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Arbitrating in Thailand

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Member of the Class of 1993

Thailand is a Southeast Asian nation approximately the size of Texas with a population of fifty-seven million people. It is bounded by the Gulf of Thailand and Malaysia to the south, Burma to the west and northwest, Laos to the north and northeast, and Cambodia to the southeast. Thailand is a member of the Association of Southeast Asian Nations (ASEAN), a regional trading block which also includes Indonesia, Malaysia, the Philippines, Singapore, and Brunei. Bangkok is Thailand's capital and center of economic activity.

Thailand has one of the developing world's strongest economies. Between 1987 and 1990 the annual economic growth rate exceeded eleven percent. This growth was fueled largely by direct foreign investment in export-oriented industries. The manufacturing sector in particular experienced tremendous growth. The Thai government's seventh five-year plan, covering 1992 through 1996, seeks sustainable growth of nine percent annually. The United States State Department predicts, "Thailand's economy will continue on its path of rapid growth and industrialization." This economic development and the potential for future growth attract greater foreign investment in export industries.

* B.A., University of California, Santa Cruz 1990
2. ASEAN was founded in 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Brunei joined the Association in 1984. ASEAN was formed to facilitate the development of the member nations primarily through inter-member tariff reductions. However, competitiveness between the member nations has impaired their willingness to meaningfully cooperate with each other, thereby inhibiting the effectiveness of tariff reductions and the Association generally. Id. at 4.
3. Id. at 3.
5. Id. at 12.
6. Background Notes, supra note 1, at 4.
8. Background Notes, supra note 1, at 4.
also lures investment by foreign suppliers and manufacturers of consumer goods for Thailand's growing domestic market.

As the growth of foreign investment in Thailand continues, disputes between foreign enterprises and their Thai counterparts inevitably arise. In an effort to abate foreign businesses' reluctance to trust the Thai legal system and the Thais' disinclination to submit to international arbitration, Thailand recently opened an Arbitration Office in the Ministry of Justice. The Arbitration Office provides foreign businesses a means of resolving disputes outside the confines of the Thai legal system. The Office also provides Thais an alternative to arbitrating in a foreign country.9

This Note will examine the following: (1) common considerations involved with arbitration and agreements to arbitrate; (2) the Thai legal system and reasons why a foreign investor may wish to resolve disputes outside that system; (3) Thailand's 1987 Arbitration Act, the 1990 Arbitration Rules promulgated by the Arbitration Institute, and the 1990 Conciliation Rules also promulgated by the Arbitration Institute; (4) enforcement of arbitral awards; and (5) the Working of Aliens Act, which prohibits the involvement of non-Thais in the arbitration process. Finally, the note concludes that due to Thailand's arbitration rules, many potential advantages of arbitration are lost, making arbitration in Thailand only marginally more attractive to the foreign investor than litigating in the Thai national courts.

I. ARBITRATION

Arbitration is a method of dispute resolution in which an agreement between the disputing parties vests the power to decide the conflict in one or more third persons.10 It is a contract-based substitute for court-supervised litigation. True arbitration produces a decision which binds the parties and carries the legal effect of a final court judgment.11 Parties may agree to arbitrate after a dispute arises. However, an arbitration agreement is most effective if the parties contemplate an arbitration clause alongside other negotiable terms of a commercial agreement and include the arbitration clause in the original written agreement.12 An arbitration agreement generally must be in writing and be sufficiently

9. For example, many foreign businesses will attempt to conduct arbitration proceedings in neutral forums such as Geneva.
11. Id. at 47.
broad to cover all disputes potentially arising under the parties' agreement.  

A. Advantages of Arbitration

Dispute resolution by arbitration incorporates various attractive features. Arbitration's most notable feature is flexibility. In an arbitration agreement the parties are generally free to negotiate the applicable procedures, venue, and substantive law which will govern dispute resolution. Furthermore, flexible arbitration procedures provide the parties the freedom to choose the judges who will decide their dispute. Another important feature of arbitration is that generally the grounds upon which a court may vacate or refuse enforcement of an arbitral award pursuant to a valid arbitration agreement are narrow and few. Thus, arbitration provides a non-judicial mechanism for conflict resolution sufficiently flexible to suit particular needs or circumstances, yet it carries the force of a binding judicial decision, generally without the time, expense, and uncertainty of an appeal.

Arbitration allows both parties a middle ground where disputes are removed from either side's "home court" with its attendant substantive and procedural rules. Often, when the possibility of a dispute is considered before entering an international commercial agreement, neither party willingly accepts dispute resolution in the other party's native court system. Since international contracts cross not only geographical bounds, but cultural and linguistic as well, parties often believe they will be disadvantaged in the other party's courts due to national bias or simply because of their unfamiliarity with the procedural and substantive law of the foreign court: "Whether right or wrong, each party feels the submission of disputes to the other's local courts will give the 'home court' party an unfair advantage, either substantively, procedurally, or psychologically." Arbitration resolves the national bias problem by re-

13. Id. at 289.
15. The extent of the parties' freedom to structure dispute resolution depends on the prevailing law in the jurisdiction where arbitration is sought, the rules of the arbitration association chosen (if any), and the law of the jurisdiction where enforcement will likely be sought. De Vries, supra note 10, at 50.
16. Id. at 69.
17. Id. at 52. A broad agreement is therefore necessary to foreclose the possibility of an attack on the agreement itself.
19. Id.
laxing both procedural and substantive law. Procedure can be streamlined, or left to the arbitrator’s discretion, to create an informal proceeding where lawyers are unnecessary. By minimizing delays and discarding rigid procedural rules, dispute resolution occurs more quickly. By agreeing beforehand to a choice of law provision regarding which substantive rules will govern, the parties lend certainty and predictability to their agreement, and avoid unfavorable substantive law. For example, Thailand is a civil law country and court proceedings are conducted in Thai. A common law lawyer with a client who wishes to enter a simple agreement in Thailand would find it difficult to advise the client regarding the appropriate contract clauses to include, their exact ramifications, or the likely outcome of a dispute. Entering an arbitration agreement in which the parties agree to the specific substantive rules lends a greater degree of predictability and certainty for a foreign party unfamiliar with Thai substantive law. Even if arbitration in a neutral third country is impossible, the ability to appoint arbitrators from a neutral third country helps placate the fear of national bias.

Another advantage of arbitration is that its flexibility and informal nature help preserve the underlying commercial relationship: “If business people withdraw from the dispute resolution process and leave their lawyers to engage in a 'win-lose' contest, damage to the commercial relationship is likely.” Indeed, a pre-arranged resolution procedure in a contract may allow the parties to reach a business solution without actually resorting to formal procedure. Even if the parties invoke the formal mechanism, arbitration’s non-judicial aspects, such as the ability to appoint business peers as arbitrators, lessen the proceeding’s confrontational and adversarial nature. Thus business people are more likely to avoid the animosities which make further commercial dealings impossible.

Arbitration is only as good as the arbitrators who administer it.
Moreover, it has been noted that, "[t]he organization and composition of the arbitral tribunal is the most important element in the arbitral process."27 The parties' ability to control the tribunal's organization and composition by appointing their own arbitrators is a great potential advantage. By controlling the selection of arbitrators, the parties may fashion a tribunal as impartial, as familiar with the particular business practices, or as sympathetic to a particular position28 as they desire.

Arbitrators, more than judges, are singularly concerned with the equities between the parties because they "have no public policies extrinsic to the agreement of the parties that they must enforce."29 National judges, on the other hand, must consider national policy goals when rendering their decisions. This is an advantage of arbitration for the foreign party because policy arguments and considerations are difficult for a foreigner to grasp. In many countries this difficulty in understanding is compounded by the fact that policy arguments and considerations often change. By removing policy-based claims and defenses, the agreement becomes more predictable because conflict resolution is based primarily on the equities of the case and business custom.

In the international arena, arbitral awards enjoy a distinct advantage in enforcement over court judgments. The United States Constitution's "full faith and credit" clause does not guarantee enforcement in the United States of judgments rendered by foreign courts.30 Similarly, foreign courts do not automatically honor judgments of American courts.31 Paradoxically, arbitral awards rendered in one country are enforced by international treaty in foreign countries, while court judgments are not.

The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention,32 is the most important treaty for enforcing foreign arbitration awards because of both the number of nations who are parties to the agreement and the breadth of its provisions. The New York Con-

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27. De Vries, supra note 10, at 69.
28. Since both parties generally have an equal say in the selection, it is unlikely that any party could "pack" the tribunal in its favor. Also, conflict of interest or bias is generally recognized as one of the few grounds for overturning an arbitral award.
30. Id. at 191.
31. Id.
32. De Vries, supra note 10, at 56.
vention requires each member state to recognize written arbitration agreements.\textsuperscript{33} It further requires each member's courts to refer parties to arbitration where an arbitration agreement governs the dispute before the court, and one party requests arbitration.\textsuperscript{34} Most importantly, Article III requires each member state to recognize arbitral awards rendered in other member states.\textsuperscript{35} "An award made in the territory of a member state other than the state in which enforcement is sought must, subject to limited grounds for review, be enforced in the latter state following compliance with the simple procedure of furnishing its courts with a translated copy of the award."\textsuperscript{36} Thus, a party who obtains an arbitral award in a member state may seek enforcement in any member state where the other party's assets lie. Presently, over eighty nations have signed, ratified, or acceded to the New York Convention.\textsuperscript{37}

An arbitration agreement also minimizes the risk that parties will simultaneously initiate proceedings in several jurisdictions resulting in inconsistent outcomes.\textsuperscript{38} The agreement establishes the mechanism, and often the forum, for dispute resolution, thus minimizing the chance of duplicative litigation arising in different forums.

\textbf{B. Potential Drawbacks to Arbitration}

Arbitration's advantages to a foreign investor may depend on where the contract is executed or the citizenship of the other party. When an American party enters a contract in England with a British party, the shared common-law tradition, language, and culture reduce concerns regarding unfamiliarity with the law and legal system, national bias, or enforceability. These concerns are far more pressing, however, when the parties are American and Thai. Although the reasons to arbitrate are perhaps less compelling for the American and British parties, other attributes, such as informality and speedy resolution, still favor arbitration.

In deciding whether to arbitrate, the parties should consider the complexity of the commercial relationship they are entering. Arbitration is ideal for relatively uncomplicated two party disputes, not multi-party proceedings. Moreover, because the power to arbitrate springs from an agreement between the parties, third parties necessary or proper for com-

\begin{itemize}
\item \textsuperscript{33} Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II, § 1, 330 U.N.T.S. 3, 38 [hereinafter New York Convention].
\item \textsuperscript{34} \textit{Id.}, art. II, § 3.
\item \textsuperscript{35} \textit{Id.}, art. III.
\item \textsuperscript{36} De Vries, \textit{supra} note 10, at 58.
\item \textsuperscript{37} The 1989 Guide, \textit{supra} note 26, at 437-39.
\item \textsuperscript{38} Nelson, \textit{supra} note 14, at 193.
\end{itemize}
plete resolution of the dispute, who are not parties to the arbitration agreement, are not bound by the arbitration. Thus, in complex commercial transactions the procedural formality of a court may be more appropriate, indeed necessary, for a just resolution.\textsuperscript{39}

The parties should also consider cost. The government bears most of the national courts' costs, while the parties in arbitration must pay their own advocates, the arbitration center's costs, and the arbitrator's fees. The daily cost of arbitration may outweigh court litigation expenses, but arbitration may take less time. Furthermore, the parties may specify in the arbitration agreement how to allocate costs.

C. Summary

Arbitration has distinct advantages as well as drawbacks. In considering arbitration, much depends upon the particular circumstances surrounding the contract negotiations. Of course, much also depends on what is mutually agreeable, rather than what is optimally desirable. A related consideration concerns the amount of negotiating effort parties are willing to expend for a favorable arbitration agreement. Depending on the situation, it may be that the commercial terms of an agreement are so important that an arbitration agreement is only a secondary consideration and not worth the effort required to conclude an optimally favorable arbitration agreement. The inclusion of an arbitration agreement in a commercial contract should never be a blanket policy.\textsuperscript{40} Parties should enter an arbitration agreement only after analyzing and weighing the various factors discussed above.

II. THE THAI LEGAL SYSTEM

Thailand has a constitutional monarchy with a parliamentary system of democracy.\textsuperscript{41} It is the only country in South and Southeast Asia never to have been colonized by a Western nation.\textsuperscript{42} Although its legal system follows the civil law tradition,\textsuperscript{43} because it was adopted by the Thais and not imposed upon them, it blends principles of traditional Thai law with Western law.\textsuperscript{44} As a civil law system, the substance of the law

\textsuperscript{39} Id. at 200-01. Of course, this depends on the court practices which prevail in the jurisdiction where court action would be an alternative.

\textsuperscript{40} De Vries, supra note 10, at 79.


\textsuperscript{42} Background Notes, supra note 1, at 3.

\textsuperscript{43} Hemarajata, supra note 22, at 49.

\textsuperscript{44} Background Notes, supra note 1, at 3.
is mainly composed of generally phrased codes. Also, unlike the common law system, judicial decisions are not a source of binding precedent or law. Therefore, the Thai legal system may be something of a mystery to many common law lawyers.

A. Structure of the Thai Legal System

Thailand's judicial system is divided into three tiers: Courts of First Instance, the Court of Appeal, and the Supreme Court. The Courts of First Instance, which hold original jurisdiction of commercial matters, are further subdivided territorially between the Bangkok Metropolis and the provinces. The only Court of Appeal is in Bangkok. The Supreme Court, also located in Bangkok, is the final court of appeal. Judicial proceedings are conducted in Thai.

B. Sources of Thai Law

The substance of Thai law derives from several sources, such as the Civil and Commercial Code, the Constitution, legislative enactments, executive regulations, and even custom. Probably the most important sources are the Codes, as most commercial matters are governed by them.

1. Civil and Commercial Code

The Thai Civil and Commercial Codes, adopted in 1935, with an English translation alongside the Thai, contain the general provisions governing contracts and commercial dealings. The Civil and Commercial Codes also include "general principles," which are principles of law applicable to the interpretation and elucidation of all Thai law. The Codes, however, "tend to be statements of law so generally [phrased] as to provide only a foundation of basic doctrine, on which scholars and judges must build the specific requisite to the solution of legal problems."

2. Acts and Subordinate Legislation

With Parliament's recommendation and consent, the King may pass
acts which have the force of law but which are not codes. Before such acts are effective, they must be published in the government gazette. All Thai public economic and social laws are in this form.

The executive branch also issues subordinate legislation such as royal decrees, ministerial regulations, and other by-laws; however, an Act of Parliament must first delegate authority to the executive branch to promulgate specific subordinate legislation. Subordinate legislation is analogous to United States administrative regulations and is an increasingly important source of law, presently numbering over 50,000 pieces of legislation.

3. The Thai Constitution

Thailand's Constitution is only slightly relevant to commercial dealings because, while in theory the Constitution is the supreme law of the land, since 1932 Thailand has enacted thirteen constitutions. Thai constitutions are rather rigid and difficult for interest groups to amend. As a result, the most popular form of constitutional amendment is a coup d'etat, which occurs with alarming regularity. The most recent occurred February 23, 1991, when a military takeover abolished the Constitution and disbanded Parliament. The regularity of this form of constitutional "amendment" seriously undermines the Constitution as a viable source of stable and supreme law.

4. Custom and "General Principles"

Custom is another source of Thai law. Book I, section 4 of the Thai Civil and Commercial Code establishes "local custom" as law where no specific provision of law is applicable: "The law must be applied in all cases which come within the letter or the spirit of any of its provisions. Where no provision is applicable the case shall be decided according to the local custom." This is especially troublesome for a foreign party.

52. Sathirathai & Uwanno, supra note 41, at 46.
53. Id.
54. Id.
55. Id. at 47.
56. Id.
57. Id. at 45.
58. Id.
59. Id.
61. Sathirathai & Uwanno, supra note 41, at 45.
because custom does figure into business law: "[C]ustom has an important role in the areas of family and commercial laws . . . . [F]or example, issues concerning trust receipt, documentary credits, [and] incoterms have been decided upon bas[ed] on commercial practices."63 Determining the Thai commercial customs in general or in a particular region with any precision, or predicting what a Thai court is likely to believe them to be, is difficult at best.

Section 4 of the Civil and Commercial Code states that "general principles of law" shall control where there is no custom: "If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law."64 Thai scholars Uwanno and Sathirathai note that there are two approaches to applying "general principles." One application defers to a form of natural law.65 The second is "on an ad hoc basis, taking into account the structure and nature of the laws and issues . . . which the general principles will supplement."66 The exact meaning of the foregoing is far from clear, highlighting the fact that when "general principles of law" are invoked, one can be sure the law is uncertain and unpredictable.

Invocation of these two broad and seemingly vague provisions is not as rare as one might initially think, due to the limited use of analogy in Thai law: "Even Thai courts are bound to apply only the words of the statute and cannot apply them by analogy to new cases not explicitly covered by these [sic] words."67 Thus, where an issue is not squarely covered by a Code provision, a court may not analogize to a similar Code provision, but rather must resort to custom and "general principles of law."

5. Judicial Precedent

In a common law jurisdiction, custom, "general principles," and broad statutory commands would not be troublesome, at least not after a body of case law evolved lending concrete definition to the broad mandates. Unfortunately, judicial decisions are not a source of law in Thailand, nor are they binding precedent.68 The Supreme Court's decisions have some persuasive authority, but those of the inferior courts have

63. Sathirathai & Uwanno, supra note 41, at 47.
65. Sathirathai & Uwanno, supra note 41, at 48.
66. Id.
67. Id. at 48-49.
68. Id. at 48.
The problem is complicated in that the Thai Bar Association never publishes the inferior courts' decisions, and only periodically publishes selected Supreme Court decisions, thus impeding a researcher from predicting the law in a given subject area.  

C. Summary

Under the Thai legal system, unless an issue or situation is specifically covered by a legislative enactment, the law is uncertain. Arbitration, with its inherent flexibility, can avoid many of the Thai legal system's problems and uncertainties through the use of a choice of law provision and the ability to appoint business peers as arbitrators. Choice of law provisions give the parties some certainty regarding the rules governing potential disputes. The ability to appoint business peers allows resolutions based more on business practices and party expectations than on the vagaries of Thai law or policy.


On July 19, 1987, His Majesty King Bhumibol Adulyadej proclaimed the enactment of the Arbitration Act. The Government Gazette published the Act on August 12, 1987; the Act became law the following day. Pursuant to section 4 of the Act, which charges the Ministry of Justice with its execution, the Ministry of Justice's Arbitration Institute promulgated both the Arbitration Rules and the Conciliation Rules in April 1990. While the Arbitration Act's provisions govern arbitration in Thailand generally, the Arbitration Rules and Conciliation Rules govern arbitration and conciliation specifically at the Ministry of Justice's Arbitration Institute.

Parties wishing to arbitrate in Thailand follow one of two courses: they simply agree to arbitrate privately under the rules of the Arbitration Act, or they agree to resolve their dispute at the Arbitration Institute under the Arbitration Rules. The Arbitration Rules, exemplifying subordinate legislation, generally follow the Act without contradicting it.

69. Id. at 48-49.
70. Id. at 49.
The Arbitration Rules provide more definite procedures than the Act, and partially restrict the parties' latitude. However, rule 4 of the Arbitration Rules allows the parties to agree not to apply the Arbitration Rules to resolution of their dispute at the Arbitration Institute. Presumably, the parties could also agree to pick and choose which Rules to apply and substitute their own variations for the Rules they discard. Thus, the Institute allows latitude while providing an experienced forum to guide the parties through the process. This helps to speed up the process. Furthermore, it ensures that the parties follow the Rules and the Act, thus minimizing the possibility of a collateral attack on the arbitral award based on an argument that the Arbitration Act was not correctly followed. Because the Arbitration Institute guides parties in following the Rules and the Act, it is also possible, although untested, that a Thai court may be influenced to uphold an arbitral award because the Arbitration Institute rendered it.

A. Preliminary Rules

A threshold determination is whether the parties entered into an arbitration agreement. Section 5 of the Arbitration Act defines an arbitration agreement as "an agreement or an arbitration clause in a contract whereby the parties agree to submit present or future civil disputes to arbitration. . . ." While the precise meaning of "civil dispute" remains unclear, the term certainly includes all ordinary commercial agreements. For a binding arbitration agreement, section 6 requires that it be written. Section II, rule 2 of the Arbitration Rules contains a model clause for parties to use if they want the Arbitration Institute to resolve their dispute using the Arbitration Rules. Section 10 of the Arbitration Act allows a party to stay a court proceeding and proceed with arbitra-

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74. Arbitration Rules, rule 4. The Director of the Institute must consent to a rule 4 agreement.
75. This ability to substitute is not stated in the Act. However, given the fact that the parties can discard the Arbitration Rules and agree upon their own rules at the Arbitration Institute, it follows that the parties can tailor the Rules to their satisfaction, so long as the modified rules do not run afoul of the Arbitration Act.
76. The principal focus of this Note is on the Arbitration Rules. For the most part the Arbitration Rules follow the provisions of the Arbitration Act closely. The Arbitration Act provisions are discussed where there is no corresponding Arbitration Rule, or where the Rules and the Act differ in some respect.
77. Arbitration Act § 5.
78. Hemarajata, supra note 22, at 49.
80. Arbitration Rules, rule 2.
tion if the arbitration agreement covers the dispute. 81 Before staying the court proceeding, the court examines the arbitration agreement to determine its validity. 82

Under the Arbitration Rules, before commencing arbitration the Director of the Arbitration Institute must convene the parties to try to reach a settlement. 83 If the Director deems it appropriate and the parties agree, a conciliator is appointed and conciliation is conducted under the Conciliation Rules, 84 which are quite flexible. Conciliation Rules 3(2) specifically allows the parties to exclude or vary any of the Conciliation Rules at any time. 85 Basically, under the conciliation procedure an impartial conciliator mediates the parties' dispute and arrives at a mutually agreeable settlement. If the parties reach a settlement, the conciliator drafts a settlement agreement which the parties sign. 86 If they cannot reach a settlement, the conciliator is not eligible as an arbitrator or counsel with respect to that dispute. 87 Similarly, the conciliator is unavailable as a witness in any subsequent arbitral or judicial proceedings. 88 Further, parties may not introduce as evidence in a subsequent judicial or arbitral proceeding concerning the same dispute the following: (1) an opponent's views or suggestions expressed in the conciliation proceedings; (2) an opponent's admissions during such proceedings; (3) the conciliator's expressed proposals or views; or (4) an opponent's willingness to agree to a proposed settlement. 89 The obvious intent of these rules is to encourage parties to discuss settlement openly and freely without fear that opponents will use such candor against them if conciliation fails and arbitration or litigation follows.

Regardless of whether the parties agree to arbitrate their differences, they may agree to submit their dispute to the Arbitration Institute for conciliation. Conciliation rule 19 provides a model contract clause to create a conciliation agreement. 90 The conciliation procedure is ideal for parties whose differences are slight and who wish to preserve their commercial relationship. Also, parties may use conciliation to test the likely resolution of their dispute in arbitration. The conciliator's suggestions

82. Id.
83. Arbitration Rules, rule 3(1).
84. Id., rule 3.
85. Conciliation Rules, rule 3(2).
86. Id., rule 11(1).
87. Id., rule 17.
88. Id.
89. Id., rule 18.
90. Id., rule 19.
generally derive from, inter alia, fairness, trade customs, and previous practices, all of which an arbitrator would consider in making an award decision.

B. Arbitral Process

Under the Arbitration Rules, if conciliation fails, the parties begin the arbitral process. A party may appoint anyone to assist in the arbitration, and the parties are free to agree on the language, or languages, in which to conduct the arbitral proceedings. Furthermore, the parties may agree to the number of arbitrators to be selected. Barring such an agreement, the Rules specify that there will be one or three arbitrators. If one is selected, either the parties agree on a particular person, or the Institute provides a list of at least three people which the parties rank in order of preference after deleting the name of the most objectionable potential arbitrator. When using three arbitrators, each party appoints one and the two newly-appointed arbitrators appoint the third. A majority of the arbitrators decides the case.

Under the Rules, when justifiable doubts exist as to a particular arbitrator's impartiality, the non-sponsoring party may challenge the appointment. A substitute arbitrator is appointed if the sponsoring party agrees with the challenge. Otherwise, the parties submit the matter to the Arbitration Commission for determination. Under the Arbitration Act, a party must challenge an opponent's appointee in court. The permissible grounds for such a challenge are either one of the enumer-

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91. Id., rule 9(2).
92. That is unless the parties have agreed to some specific choice of law provision for arbitration.
93. Arbitration Rules, rule 9; Arbitration Act § 19.
95. Arbitration Rules, rule 10. Under the Arbitration Act, there can be one arbitrator or "several." When more than one is selected, each party appoints an equal number. Arbitration Act § 11. This method is unsatisfactory because § 16 requires an award by a majority of the arbitrators. In a deadlock situation, the parties must invoke a § 16 procedure for appointing an umpire to break the deadlock. This potentially negates the benefit of appointing arbitrators. Section 11 requires that where an agreement is silent as to the number of arbitrators, there will be three—one appointed by each party and the third appointed by the two arbitrators.
96. Arbitration Rules, rule 11(5).
97. Id., rule 11(1)-(2).
98. Id., rule 12(1).
99. Id., rule 12(4).
100. Id., rule 15(1).
101. Id., rule 16(1).
102. Id., rule 17.
ated grounds for challenging a judge under the Thai Civil Procedure Code or a showing of potential prejudice to the arbitrator's impartiality.\textsuperscript{104}

Both the Arbitration Act and the Arbitration Rules provide the arbitrator and the parties wide discretion in tailoring the proceedings to the special circumstances of each case. The Arbitration Act is quite broad regarding the actual proceedings: "[U]nless otherwise provided by the arbitration agreement or law, an arbitrator shall have power to conduct any procedure as he deems appropriate taking the principle of natural justice . . . [into] prime consideration."\textsuperscript{105} The Arbitration Rules are similarly broad: "[S]ubject to these Rules and the agreement between the parties, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."\textsuperscript{106} The Rules, however, include some specific procedures not contained in the Act. For example, rule 22 dictates the procedure for hearing evidence, though it also specifically allows the parties to agree to a different procedure.\textsuperscript{107} Rule 23 requires each party to prove the facts on which they base their claim or defense.\textsuperscript{108} However, these specific procedural rules do not make it less attractive to arbitrate under the Rules than under the Act, because the Rules' proscribed provisions are quite flexible and non-constraining, and rule 4 allows the parties to waive objectionable provisions of the Rules with the consent of the Director.\textsuperscript{109} An advantage to arbitration under the Rules instead of the Act is that the Rules, with their pre-set procedures, do not require the parties to either draft an extensive arbitration agreement with elaborate arbitration procedures\textsuperscript{110} or leave the procedure entirely up to the arbitrator's discretion.

The Act explicitly allows an arbitrator to invoke the power of a court to summon witnesses, administer oaths, order submission of docu-

\begin{footnotesize}
\textsuperscript{104} Id. § 14; Thai Civil Procedure Code of B.E. 2477 (1934) §§ 11-14 govern the challenge of judges. The grounds are: (1) the judge has an interest in the case; (2) the judge is related to any of the parties; (3) the judge is cited as a witness or an expert in the case; (4) the judge has been the legal representative of either party; (5) the judge acted as judge or arbitrator in a previous phase of the same case; (6) there is a case pending between the judge or his relatives and a party or a party's relatives; or (7) the judge is the creditor, debtor, or employer of any of the parties.

\textsuperscript{105} Arbitration Act § 17.

\textsuperscript{106} Arbitration Rules, rule 21.

\textsuperscript{107} Id., rule 22.

\textsuperscript{108} Id., rule 23.

\textsuperscript{109} Id., rule 4(1).

\textsuperscript{110} That is unless the parties wish to devise their own elaborate procedures.
\end{footnotesize}
ments or material, apply provisional measures to protect a party's interests during the arbitration proceedings, or to answer a question of law.\textsuperscript{111} To invoke the court's power the arbitrator must file a petition with the court to initiate the desired proceeding.\textsuperscript{112} If the court finds that it could execute the desired proceeding in a legal action, it grants the arbitrator's petition.\textsuperscript{113} By contrast, the Rules are silent as to a similar procedure. Since the Rules are subordinate to the Act, presumably the Act's provisions may be utilized in arbitration under the Rules, but the precise relationship of the Arbitration Act to the Arbitration Rules is unclear.\textsuperscript{114}

The Act and the Rules also differ regarding the basis for the arbitrator's award. While the Act is silent on appropriate basis for awards, rule 28 states: "In interpret[ing the] contract, the tribunal shall take into account its enforceability and the [trade] usages . . . applicable to the transaction."\textsuperscript{115} Unlike arbitration legislation in most countries, including the United States, both the Rules and the Act require the arbitral tribunal to issue a decision, identifying the basis for the award.\textsuperscript{116} This allows a more thorough review of the award by a court.

While the Rules are silent, the Act sets forth both the means to enforce, and the grounds for challenging, an award. Presumably, the Act governs as it stands in superior position to the Rules. Ordinarily an award is final and binding once the arbitrator sends a copy of the award to the parties.\textsuperscript{117} However, if the losing party refuses to comply with the award, the prevailing party must request a court judgment confirming the award before attempting to enforce it.\textsuperscript{118} During the court inquiry, the court must give the party refusing compliance an opportunity to challenge the request.\textsuperscript{119} The party seeking enforcement must file the request for confirmation within one year from the date the arbitrator sent copies of the award to the parties.\textsuperscript{120} Therefore, prudent parties who desire enforcement are well-advised to automatically request confirmation, regardless of their opponents' willingness to abide by the award, to ensure that they do not lose their rights to judicial enforcement if other

\textsuperscript{111} Arbitration Act § 18.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} It is unclear when one proceeds under the Rules, whether the Act's provisions which have no corresponding rule will apply. Since the Act is the enabling legislation for the Rules, the Act's provisions most likely apply when the Rules are silent.
\textsuperscript{115} Arbitration Rules, rule 28.
\textsuperscript{116} Arbitration Act § 20; Arbitration Rules, rule 29.
\textsuperscript{117} Arbitration Act § 22.
\textsuperscript{118} Id. § 23.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
Arbitrating in Thailand

enforcement attempts take longer than a year. The drawback of automatically requesting confirmation, however, is that such a procedure allows judicial review of the award, raising the possibility the court will vacate the award when the other party was willing to comply with it.

C. Vacating the Award

Section 24 of the Act allows a court to deny enforcement of an arbitral award, "[i]n case[s] where the court is of the opinion that an award is contrary to the law governing the dispute, is the result of any unjustified act or procedure or is outside the scope of the binding arbitration agreement or relief sought by the party . . . ."\(^{121}\) The court's judgment regarding a challenge to an award cannot be appealed unless:

1. [A party] . . . alleg[es] that the arbitrator or umpire did not act in good faith or that fraud was committed by any party;
2. The order or judgment . . . [frustrates] the provisions of law governing public order;
3. The order or judgment is not in accordance with the arbitral award;
4. The judge who held the [i]nquiry . . . [issues] a dissenting opinion or . . . certifie[s] that there are reasonable grounds for appeal; or
5. It is an order concerning the provisional measures for the protection of interests of the party pending arbitration proceedings under section 18.\(^{122}\)

Section 24 of the Act, which gives courts wide latitude to review arbitral awards, resulted from a dilemma facing the Act's drafters regarding how to ensure that "on the one hand, the court would . . . [generally] respect the sanctity of the arbitral award but, on the other hand, . . . arbitral awards . . . [inherently] contrary to public order [would be struck]."\(^{123}\) Exactly what the drafters considered contrary to the public order or which criteria they anticipated using in such a factual determination is unclear.\(^{124}\) The court is left to determine whether awards are contrary to the public order on a case-by-case basis. One commentator predicted that either the section will be narrowly interpreted, or the concept of arbitration may be lost.\(^{125}\)

Parties considering arbitration proceedings in Thailand should con-

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121. *Id.* § 24.
122. *Id.* § 26. Section 18 proceedings involve resorting to the court's power to issue injunctions.
124. *Id.* at 6-7.
125. *Id.* at 6.
cern themselves with the courts' broad power to review arbitral awards, especially since the Act is relatively new and the courts' actual application of section 24 remains unclear. 126 Nevertheless, parties can minimize the courts' opportunities to vacate an award by agreeing to apply substantive law and procedural rules which are not radically contrary to Thai law or policy. Unfortunately, taking such precautions negates arbitration's beneficial aspect of allowing parties to avoid national policy considerations, increases the complexity of entering an arbitration agreement, and reduces the flexibility offered by arbitration. Thus, the potential of a court vacating an award under section 24 adds uncertainty and reduces arbitration's appeal and utility.

IV. ENFORCEMENT

Enforcement of a Thai arbitration award is fairly simple under the procedure provided in section 23 of the Arbitration Act. When the party against whom enforcement is sought lacks assets in Thailand sufficient to satisfy the award, the 1958 New York Convention 127 provides for enforcement in any member country where that party has sufficient assets.

Thailand's membership status in the New York Convention is unclear. Thailand acceded to the New York Convention on December 21, 1959. 128 However, before an international treaty becomes operative in Thailand, the Parliament must promulgate domestic legislation in compliance with the treaty. 129 The Military Government promulgated domestic legislation complying with the New York Convention on March 10, 1960, in the form of a domestic decree, but at the time the military regime governed without a parliament. 130 Some legal scholars thus argue that Thailand is not a member of the New York Convention because Parliament never properly ratified it. 131 Although the Thai government never acted to resolve the matter, however, the Thai courts and observers generally accept Thailand as a member of the New York Convention and abide by its terms. 132

A party seeking enforcement of a Thai arbitral award in another member country must submit to a "competent authority" 133 an original

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126. The parties' concern with the court's broad power of review is not over the precedential value of a given decision, but over the court's willingness to vacate arbitral awards.
127. New York Convention, supra note 33, art. I, § 1.
128. Sathirathai & Uwanno, supra note 41, at 108.
129. Id.
130. Id.
131. Id.
132. Id.; see also Bunnag, supra note 60, at 2.
133. New York Convention, supra note 33, art. V, § 1.
or authenticated copy of the award and the original agreement to arbitrate. If these documents are not in an official language of the member-state, the enforcing party must provide written translations. The court may refuse to recognize and enforce the award on a number of grounds, but the party opposing the enforcement bears the burden of proving those grounds. Thus, once the party seeking enforcement meets a simple showing of an arbitration agreement and an arbitration award, the New York Convention shifts the burden of proof to the party opposing enforcement.

The Article V grounds for refusing enforcement under the New York Convention are:

(a) Incapacity of one of the parties under the law [of the country where the award was made];

(b) The agreement is invalid under the law ... [selected by] the parties ... or if none [was] specified, the law of the country where the award was made;

(c) The party against whom [the] award was given was not afforded proper notice of proceedings, arbitrator, or otherwise was unable to present his case;

(d) The award deals with matters beyond the scope of the arbitration agreement;

(e) The composition of the arbitral tribunal or the procedure was not in accordance with the agreement or the law of the country where the award was given;

(f) The award ... [is] not yet ... binding on the parties;

(g) The subject matter of the arbitration is not capable of settlement by arbitration under the law of the country where enforcement is sought;

(h) Recognition or enforcement of the award ... [is] contrary to the public policy of the country where enforcement is sought.

Although the grounds listed above indicate that a court deciding whether to enforce an award under the New York Convention has broad

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134. Id., art. IV, § 1.
135. Id., art. IV, § 2.
137. Id., art. V, § 1(a).
138. Id.
139. Id., art. V, § 1(b).
140. Id., art. V, § 1(e).
141. Id., art. V, § 1(d).
142. Id., art. V, § 1(e).
143. Id., art. V, § 2(a).
144. Id., art. V, § 2(b).
authority to refuse enforcement, the enforcing party can effectively avoid sections (a) through (f) by petitioning a Thai court to confirm the award under section 23 of the Arbitration Act. A Thai court's confirmation creates a prior judicial finding that the arbitration conformed either to the laws of Thailand or to the rules agreed upon by the parties. Especially with respect to Thai law (including the Arbitration Act and Arbitration Rules), foreign courts almost unfailingly defer to a Thai court's judgment. Even as to matters not uniquely Thai (for example, rules to which the parties stipulated in the arbitration agreement), the enforcing court will probably defer to the Thai court's prior judicial holding either because of comity concerns or because of especially high standards of proof required for overturning prior judicial findings. The applicability of sections (g) and (h), however, will depend on the enforcing country's law. Since it is unlikely that a commercial dispute is incapable of settlement by arbitration under the enforcing country's law, a section (g) attack will seldom succeed. Nor is the enforcing country's "public policy" likely to present a section (h) obstacle. Furthermore, most judicial systems' policies encourage dispute resolution by arbitration and mandate non-interference with arbitral awards. For example, the United States' explicit judicial policy is to construe the public policy limitation narrowly. In *Fotochrome, Inc. v. Copal Company, Limited*, the Court of Appeals for the Second Circuit noted, "[t]he public policy in favor of international arbitration is strong ..." and "the 'public policy' limitation on the Convention is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice." Any award recognized by a Thai court is unlikely to violate the enforcing state's "most basic notions of morality or justice."

The United States and Thailand signed and ratified the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America. Article II, paragraph 3 provides for mutual enforcement of arbitral awards. Parties should first seek enforcement under the New York Convention because its provisions are

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145. 517 F.2d 512 (2d Cir. 1975).
147. *Id.* (citing Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974)).
150. *Id.*
more encompassing than the Treaty, but the Treaty's existence provides a compelling argument that a United States court should enforce a Thai arbitral award under the Convention regardless of objections made to enforcement in the United States under sections (g) or (h).

The New York Convention makes arbitral awards more enforceable than awards rendered by national courts. The enforceability of a Thai arbitral award faces few obstacles and this is an advantage of resolution by arbitration.

V. THE WORKING OF ALIENS ACT

The Working of Aliens Act B.E. 2521 (1978) prohibits non-Thai nationals from working in certain fields and requires aliens to obtain work permits to work in others.\(^{151}\) In addition to prohibiting aliens from manual cigarette rolling, the Act also prohibits aliens from performing thirty-eight other jobs, including any aspect of the legal profession or litigation services.\(^{152}\) Thus, a non-Thai lawyer cannot render legal services to a client in Thailand unless she obtained a work permit prior to the Act's implementation (July 22, 1978) and qualifies to continue practicing under the grandfather clause.\(^{153}\) The Act also prohibits aliens from representing clients in arbitration or acting as arbitrators: "As the Alien Occupation Act is presently worded, it is not legally possible for foreign lawyers to participate in arbitration proceedings in Thailand as legal counsel or even as arbitrators or umpires if such function involves the interpretation of legal principles or rules as would occur in most cases."\(^{154}\)

The Working of Aliens Act presents two important problems for business people in Thailand. First, the Act certainly prohibits the business person's counsel from presenting a case before an arbitral tribunal, and if strictly construed, the business person's or a company's own counsel cannot even assist or advise the client regarding Thai arbitral proceedings in general. It is always advisable to retain a local attorney when entering an international business transaction. Still, a major advantage of arbitrating in other countries, besides Thailand, is that the business person can use his or her own attorney, a proven litigator, or a specialist in international arbitration as an advocate. Most business people prefer

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152. *Id.* at 89; Royal Decree Naming the Occupations and Professions, Forbidden to Aliens, B.E. 2522 (1979) (published in Government Gazette, vol. 96, special issue, part 80, May 14, 1979).
154. *Id.* at 12.
to use the attorney who is most familiar with their general business and who was involved in the transaction from its beginning to at least oversee the arbitration. Secondly, the Working of Aliens Act requires the parties to select Thai arbitrators, reviving doubts as to national bias. Furthermore, this requirement presents a foreign business person with the difficult task of finding a Thai arbitrator who is familiar with the particular business or type of transaction at hand, thus cancelling some of the important benefits generally derived from control over the selection of arbitrators.

The Working of Aliens Act also applies to litigation in the Thai national courts, preventing non-Thai counsel from participating while placing the decision in the hands of a Thai national. If the decision is between submitting a dispute to Thai national courts or arbitrating, arbitration is still more attractive because of other advantages of arbitration such as flexibility, time savings, ability to choose the governing substantive and procedural law, and its relatively non-adversarial nature. However, application of the Working of Aliens Act argues for locating the arbitration in some third country if possible. If Thailand decides to promote itself as a regional arbitration center, the government may relax the Act's prohibition of alien attorneys as it applies to arbitration.\textsuperscript{155} However, as the law now stands, the Working of Aliens Act seriously undermines the attractiveness to foreign investors of arbitrating in Thailand.

\section*{VI. CONCLUSION}

Arbitration is an effective and increasingly common mechanism for resolving many international commercial disputes. Arbitration's flexibility, informality, and enforcement advantages are strong attractions for a foreign investor. It is especially attractive in a country such as Thailand where a foreign investor faces an unknown foreign language, culture, and legal system. In such situations arbitration allows resolution of disputes on a more familiar and predictable basis.

Arbitrating in Thailand is potentially an ideal compromise between leaving dispute resolution to Thai courts and arbitrating disputes abroad. Often one party will not agree to allow Thai courts to resolve the dispute, or the transaction's value does not justify the cost of arbitrating overseas.\textsuperscript{156} Perhaps agreeing to resolve the dispute in Thailand would be beneficial as a valuable goodwill gesture or where a party is unwilling to

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\textsuperscript{155} \textit{Id.}

\textsuperscript{156} An option not explored in this Note is to arbitrate at the relatively close Regional Arbitration Center in Kuala Lampur, Malaysia.
expend negotiating capital to secure the optimal mechanism for dispute resolution. In such instances, arbitrating in Thailand is an attractive alternative to submitting the dispute to the Thai courts.

However, the attraction of arbitrating in Thailand is greatly reduced by Thailand's present rules governing arbitration. To some degree, the broad reviewability of arbitral awards by Thai courts returns the dispute to the forum originally sought to be avoided. For example, the unknown criteria to be applied in determining what is contrary to "public order" effectively requires that the parties to an arbitration not stray far from Thai law for fear a court will vacate their award. This defeats the purpose of using a choice of law provision to remove the dispute from the uncertain application of national law and policy. The prohibition against aliens' participation in the arbitration process also reduces Thailand's draw as a site for arbitration. International arbitration is highly attractive to foreign investors because of the global uniformity of its procedures and the ability to select their own lawyers to litigate on their behalf anywhere in the world. The inability of foreign lawyers to participate in the arbitration process in Thailand removes this attractive feature. More importantly, by requiring the arbitrators to be Thai, the Working of Aliens Act negates much of the benefit derived from the power to select arbitrators by greatly reducing the pool of potential arbitrators. It also reinstates the fear of national bias, since the dispute will be settled by Thais.

If one party refuses to resolve a dispute outside of Thailand, arbitration is still potentially more attractive than litigating in Thai national courts. However, if arbitration's most attractive aspects are the broad choice of law provisions and the freedom from national bias, then the advantage derived from arbitrating in Thailand is negligible as these benefits are difficult to obtain under Thai law. Thus, the decision to arbitrate in Thailand cannot be automatic. It requires a foreign investor to specifically assess the value of the various factors and weigh the potential benefits against the risks. This result is unfortunate because, with modest reform of both the Working of Aliens Act and the courts' power of review, Thailand could provide an ideal forum for arbitration and, by extension, a more attractive site for foreign investment.