint, court assistance would come into play when documents and witnesses are under the control of a third party and such party is not subject to the arbitration agreement.136

In the Thai arbitration act, court assistance in obtaining evidence has been stated in section 33 - ‘the arbitral tribunal, an arbitrator or a party may, with the consent of the majority of the arbitral tribunal, request from a competent court to issue a subpoena or an order for submission of any documents or materials.

If the court is of the opinion that such proceedings could have been carried out by the court if a legal action were brought, it shall proceed in accordance with the motion, provided that the provisions of the Civil Procedure Code in the part relating to such proceedings shall apply mutatis mutandis.137


137 Id.
3.6 Recognition and Enforcement of An Arbitration Award

Even though an arbitration award is normally final and binding, sometimes a losing party does not comply with the decision, and a prevailing party cannot compel an opposing party by itself. Such enforcement is beyond the arbitral tribunal’s power because the power belongs to the State.\(^{138}\)

In the past, there was the so-called double exequatur problem, since awards were enforceable only in the state where the award was made and leave for enforcement in any other state was needed.\(^{139}\) The International Chamber of Commerce (ICC) suggested that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards\(^{140}\) should ensure enforceability of arbitration awards internationally.\(^{141}\)

Thailand is a signatory of the New York Convention so Thai courts have to recognize and enforce international arbitral awards rendered in other contracting states. Additionally, it is stipulated in section 42 paragraph 1 that ‘Subject to Section 42, Section 43 and Section 44, an arbitral award, irrespective of the country in which it was made, shall be recognized as binding on the parties, and upon petition to the competent court, shall be enforced.’\(^{142}\)

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\(^{138}\) เสาวนีย์ อัศวโรจน์, คำอธิบายกฎหมายว่าด้วยวิธีการระจับข้อพิพาทด้วยฎีกาธนธุรกิจโดยการอนุญาตโดยศาล (3 edn, สัมพันธ์พิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduay Kamrangabkorpipat Thangthurakij Doyaniyatutularkam (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))

\(^{139}\) Concise International Arbitration (Kluwer Law International 2010)

\(^{140}\) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958

\(^{141}\) See id at para.41

\(^{142}\) Thai Arbitration Act B.E.2545 (2002), translated by the Office of Arbitration, Thailand
However, Thai law also provides some conditions for the foreign award to be enforced which stated in section 42 paragraph 2 – ‘In case where an arbitral award was made in a foreign country, the award shall be enforced by the competent court only if it is subject to an international convention, treaty, or agreement to which Thailand is a party. Such award shall be applicable only to the extent that Thailand accedes to be bound.’

From this section, only the foreign award that rendered in contracting states of the convention, treaty, or international agreement which Thailand is also a contracting state, is recognizable and enforceable in Thailand. Other states that are none of the above, Thai court would only be bound to the extent applicable under Thai law and international law.143

3.7 Conclusion

Court assistance in arbitration has been seen as filling gaps in arbitration’s power.144 The role of national courts through various forms of support in arbitration is very important. The issues when the judicial assistance from courts is needed always dealing with the arbitral procedure, because of the fact that courts have coercive powers145 while arbitrators do not. This can be seen as a benefit, but in some aspects

143 เศาณี อาทิไพร, คำอธิบายกฎหมายว่าด้วยวิธีการระงับช้อพิพาททางธุรกิจโดยการอนุญาโตตุลาการ (3 edn, สํานักพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2554) (Saowanee Asawaroj, Kham Athibai Kodmai Waduay Kamrangabkorpipat Thangthurakij Doyaniyatotularkarn (Dispute Resolution Methods: Arbitration) (3 edn, Thammasat University Press 2011))
145 Coercive power is the ability to influence someone’s decision making by taking something away as punishment or threatening punishment if the person does not follow instructions.
it can be considered as threats to those of arbitration practitioners who want to free international arbitration from its links with a national legal system.\textsuperscript{146}

However, in this modern international arbitration era, national judges are no longer viewed as competitors, but as promoters of arbitration who ensure the integrity of the arbitral process by exercising their powers within the scope of the applicable arbitration law.\textsuperscript{147} There are many aspects from the judicial assistance from national courts. From the beginning of the arbitral proceedings involving with the validity of arbitration issues, until the end when the arbitral award is enforced, there are many times when court assistance is necessary.

Judicial assistance is needed from the first step of commencing the arbitration agreement, throughout the arbitral procedure, such as in anti-suit injunction, interim measure and the court assistance in obtaining evidences are required in some cases, until the last stage, in which the recognition and enforcement of the award, is when judicial assistance is needed the most.

In theory, the coordination between arbitration and court proceeding of the authority to exercise control over the validity of the arbitration agreement is governed by the principle of “competence-competence” to the extent that it is compatible with the New York Convention, article II(3).\textsuperscript{148}

The Thai Arbitration Act 2002 has adopted the Model Law’s core concepts and Thailand is a signor to many international conventions. The extent of judicial review on the validity of the arbitration agreement under the Act can be considered

\textsuperscript{146} Jean-Francis Poudet & Sebastien Besson, \textit{Comparative Law of International Arbitration} (2002)

\textsuperscript{147} Schaefer JK, ‘Court Assistance in Arbitration-Some Observations on the Critical Stand-by Function of the Courts’ 43 Pepperdine Law Review 523

\textsuperscript{148} ธวัชชัย สุวรรณพานิช, คําอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) (Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakam PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015))
as a full review but the issue of a choice of foreign law, there is still no guidance since there is no Supreme Court cases have been reported.

As a consequence, lawmakers are playing significant roles in trying to make Thailand attractive arbitration venues, in addition to judicial assistance. The amendment of the Thai Arbitration act has allowed courts to take parts in arbitral procedural more efficiently and internationally. In order to take further steps to make Thailand more arbitration-friendly environment, judicial assistance from courts needs to be flexible in order to provide helpful support to promote international commercial arbitration in Thailand.
CHAPTER 4

APPLICABLE LAW UNDER SECTION 14 OF THE THAI ARBITRATION ACT B.E 2545

4.1 Introduction

The \textit{lex arbitri} or the law governing the arbitration, in Thailand is the Arbitration Act B.E. 2545 (2002) which is applied to both domestic and international arbitration cases and awards. The Act is substantially based on the UNCITRAL Model Law 1985. It is considered to be a modern and practical arbitration statute. The overview of the Act consists of 48 sections as follows:\textsuperscript{149}

- Introductory Matters (section 1-10);
- Chapter 1: Arbitration Agreement (section 11-16);
- Chapter 2: Arbitral Tribunal (section 17-23);
- Chapter 3: Jurisdiction of Arbitral Tribunal (section 24);
- Chapter 5: Award and Termination of Proceedings (section 34-39);
- Chapter 6: Challenge to Award (section 40);
- Chapter 7: Recognition and Enforcement of Awards (section 41-45);
- Chapter 8: Fees, Expenses and Remuneration (section 46-47);
- Transitional Provisions (section 48)\textsuperscript{150}

The relevant provisions of the Act concerned with the issues of which law is applicable in arbitration agreement, only require that the arbitral tribunal decide disputes in accordance with the governing law chosen by the parties.\textsuperscript{151}

For domestic arbitration cases, Thai laws clearly apply. However, for international arbitration cases when the arbitral clause specifies, that a foreign law

\textsuperscript{149} Michael J. Moser JC, \textit{Asia Arbitration Handbook} (Oxford University Press 2011)

\textsuperscript{150} Id.

\textsuperscript{151} Thai Arbitration Act section 34
shall be the governing law of the contract, the question arises whether the foreign law would be upheld, or should be the applicable law to the arbitration agreement.

4.2 Applicable Law and Rules

Parties have freedom in choosing which law governs the arbitration agreement. Interpreting layers of laws and rules is more complicated when it comes to international arbitration where more than one nation is involved. The complexity depends on the particular factors, such as when contractual or procedural issues have arisen, certain technical words or tasks involved, needed experts, etc.

Various laws and their application to international arbitration is the ongoing debate among the arbitration practitioners and academics. Even if parties have specified their choice-of-law clauses pertaining to procedural issues in the arbitration contract, other issues, such as enforceability in national court proceedings, may arise. Procedural issues may be bound up with questions of judicial administration, as to which local public policy will require application of a forum’s law.

Application of foreign law will often be regarded as impracticable, e.g. pleading requirements. More than just foreign national laws can be specified in an arbitration agreement, many other kinds of law and rules may be applied, such as the merchant law, arbitration institutions’ rules etc. When courts consider which applicable law and rule is most suitable, there are some principles that should be taken into account.

4.2.1 Delocalization v. Territoriality

4.2.1.1 Arguments Favoring Delocalization

Delocalization is also referred to as stateless, floating, or a-national arbitration. The theory is that national law should not intervene in the seat of

the arbitration, in international arbitration.\textsuperscript{153} Normally, the seat of arbitration is a country that is considered to be neutral for both parties. Therefore, the local law and court system in such country should not intervene, even with its own citizens. The supporters of this theory view this concept as a self-regulating method.\textsuperscript{154}

There are four characteristics of this theory towards the international arbitration which are;

1. It shall not be the procedural rules of the place of arbitration,
2. It shall not be the procedural rules of any specific national law,
3. It shall not be from the substantive law of the place of arbitration and
4. It shall not be the national substantive law of any specific jurisdiction.\textsuperscript{155}

Because the laws and rules shall rely on the written contractual agreement, and the agreed arbitral clause, it is a general principle of commercial obligations law that applicable procedural and substantive approaches common to the legal systems to which the transaction is connected.

4.2.1.1 Arguments Opposing Delocalization

The counterargument to delocalization is that every arbitration takes place in a specific territory, and must conform to the laws – at a minimum, to the mandatory laws.\textsuperscript{156} States also want to exercise a supervisory function to ensure that the private system of dispute resolution in their territory is conducted

\textsuperscript{153} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)

\textsuperscript{154} Janićijević D, ‘DELOCALIZATION IN INTERNATIONAL COMMERCIAL ARBITRATION’ 3 FACTA UNIVERSITATIS 63

\textsuperscript{155} Id.

\textsuperscript{156} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
in justice and fairness.\textsuperscript{157} It is similar to the ‘\textit{Jurisdiction theory}’ in which states have powers to control anything under its own territory and its court is the only institution that can interpret laws, and the private sector can do that only when states have given the power to do so.\textsuperscript{158}

\subsection*{4.2.2 Lex Mercatoria}

\textit{Lex Mercatoria} literally means ‘merchant law’- a loosely organized system of transnational legal principles, rules, and standards derived from the usages, customs, and practices of international commerce.\textsuperscript{159} However, the definition of lex mercatoria has been described differently, and is not uniformly agreed on. There is the definition that includes ‘...\textit{a set of substantive rules that come not only from international commercial dealings, standards clauses, international conventions and arbitral awards but also from various sets of legal rules issued by the ICC or other international organizations}.’\textsuperscript{160} Many practitioners and academics have criticized the lex mercatoria as vague and uncertain to apply.\textsuperscript{161} On the contrary its support in international arbitration has increased steadily.

Lex Mercatoria is not law as such, because it is not adopted as law by any jurisdiction. But if the parties agreed that their contract is governed by general principles of law and the lex mercatoria then it would come into play.

\begin{itemize}
\item \textsuperscript{157} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
\item \textsuperscript{158} ธวัชชัย สุวรรณพานิช, คําอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) (Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakarn PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015))
\item \textsuperscript{159} L, Yves Fortier, The New, New Lex Mercatoria, or, Back to the Future, 17 Arb. Int. 121, 128 (2001)
\item \textsuperscript{160} Dr. Beda Worthman, \textit{Choice of law by Arbitrators: The Applicable Conflict of Laws System}, 1998
\item \textsuperscript{161} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
\end{itemize}
4.2.3 Parties’ Choice of Law

The *lex arbitri*,\(^{162}\) which governs the arbitral proceedings, is always the law of the place of arbitration.\(^{163}\) When parties have agreed upon the seat of arbitration, the procedural law of that country would normally govern the arbitral procedure. However, there is a thin line between the procedural and substantive law and they are not viewed the same way in all countries. Additionally, States have not adopted the UNCITRAL model law uniformly, even though the major elements are the same. Basically, parties can agree on how the proceedings will be held.

The *lex arbitri* is at default when parties have chosen the seat of arbitration. But if parties have chosen arbitration rules either from an ad hoc arbitration or an institutional arbitration, then the procedural rules that would be applied in that case would supersede the *lex arbitri*.\(^{164}\)

4.3 Determining an Applicable Law on the Validity of the Arbitration Agreement

**Issue under the New York Convention and Thai Arbitration Act**

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is arguably the most successful such instrument. Not only is it used in private dispute resolutions, but also in the area of private and commercial law, in general.\(^{165}\) The Convention has drawn the scope of application by adopting a ‘territorial criterion’, it applies when the arbitral award rendered in a state other than the state where recognition and enforcement are sought.

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\(^{162}\) *The lex loci arbitri* is the Latin term for “law of the place where arbitration is to take place” in the conflict of laws. laws are applied.


\(^{164}\) Id.

\(^{165}\) *Concise International Arbitration* (Mistelis LA ed, Kluwer Law International 2010)
The Convention, despite its success as a fundamental role in making arbitration the most popular means of dispute resolution in international trade, is not a perfect tool. Some aspects of the Convention have indeed been the objects of controversial debate that does not seem to subside.\textsuperscript{166} There are three areas that the Convention does not cover or harmonize but leaves to domestic legislation, 1) public policy 2) arbitrability\textsuperscript{167} and 3) procedure relating to recognition and enforcement of awards.\textsuperscript{168} In considering the law applicable to the arbitration agreement it is necessary to distinguish between the various aspects of its existence and validity.\textsuperscript{169} Several provisions of the New York Convention address directly or indirectly the issue of arbitrability. However, the Convention is silent on the issue of conflict of laws on the validity of the arbitration agreement.

4.3.1 Article II(3) and V(1)(a) of the New York Convention

The New York Convention states the most significant conditions regarding the validity of the arbitration agreement two articles: Article II(3) – where an arbitration agreement commenced, and Article V(1)(a)– where foreign arbitral awards are to be enforced.

Article II(3) states that ‘...The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.’

\textsuperscript{166} Loukas A. Mistelis SLB, \textit{Arbitrability International & Comparative Perspectives} (Kluwer Law International 2009)

\textsuperscript{167} What matters are capable of settlement by arbitration

\textsuperscript{168} \textit{Concise International Arbitration} (Mistelis LA ed, Kluwer Law International 2010)

The Article allows national courts of Contracting States to deny the stay of court proceedings in the presence of an arbitration agreement where the validity of such an agreement is affected, but does not provide which law shall be applied to the validity issue.\textsuperscript{170}

The validity issue includes whether there are any grounds for nullity, voidness, inoperability, or incapable of being performed by the contract. Since an arbitration agreement involves different nations, if a court where the party submits his case to litigation is in country A, and the agreed upon seat of the arbitration is in country B, which country’s law is the most appropriate to apply?

However, Article V(1)(a) provides that ‘...recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The parties to the agreement referred to in \textit{article II} were, under the law applicable to them, under some incapacity, or the said agreement is not valid under \textit{the law to which the parties have subjected it} or, failing any indication thereon, under \textit{the law of the country where the award was made}...’

Under Article V(1)(a), recognition and enforcement of the award may be refused by the enforcing court (the competent authority) if one of the grounds in the article is alleged and proven by the resisting party.\textsuperscript{171}

Although both articles have mentioned the validity of the arbitration agreement issue but there are some significant differences between them. While Article II(3) deals with the first step, or the step of recognizing the arbitration agreement, Article V(1)(a) deals with the last step, or the step of recognizing the award. Furthermore, while Article II(3) is silent on the applicable law to determine the validity of the arbitration agreement, Article V(1)(a) provides that the applicable law is \textit{the law to}
which the parties have subjected it or the law of the country where the award was made.

Consider these two articles in a scenario, when one party to an arbitration submits his case to court proceedings in country A, the court in country A decides that such arbitration clause is invalid and proceeds with the litigation. After the award is rendered, the prevailing party brings the case to the enforcing court in country B. The compelled party might raise an argument that such award cannot be enforced, since it was not made under the applicable law of Country C, which the parties had agreed upon in the arbitration agreement. The court in Country B might find that there are grounds for nullity, and set aside the award. This scenario could occur, if the first stage of arbitration was not under the correct applicable law.

Thus, it is suitable to apply Article V(1)(a) mutatis mutandis to the validity issue at the arbitration commencement stage, because to have an award set aside, annulled, or enforced at the post-award stage, the court would have to make validity determination again. If the court decides that the award cannot be enforced because it was not valid under the applicable law, a great amount of expense and time will have been lost.

4.3.2 Section 14 of the Thai Arbitration Act B.E 2545

Section 14 states that ‘In case where any party to the arbitration agreement commences any legal proceedings in court against the other party thereto in respect of any dispute which is the subject of the arbitration agreement, the party against whom the legal proceedings are commenced may file with the competent court, no later than the date of filing the statement of defense or within the period for filing the statement of defense in accordance with the law, a motion requesting the court to issue an order striking the case, so that the parties may proceed with the arbitral proceedings. Upon the court having completed the inquiry and found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform, the court shall issue an order striking the case.”

172 Translated by Office of Arbitration, Thailand
Thai arbitration act is based on a ‘single act’ doctrine which means that domestic and international arbitration are considered to have the same elements under the arbitration law.\textsuperscript{173} Thus, section 14 is applied in both domestic and international arbitration cases. In domestic arbitration cases, when the parties have agreed that Thailand is the seat of the arbitration, or the governing law, it is no problem for courts to apply section 14 on the validity of the arbitration agreement issue.

Nevertheless, if the arbitration clause provides that the seat of arbitration is in a country other than Thailand, such as England, when one party later brings a case to litigation under section 14, should the applicable law on the validity issue be Thai law or English law? Section 14 is silent on this issue.\textsuperscript{174}

4.4 Judicial Interpretation of the Applicable Law of Validity of International Arbitration Agreement

When parties have not agreed on the arbitration, the question of the arbitration agreement’s validity is critical.\textsuperscript{175} Many states are pro-arbitration jurisdictions, which determine that, when there is a conflict between parties when one party has commenced litigation, but an explicit arbitration agreement exists, the courts usually refer the parties to arbitration.

\begin{itemize}
  \item \textsuperscript{173} In some countries such as Singapore, there are two different arbitration law for two categories of arbitrations, which one for domestic arbitration and another one for international arbitration.
  \item \textsuperscript{174} ธวัชชัย สุวรรณพานิช, คําอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) (Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakarn PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015))
  \item \textsuperscript{175} Moses ML, \textit{The Principles and Practice of International Commercial Arbitration} (Cambridge University Press 2012)
\end{itemize}
States, such as the People’s Republic of China where its arbitration law does not recognize the doctrine of competence-competence. Under Article 20 of the PRC Arbitration Law, the primary authorities with power to decide the validity of an arbitration agreement, and hence the jurisdiction of the arbitral tribunal, are the Chinese arbitration commissions and the People’s Courts. Thus, in this case judicial interpretation is crucial to the issue of validity of the arbitration agreement. However, under Article 145 of the PRC General Principles of Civil Law (PRC Civil Law) and Article 126 of the PRC Contract Law, parties to a foreign-related contract are permitted to choose the substantive law governing the contract subject to certain statutory exceptions. Foreign-related contracts that are subject to PRC law are Sino-foreign equity joint venture contracts, Sino-foreign cooperative joint venture contracts, and Sino-foreign contracts for joint exploration of natural sources. Although Chinese courts are generally supportive of arbitration, outcomes may vary due to mandatory rules that limit the scope of international commercial arbitration agreements.

The competence-competence doctrine has been embodied into Article 16 of the Hong Kong Arbitration Ordinance 2006. It states that the arbitral tribunal is

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176 Adopted at the Ninth Meeting of the Standing Committee of the Eighth National People’s Congress on August 31, 1994, promulgated by Order No.31 of the President of the People’s Republic of China on August 31, 1994, and effective as of September 1, 1995

177 It means that the appointed arbitral tribunals are empowered to decide their own jurisdiction to hear and determine the dispute before them


179 Id.

180 In November 2010, Hong Kong passed its long awaited new Arbitration Ordinance (c 609) (Arbitration Ordinance). The Ordinance takes into account the 2006 amendments to the Model Law and, significantly, largely abolishes the previous distinction between international and domestic arbitrations, and applies to both kinds of arbitration
authorized to rule on its own jurisdiction, including on the existence or validity of the arbitration agreement.\textsuperscript{181} Hong Kong enjoys a high degree of autonomy from mainland China, except in areas relating to foreign affairs and defense. Given the country’s status as a leading regional arbitration venue, it is unsurprising that most Hong Kong-related disputes are arbitrated in Hong Kong itself.\textsuperscript{182} So the courts’ perspective is much different from others jurisdictions.

Thus, national arbitration laws and judicial interpretation can vary widely between jurisdictions. As a consequence, national arbitration laws and judicial interpretation are equally significant, because they can turn an entire case upside down, including who is going to lose or win the case.

4.4.1 Judicial Interpretation in Foreign Courts

There are different approaches to determining the law applicable to the validity of the arbitration agreement issue.

4.4.1.1 Courts Apply Article V of the New York Convention

\textit{mutatis mutandis}

Article V of the New York Convention applies when the court is using the \textit{lex arbitri}, or the law of the place of arbitration, as the applicable law on the issue of the validity of the arbitration contract.

In Japanese Supreme Court decision 1994, \textit{Japan Education v. Kenneth J. Feld},\textsuperscript{183} the issue was whether the president of a company was bound by an arbitration agreement entered by his company. The court found in the parties’ explicit agreement on the place of arbitration an implicit agreement on the law applicable to the arbitration agreement for the purpose of determining the subjective

\textsuperscript{181} Michael J. Moser JC, \textit{Asia Arbitration Handbook} (Oxford University Press 2011)

\textsuperscript{182} Id.

\textsuperscript{183} Japan Education Co. v. Kenneth J.Feld, 1499 Hanrei jiho 68 (Tokyo High Ct., May 30, 1994)
scope of the arbitration agreement in question.\textsuperscript{184} The court applied New York law, which had been chosen by the parties as the governing law, to the interpretation of the arbitration agreement.\textsuperscript{185}

The German Supreme Court came to a similar conclusion, in German (F.R.) manufacturer v. Dutch distributor (1973). A German company and a Dutch company concluded a contract containing a clause calling for the resolution of disputes that could not be amicably settled by an arbitral tribunal of the German-Dutch Chamber of Commerce. The court ruled that parties have the freedom to choose the law applicable to the arbitration agreement and, absent any indication of applicable law by the Parties, the \textit{law of the country in which the award "will be made"} applies.\textsuperscript{186} However, in the event, where the choice of law is not described in an arbitration agreement, the law that governs the arbitration agreement and the seat of arbitration, can cause an arguable dispute, yet, this is very rare case to happen.\textsuperscript{187} This approach to judicial interpretation is considered to be consistent with the parties’ intentions on an arbitration agreement, avoids unnecessary disputes occurred in the enforcement stage, and promotes and supports the international arbitration.

\textbf{4.4.1.2 Courts Apply Domestic Law}

Another approach to judicial interpretation is demonstrated in a US court’s decision in \textit{Rhone Mediterranee v. Achille Lauro} 1983, Rhone and the defendants raised the issue of which choice of law should be used under Article V of the New York and Article II. The defendants urged that in the absence of a specific

\textsuperscript{184} Arbitration in Asia (Moser MJ ed, 2nd edn, 2017)
\textsuperscript{186} 8 U 129/72 1958 New York Convention Guide (Germany, Oberlandesgericht Karlsruhe (Higher Regional Court of Karlsruhe)
\textsuperscript{187} ธวัชชัย สุวรรณพานิช, คำอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) (Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakarn PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015))
reference, Article II should be read so as to permit the forum, when asked to refer a dispute to arbitration, to apply its own law respecting validity of the arbitration clause.\(^{188}\)

However, the court ruled that ‘...under Convention on Recognition and Enforcement of Foreign Arbitral Awards, agreement to arbitrate is “null and void” only when it is subject to internationally recognized defense such as duress, mistake, fraud or waiver, or when it contravenes fundamental policies of forum state; “null and void” language must be read narrowly, for signatory nations have jointly declared general policy of enforceability of agreements to arbitrate.’\(^{189}\)

And the court also stated that US law was applied to the validity of the arbitration agreement issues because US court is the court of competent jurisdiction to enforce the arbitration agreement.\(^{190}\) Since no federal law imposes an odd number of arbitrators rule--the only defect relied upon by Rhone--the district court did not err in staying the suit for breach of the time charter agreement pending arbitration. Moreover since the duty to provide a seaworthy vessel and to operate it non-negligently arises out of the charter relationship, it was proper to stay the entire case.\(^{191}\)


\(^{189}\) Rhone Mediterranee Compagnia Fratnese Di Assicurazioni E Riassicurazioni v. Lauro, 712 F.2d 50 (3d Cir. 1983)

\(^{190}\) ธวัชชัย สุวรรณพานิช, คำอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2015) (Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakarn PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015))

The problem with this judicial interpretation is that the court’s decision on the validity issues is considered to be in conflict with the court’s decision at the award enforcement stage, and it is considered to be contradictory to the parties’ intention, as well as the arbitration agreement.\(^\text{192}\)

### 4.4.2. Thai Courts’ Interpretation

Unfortunately, there are no Thai court decisions as to the applicable law on the validity of an international arbitration agreement.\(^\text{193}\) But generally, when the validity of the arbitration agreement issue arises, the court has used section 14 of the Arbitration Act 2002.

In Supreme Court decision no.1874/2549,\(^\text{194}\) in sales representative contract included arbitration clause, when plaintiff raised disputes to court proceeding, defendant had a right to file a motion against plaintiff’s statement to court, within the time period permitted by law, the court dismissed the case under section 14 of the Arbitration Act.

The issue of an international arbitration agreement’s validity was addressed in Supreme judgment no.3368/2552.\(^\text{195}\) The plaintiff and defendant had mutually agreed that the law governing the arbitration agreement should be Singaporean Arbitration Law. Because the agreement had been mutual, the arbitration agreement was not considered to be invalid.

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\(^{192}\) ธวัชชัย สุวรรณพานิช, คําอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิติธรรม 2558) Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakam PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015)

\(^{193}\) ธวัชชัย สุวรรณพานิช ‘กฎหมายที่ใช้บังคับแก่สัญญาอนุญาโตตุลาการตาม พ.ร.บ.อนุญาโตตุลาการ พ.ศ.2545 มาตรา 14’ 17 วารสารกฎหมาย คณะนิติศาสตร์ มหาวิทยาลัยอุบลราชธานี (Thawatchai Suvanpanich, ‘Law Applied to the Arbitration Agreement under the Thai Arbitration Act B.E.2545’ 17 Ubon Ratchathani University Law Journal 83)

\(^{194}\) Thai Supreme Court Case No. 1874/2549 ( DEKA.in.th 2007) <https://deka.in.th/view-267756html>

\(^{195}\) Thai Supreme Court Case No. 3368/2552 ( DEKA.in.th 2011) <https://deka.in.th/view-502744html>
agreement was not considered to be an unfair contract term, the arbitration clause was deemed valid under section, and the court dismissed the case.\textsuperscript{196}

In this particular case, neither of the parties argued about the validity of the arbitration agreement. The Thai Arbitration Act was considered appropriate since the party had bought the case to Thai court, and the application of foreign law was irrelevant.

Thai courts normally refer parties to arbitrate when there is an explicit arbitration agreement under section 14 of the Arbitration Act. On the other hand, issues on the applicable law of an international arbitration agreement, when more than one national law is involved, is still debatable.

In theory, courts must dismiss cases and order arbitration, when one party to an arbitration agreement commences proceedings in court, and the opposing party files a motion to dismiss and arbitrate.

In general, where courts must consider whether such an arbitration agreement is valid or not, they schedule evidentiary hearings to review relevant witness evidence, and to receive the parties’ submissions. In international arbitration cases, foreign laws are typically proved in courts with testimony by an expert witness with appropriate legal qualifications.\textsuperscript{197} Section 8 of the Thai Conflict of Law Act B.E.2481 (1938) provides that where an applicable foreign law is not proved to the satisfaction of the court, the domestic law of Thailand shall be applied to the international arbitration. This is also subject to section 5 of the Conflicts of Laws Act, which provides that where a foreign law is applied, it shall only be applied insofar as it is not contrary to public order and the good morals of the people.\textsuperscript{198} It is likely that these applicable

\textsuperscript{196} ธวัชชัย สุวรรณพานิช, คำอธิบายพระราชบัญญัติอนุญาโตตุลาการ พ.ศ. 2545 (1 edn, นิทิธรรม 2558) Thawatchai Suvanpanich, Khamathibai Phrarajabunyut Anuyatotulakam PorSor 2545 (Concise Arbitration Act B.E.2545) (1 edn, Nititham 2015)
\textsuperscript{197} CPC section 34
\textsuperscript{198} Michael J. Moser JC, Asia Arbitration Handbook (Oxford University Press 2011)
laws would be applied in the context of an international arbitration agreement in Thai courts.199

4.5 Judicial Assistance to Promote the International Commercial Arbitration

Law makers are not the only ones promoting international commercial arbitration. National courts also play an essential role. Some countries have substantive rules on how to approach the validity of an international arbitration, and this approach is considered to be a very effective tool in their domestic courts.

A "substantive rules" approach is when national arbitration laws are regulated for the purpose of promoting international arbitration, and there is explicit language specifying which law to apply to the validity of international arbitration agreements issue. Domestic courts can apply such rules in their jurisdiction without any conflict of laws issues arising. As a consequence, this judicial interpretation or assistance promotes the international commercial arbitration in the countries.

In some jurisdictions, such as Thailand, there is no "substantive rules" approach to this issue. However, the New York Convention, and international commercial arbitration doctrines, are in hand, to aid judicial assistance in promoting international arbitration.

4.5.1 Foreign Courts

There are many levels to the "substantive rules" approach in each jurisdiction, and some examples of approaches follow.

(1.) Sweden

Compared to many other countries, commercial disputes in Sweden are to a large extent settled through arbitration, in domestic, as well as

international, cases. The Swedish Arbitration Act follows the UNCITRAL Model Law and is perceived as a very modern and efficient piece of legislation.\textsuperscript{200}

The Swedish Arbitration Act of 1999 is applicable to both international and domestic arbitration but deals only with arbitral proceedings in Sweden.\textsuperscript{201} Section 48 of the Act provides “Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.

The first paragraph shall not apply to the issue of whether a party was authorized to enter into an arbitration agreement or was duly represented.”

The judgment of the Supreme Court of Sweden of 26 April 2016 in Case no. T 4816-12 clarifies how section 48 should apply in Clause 19 of its judgment, stating,

‘By the very nature of the matter, it is not always possible to maintain the same standard for the application of foreign law as for Swedish law. This task involves legal rules in another legal system. The foreign rules may be unclear, and there may be no court rulings to guide their interpretation. In some cases, it may be that there are no explicit rules for the issue to be ruled on. In situations of this kind, the court may, when the content of foreign law remains unknown, in practice sometimes need to proceed using as a point of departure an assumption that the foreign law corresponds to the Swedish law, in the absence of any special


\textsuperscript{201} \textit{Arbitration in Sweden} (ABA Section of International Law 2018)
circumstances suggesting otherwise’ and the court concluded that Italian law was applicable in this case.\textsuperscript{202}

This approach has a considerable advantage compared to the indirect rules contained in most other laws. It ensures that Swedish courts will apply the same criteria to determine the applicable law, irrespective of whether the question arises at either the pre- or post-award stage.\textsuperscript{203} This approach of Swedish law is similar to judicial interpretation under the New York Convention Articles II and V, which also apply the law where the award was made or where the proceedings have taken place or shall take place.

\textbf{(2.) Switzerland}

Switzerland is among the world’s most-preferred places for international commercial arbitration. It was highly rated as a seat of arbitration in the recently published report on Legal Instruments and Practices of Arbitration in the EU.\textsuperscript{204}

The Swiss Law on International Arbitration is set out in Chapter 12 of the Private International Law Act 1987 (PIL Act).\textsuperscript{205} The law contains a rare examples of a substantive rule on the validity of an arbitration agreement. This approach avoids the pitfalls of the conflict of laws analyzing the categorization of the

\textsuperscript{202} Marszalek J, \textit{When foreign law is to be applied by a Swedish court but the content of the foreign law remains unknown} (2016) <http://www.zacharias.se/en/procedural-law/foreign-law-applied-swedish-court-content-foreign-law-remains-unknown/>


\textsuperscript{204} Harold Frey XF-B, Martin Aebi, Lenz & Staehelin, \textit{Arbitration procedures and practice in Switzerland: overview} (Thomson Reuters 2016) <https://uk.practicallaw.thomsonreuters.com>

arbitration agreement and the traits of applicable national private international law rules.  

Article 178(2) of IPL provides “...Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.”

This Swiss rule goes beyond any of the traditional conflict of laws approaches in upholding the validity of an arbitration agreement. By this provision, when an arbitration agreement is invalid under the law chosen by the parties, Swiss courts will still enforce an agreement considered to be valid under Swiss law or the law governing the main contract. This judicial assistance is extremely pro-arbitration but it can cause an enforcement issue under the New York Convention since the invalidity of an arbitration agreement according to the law chosen by the parties can justify refusal of enforcement.  

(3.) France

France is another jurisdiction that is favorable to arbitration proceedings. Its substantive and procedural laws are pro-arbitration; its judiciary is accustomed to dealing with issues arising out of arbitrations at all stages of the arbitral proceedings. 

A “substantive rule” approach can be found in the French arbitration law. The law was codified in 2011. The main source of legislation on arbitration is Book IV of the Code of Civil Procedure. It was developed by the Court

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207 Id.

208 Portwood T, Arbitration in France (Financier Worldwide 2011)

<https://www.financierworldwide.com/arbitration-in-france/#.W1tIBNUzbIU>

209 French Arbitration Law 2011, embodied in Articles 1442 through 1527 of the French Code of Civil Procedure (CCP)
de Cassation\textsuperscript{210} in the Dalico\textsuperscript{211} decision in 1993. The dispute in this case arose out of a contract for the construction of a water supply between the Libyan municipal authority and a Danish contractor. The Danish contractor started arbitration proceedings but the Libyan respondent challenged whether the arbitration agreement was invalid under Libyan law. The Court of Appeals rejected the application finding that both parties abided by the arbitration agreement without determining which law was applicable to the arbitration agreement.\textsuperscript{212} The Court de Cassation affirmed that “…according to a substantive rule of international arbitration law the arbitration clause is legally independent from the main contract in which it is included or which refers to it and, provided that no mandatory provision of French law or international ordre public is affected from the main contract in which it is included or which refers to it and, provided that no mandatory provision of French law or international ordre public is affected, that its existence and its validity depends only on the common intention of the parties, without it being necessary to make reference to a national law.”\textsuperscript{213}

This approach has been followed by other French court decisions and used as a core concept to French Arbitration law. The Court viewed the issue of the validity of the international arbitration agreement, to be determined independently from any provisions of the national law.

\textsuperscript{210} The Court of Cassation (French: Cour de cassation) founded in 1804 is one of France’s courts of last resort having jurisdiction over all matters triable in the judicial stream with scope of certifying questions of law and review in determining miscarriages of justice.

\textsuperscript{211} French Cour de cassation, 20 December 1993, Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors, 121 Clunet 432 (1994)


\textsuperscript{213} Id.
French courts have a *delocalization* view on the arbitration agreement. In other word, courts view an international arbitration agreement as stateless and that is shall not be intervened by any national law of the place of arbitration. So the validity of an arbitration agreement is only concerned with the parties’ intentions to arbitrate. This is considered to be the most pro-arbitration point of view from judicial assistance.

4.5.2. Thai Courts

Thai courts do not have the "substantive rules" approach to resolving disputes over the conflict of laws determining the validity of the international commercial arbitration, because section 14 of the Thai arbitration Act is silent on this issue. Additionally, there is still no guidance from the Supreme Court on this issue.

Amending the Arbitration Act, in order to create the "substantive rules" approach to the validity issue, would probably benefit international arbitration in Thailand. However, despite the many advantages of the "substantive rules" approach to international arbitration, there are also some disadvantages. For example, under Swiss rules, either the Swiss rule or the law governing the main contract can be applied on the validity of an arbitration agreement. This can raise an argument during the award enforcement stage that the arbitration was invalid since it was not in accordance with the law chosen by the parties.

Since Thailand is a contracting state to the New York Convention, and the language and concept of law in section 14 was adopted from Article II of the Convention, it would be appropriate for Thai courts to apply the Convention on the validity issue. This would be involve less effort, time, and complication than amending the Arbitration Act.

Considering there is an attempt to project Thailand’s image as an arbitration-friendly jurisdiction, judicial assistance on this issue is significant in determining the validity issue. When courts have standards of practice on international arbitration agreements that are flexible and favorable to international arbitration, then the country would have explicit factors demonstrating itself as an arbitration-friendly jurisdiction.
country. To have such effective standards of practice, courts need to take the following factors into account:

(1.) Competence-competence doctrine

Section 11 of the Arbitration Act states that “Arbitration agreement means 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 may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”

The Act defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them.

Moreover, section 34 of the Act states that “The arbitral tribunal shall decide the dispute in accordance with the governing law chosen by the parties. Any designation of law or legal system of a country shall be construed, unless otherwise expressed, as directly referring to the substantive law of the country and not to its conflict of laws rules.

The Act requires tribunals to decide disputes in accordance with the governing law chosen by the parties. The parties’ intentions in an arbitration agreement underpins the arbitral tribunal’s power for the entirety of the arbitral proceedings. The tribunal’s power is linked to the principle of competence-competence. In instances where courts apply laws other than the chosen law, it would be considered to be an intervention contrary to the appointed arbitrators’ power.

214 Thai Arbitration Act B.E.2545 (2002), translated by the Office of Arbitration, Thailand
(2.) Court’s interpretation of Article II(3) and V(1)(a) in determining an applicable law that shall apply to the validity of an international arbitration agreement

The coordination between judicial assistance under section 14 of the Arbitration Act and the parties’ freewill in choosing the governing law of the arbitration agreement should be controlled by the principle of “competence-competence” to the extent that it is compatible with the New York Convention, Article II(3). In the same way, when courts determining the applicable law on the validity of the international arbitration agreement issue, Article V(1)(a) should apply mutatis mutandis to the issue.

4.6 Conclusion

The question of what law applies to determine the validity of the arbitration agreement is effectively related to the role and the interests that a state has in arbitration proceedings that take place within its territory.216

The New York Convention, as well as most national arbitration laws, contain no special provisions dealing with the law applicable to the various aspects of the international arbitration agreement. However, the Convention provides a rule regarding issues of annulment and enforcement, in cases where the lack of a valid arbitration agreement, generally constitutes a defense against an application to set aside or enforce an award under Article V(1)(a).217

On the other hand, the applicable law on the validity of an arbitration agreement is still debatable. Courts in various jurisdictions differ in many aspects. Due

216 Loukas A. Mistelis SLB, Arbtrability International & Comparative Perspectives (Kluwer Law International 2009)

to the fact that the New York Convention is silent on such issues, leaving each state’s
callmakers, courts, and practitioners, to determine and decide which theories and
doctrines are most suitable to the case.

Unlike Sweden, Switzerland, and France, whose national arbitration acts
provide methods of resolving the validity of the international arbitration agreements,
Thailand does not provide a solution, but only the obligation of the court to determine
the validity of the agreement.

In practice, the arbitration laws of many contracting states of the New York
Convention, such as Japan and Germany, do not provide explicit provisions on the
applicable law of the validity issues, and have used judicial interpretation as an
approach to the cases.

Thailand is also a signatory to the New York Convention, Article V should
be applied to the validity of the international agreement *mutatis mutandis*. In other
words, when there is a case that the seat of the arbitration, or the governing law of
the arbitration agreement, is in another country, the court should apply the law of the
seat of arbitration as the governing law on the validity of an arbitration agreement
under Article V(1)(a) of the New York Convention. This approach would be in
accordance with the parties’ intentions and the arbitration agreement, and would also
avoid arguable disputes that may arise during the award enforcement stage.

In one such scenario, a Thai court might decide that an agreement is invalid
under Thai law, and proceed with litigation until an award is made. However, later,
when the prevailing party seeks to enforce the award in countries where the
compelled parties’ assets are located, the compelled party might argue that the award
cannot be enforced, because the award was not made under the law of the arbitration
agreement. This would lead to many problems and waste time and resources.

Courts should apply the law which the parties chose to govern the
arbitration agreement, as an effective solution to determining the validity of the
arbitration agreement. There is also a strong argument in favor of applying the same
criteria at the pre-award stage\textsuperscript{218} because the application of different criteria at the pre-award stage could entail the danger of divergent decisions.\textsuperscript{219} Considering Article II(3) and Article V(1)(a) of the Model Law, the solution and benefits are as follows;

(1.) When parties have chosen a country’s law which shall govern the arbitration agreement, then that country’s law and public policy standards shall be applied to the validity issue, as well. On the other hand, if parties only chose the seat of the arbitration, then that country’s law and public policy shall apply \textit{mutatis mutandis}.\textsuperscript{220} The validity of the arbitration agreement should be primarily governed by the law chosen by the parties.\textsuperscript{221}

(2.) Applying the law according to the arbitration agreement, would be compatible with the parties’ intentions, and could avoid potential arguments at the arbitration award enforcement stage. Otherwise arguments could be raised that the arbitral proceedings were not in accordance with the arbitration agreement.

(3.) When this solution and practice becomes standard practice, this could ensure foreign investors that Thailand is an arbitration-friendly country. This could be one of the advantages to doing business in Thailand, and could attract foreign investment. Moreover, it would help to support the recent amendment to the Thai Arbitration Act, because the purpose of the new amendment is to set the standards of international arbitration in Thailand.

\textsuperscript{218} In favour of such an approach see e.g., Corte d’Appello Genoa, 3 February 1990, \textit{Della Sanara Kustvaart – Bevrachting & Overslagbedrijf BV v Fallimento Cap Giovanni Coppola srl}, XVII YBCA 542 (1992) 543.


\textsuperscript{220} Means that matters or things are generally the same, but to be altered, when necessary, as to names, offices, and the like.

\textsuperscript{221} \textit{No. XIV.1 - Law applicable to international arbitration agreements} (Trans-Lex.org Law Research) < https://www.trans-lex.org/973000/_/law-applicable-to-international-arbitration-agreements/>
CHAPTER 5
CONCLUSION

The nature of the international commercial arbitration agreements involve many national laws, international conventions, bilateral agreements, and arbitration doctrines. Problems caused by such complexity may arise in every stage of the arbitral proceedings. The law applicable to the various aspects of the arbitration agreement has received considerable attention, both in academic discussion and practice.

To avoid problems arising out of the arbitration agreement, there are some essential elements that must be taken into account by the parties. In general, the seat of the arbitration and the agreement’s governing law are foreign. The question of the applicable law as to whether a dispute can or must be referred to arbitration, always arises. This is due to the formal and substantive differences between national laws, requirements for the validity of the arbitration agreement.222

The thesis problem does not arise if parties to the arbitration agreement comply with the agreement, so that when defined disputes arise, the parties commence the arbitral proceedings in accordance with the arbitration clause. However, it arises when one party brings a case to litigation, and the opposing party argues to the court which law should apply on the validity of the arbitration agreement.

When national courts have to deal with the question of the existence and validity of an arbitration agreement, judicial assistance is necessary. Some states, already have legal mechanisms to determine which law should apply. Examples include the substantive law approaches in Sweden, Switzerland and France. On the other hand, courts in states such as Thailand, which lack substantive law, approach the validity issues by judiciary interpretation. Examples include courts in Japan, Germany and United States. Court rulings have been used as guidance for many cases involving foreign-related arbitration agreements which come before them.

There is no Thai Supreme Court guidance as to whether a foreign law, applied to the validity of the international arbitration agreement, would be upheld. However, since Thailand is a signatory to the New York Convention, the Convention should be applied to validity issues.

At the first stage of commencing the arbitration process, the convention provides the following:

**Article II**

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The most important elements of this Article are that the arbitration agreement must be in writing, and that national courts are to deny cases when there is a valid arbitration agreement.

However, because the Convention is silent on the applicable law of the international arbitration agreement, it is left to national courts to determine such issues. The lack of guidance can cause problems in practice.

Considering that the Thai Arbitration Act has adopted the UNCITRAL Model law as well as the New York Convention, the language of Section 14 of the Thai Arbitration Act 2002 is stated in similar way to Article II (3). It states that, in case where any party to the arbitration agreement commences legal proceedings in court against
the other party thereto in respect of any dispute which is the subject of the arbitration agreement, the party against whom the legal proceedings are commenced may file with the competent court, no later than the date of filing the statement of defense or within the period for filing the statement of defense in accordance with the law, a motion requesting the court to issue an order striking the case, so that the parties may proceed with the arbitral proceedings. Upon the court having completed the inquiry and found that there are no grounds for rendering the arbitration agreement void, unenforceable or impossible to perform, the court shall issue an order striking the case.223

The Act is silent as to issues such as the applicable law of the international arbitration agreement. In general, Thai courts apply section 14 in disputes over the validity of the arbitration agreement. In spite of that, when there is a conflict of laws, the most suitable solution is to use the foreign courts' interpretation guidance by applying Article V of the Convention, on issues of the choice of law rule that should be read into Article II.

Under Article V, (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Article V(1)(a) provides an explicit choice of law in the provision that it shall be the law to which the parties have subjected it or the law of the country where the award was made. Article V applies to the arbitral award enforcement stage.

223 Thai Arbitration Act B.E.2545 (2002), translated by the Office of Arbitration, Thailand
However, it may be suitable to apply Article V(1)(a) *mutatis mutandis* to the validity issue at the arbitration commencement stage. When the enforcing court determines whether the award was made under the correct law or not, it would return to the question of which law applied to the validity of the arbitration agreement issue. Therefore, if the award was not made from the right arbitral process, or not from the law chosen by the parties, the award can be set aside or annulled.

Thus, Article V(1)(a) should apply *mutatis mutandis* because such choice of laws is considered to be most consistent with the parties’ intentions according to the arbitration agreement, and avoids unnecessary disputes that can be raised at the arbitral award enforcement stage.

Under section 14 of the Thai Arbitration Act 2002, the court interprets which law to apply to the validity of the arbitration agreement under Article V(1)(a) of the New York Convention. This method is the most consistent with parties’ intentions. In other words, in determining whether the international arbitration agreement is valid or not, the court should apply the law that the parties chose, or the law of the seat of the arbitration. Thus, when the parties have chosen foreign law to be governing law of the arbitration agreement, courts should apply such foreign law to the validity of the arbitration agreement.

Arbitration in Thailand remains less popular than courts in most commercial sectors, with the possible exception of foreign-related contracts where the foreign partner may insist on arbitration instead of courts. Thailand has approached international commercial arbitration differently over time. Although Thailand has not traditionally been perceived as an arbitration-friendly jurisdiction, we are entering a new era. The recent amendment to the Arbitration Act, that will be enforced in the near future, promotes international arbitration in Thailand. Assistance from judiciary can help to achieve this goal.

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