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[MESSAGE FROM THE DIRECTORS] by Pedro Sousa Uva and Gonçalo Malheiro • [PREFACE] João Bosco Lee • [THE IMPOUNDED BOEING 737] by Vanina Sucharitkul and Gregory Travaini • [CONFIDENCE/CONFIDENCE] by Clifford J. Hendel • [CIVIL VS COMMON LAW APPROACHES TO PROCEDURE IN INTERNATIONAL ARBITRATION] by Alejandro López Ortiz • [ABACLAT VS ARGENTINA: WHAT'S IT ABOUT] by Sofia Martins • [THE EFFECTS OF THE STATUTORY ARBITRATION CLAUSE OVER COMPANIES' SHAREHOLDERS IN BRAZIL] by Amanda Lobão Torres and Fernanda Dias de Almeida • [ARBITRATION ON EMPLOYMENT DISPUTES: IS BRAZIL DOING IT RIGHT?] by Fábio Werneck de Mendonça and Daniel Becker Paes Barreto Pinto • [ASPECTS OF CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION] by Stavroula Angoura • [THE ARBITRABILITY OF CORRUPTION CLAIMS] by Chiara Catti • [INTERNATIONAL ARBITRATION IN BELARUS: RECENT TRENDS AND DEVELOPMENTS] by Alexey Anischenko and Elena Kumashova • [COMMERCIAL ARBITRATION IN ANGOLA: WHERE ARE WE NOW?] by Alexandra Gonçalves • [EVALUATING THE PROGRESS OF THE FIRST FEW MONTHS OF THE SPANISH MEDIATION LAW] by Adriana Aymamí Garcés • [ARBITRATION IN THE PORTUGUESE INDUSTRIAL PROPERTY CODE] by João Veiga Gomes



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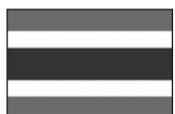
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THE IMPOUNDED BOEING 737

By Vanina Sucharitkul and Gregory Travaini



On 12 July 2011, the personal Boeing 737 of Thailand's Crown Prince was impounded in Munich on a court order as part of a long-standing battle with the Thai government over payments. This drastic measure was in response to the Thai government's refusal to comply with an award rendered on 1 July 2009 against Thailand to compensate Walter Bau in the amount of around EUR 30 million plus interest and legal costs of around EUR 2 million. The dispute arose out of the construction of Bangkok's Don Muang Airport toll highway and was brought pursuant to the German-Thai bilateral investment treaty under the UNCITRAL Rules.

1. Welcome on Board

As one of the earliest parties to adopt the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") in 1959¹ (and previously the 1923 Geneva Protocol and the 1927 Geneva Convention) and party to over 35 bilateral investment treaties, Thailand had traditionally been viewed as an arbitration-friendly country. Indeed, arbitration has been part of the Thai Civil Procedure Code since 1934. The Code provided for two kinds of arbitration, court-annexed and out-of-court.

There are multiple factors determining a host country's

attractiveness in the eyes of foreign investors, one of which being the recourse to a neutral forum and the enforcement of any decision rendered in favour of the foreign investor against the host State.

In 1987, Thailand enacted the Arbitration Act B.E. 2530² (the "1987 Arbitration Act"), which provided a separate set of rules for out-of-court arbitration. Shortly after, in 1990, the Thai Arbitration Institute (the "TAI") was founded under the auspices of the Office of the Judiciary of Thailand to actively promote arbitration³.

Thailand continued to pursue its goal of becoming pro-arbitration with the Office of the Prime Minister passing the Regulations on Compliance of Arbitration Awards in 2001⁴, for the purpose of "*promoting dispute resolution by arbitration, which will be beneficial to and support the promotion of international trade and investment and Thailand's economy.*"⁵ The Regulations provide that where an arbitration award is rendered against a state agency, the state agency shall comply with the award without the requirement for enforcement proceedings in court. The exception is if the award is: (1) contrary to the law governing the dispute; (2) the result of an unjust act or process; or (3) outside the scope of the arbitration agreement.

After nearly 15 years of service, Thailand decided

to modernize the 1987 Arbitration Act to incorporate the most recent developments in international arbitration and to move closer to the UNCITRAL Model Law on International Commercial Arbitration.

Consequently, Thailand introduced a new legislation largely based on the UNCITRAL Model Law, the Thai Arbitration Act B.E. 2545⁶ (the “Act”) in 2002. Striving to develop its infrastructures more rapidly, and more generally as part of the effort to encourage foreign investment in Thailand, Section 15 of the Act explicitly permits to insert an arbitration clause in a contract between a government agency and a private enterprise, irrespective of whether the contract is administrative in nature or not.⁷

Thailand thus became one of the most arbitration-friendly countries of the newly industrialized economies.

2. Fasten Your Seatbelts

Within the last decade, however, Thailand began to progressively restrict the scope of the Act and withdraw its support for arbitration in disputes involving government agencies. Attracting foreign investors is always a double-edged sword. The rise in foreign investment in the construction of infrastructure in the 1990’s led to a series of high-profile arbitrations involving the government or state entities.

In December 2003, the Southern Bangkok Civil Court upheld a 6.2 billion baht (approximately USD 202,000,000) arbitral award against the Thai government in a highly publicised expressway construction dispute, *Bangkok Expressway Plc v. Expressway and Rapid Transit Authority of Thailand (ETA)*. As a result, the Thai Cabinet passed a resolution on 27 January 2004, stating, “*Concession agreements, under the current law, are administrative contracts and disputes under such agreements should be submitted to the administrative court or the judiciary. Therefore, concession agreements between the state and a Thai or foreign private sector party should not contain an agreement to settle the dispute by arbitration.*”⁸ However, where there are “problems” or the contracting party requires including such a provision in the contract, “*the matter should be referred to the Cabinet⁹ for approval on a case-by-case basis.*”¹⁰ This resolution directly contradicted Section 15 of the Act.

Further, on 28 July 2009, the Cabinet extended the 2004 resolution to forbid, *on principle*, **any** contract entered into by the government and a private entity, Thai or foreign, from containing an arbitration clause as a method of dispute resolution.¹¹ The inclusion of an arbitration clause in any contract with the government, including any state entities, remains subject to Cabinet approval on a case-by-case basis. The Cabinet reasoned that when the government contracts with private sector, particularly large projects or the grant of concessions, proceed to arbitration, “*the state agencies, most of the time, tend to lose the case or be found liable for compensation resulting in a burden on the state budget.*”¹² Not surprisingly, this Cabinet resolution came within a month after the Arbitral Tribunal rendered the award in *Walter Bau AG v. Kingdom of*

Thailand on 1 July 2009.

In a further step to limit arbitration, on 31 August 2010, a new bill¹³ has been introduced to amend Section 15 of the Act to explicitly maintain that the Act shall not apply to contracts between government agencies and private entities. However, the Cabinet finally adopted the recommendation of the Office of the Council of State and decided against amending the Act, with a view that the problem does not stem from arbitration itself, but from the failure in the administration and drafting of contracts. Still, this attempt to amend the law implies a strong objection to the recourse to arbitration in public matters.

3. Mayday?

While the world economy is stuttering to recover across the West, Asia is still booming and maintaining global expansion. Thailand is the second largest economy in Southeast Asia with an expected growth of 4.5% in the next 2 years. However, in light of Thailand’s new trend to exclude arbitration whenever the government is involved, will its economy still flourish?

The hostility towards arbitration clauses in government contracts has caused a substantial concern in the business arena. The magnitude of this concern is still, for the time being, uncertain. It is, however, quite clear that Thailand is now perceived as not being arbitration friendly, especially towards foreign parties. Recourse to arbitration is now not only limited but enforcement has also gradually become an issue.

Indeed, despite being a member to the New York Convention, Thailand has frequently refused to enforce awards involving state entities on the ground of “public policy”. In the recent case *Walter Bau AG v the Kingdom of Thailand*, Thailand refused to voluntarily comply with the award. Werner Schneider, acting as insolvency administrator for Walter Bau, thus sought confirmation of the 2009 arbitral award before the New York district court. Once obtained on 14 March 2010, Thailand appealed the judgment before the US Court of Appeals for the Second Circuit. In parallel, in September 2011, two months after the seizure of the Prince’s private jet, Thailand made a request for revision of the arbitral award before the Swiss Supreme Court. In the end, Thailand’s appeal before the US courts was dismissed and the award was confirmed on 8 August 2012. Moreover, the Swiss Supreme Court dismissed Thailand’s request and ordered it to pay Walter Bau AG EUR 150,000 in legal costs and to bear court costs of EUR 85,000 on 23 July 2012. Although the saga is on-going and has not yet reached an end, it seems evident that Thailand will resist enforcement of this award for as long as it can.

Thailand is undoubtedly conscious that it is important to be recognized as an arbitration friendly jurisdiction in order to attract foreign investments. If Thailand persists in this path, all its efforts to create income from foreign investors or from holding arbitration proceedings in Thailand will become moot.

4. Joining the Frequent Flyer Program



Based on the postulate that arbitration is unfairly favourable to foreign investors, several countries in Asia, Eastern Europe, Africa and Latin America have recently adopted a restricted position on the arbitrability of disputes pertaining to public interests.

For instance, Russia imposes restrictions on the arbitrability of certain categories of disputes including those related to administrative contracts. Egypt restricts recourse to arbitration whenever an administrative contract is at stake and requires explicit ministerial approval of the arbitration clause.

Worse, Venezuela, Bolivia and Colombia passed laws

emphasizing economic protectionism, turning the region into a challenging forum for international arbitration and foreign investor arbitration in these regions is not an option any more.

In light of the above, is limiting recourse to arbitration a new trend? Will it expand?

For the sake of promoting international trade and investment, and thereby to some extent world peace¹⁴, let's hope not...

Vanina Sucharitkul and Gregory Travaini

1. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

2. Available at <http://rss2.thaichamber.org/rss/view.asp?nid=1146>

3. Available at <http://rss2.thaichamber.org/rss/view.asp?nid=1147>

4. Regulations of the Office of the Prime Minister on Compliance with Arbitration Awards B.E. 2544 (2001).

5. *Id.* at para. 1.

6. Enacted on 29 April 2002 and entered into force on 30 April 2002. Available at <http://web.krisdika.go.th/data/law/law2/%cd13/%cd13-20-2545-a0001.pdf>

7. Section 15 of Arbitration Act B.E. 2545 provides: In a contract between a government agency and private party, whether administrative contract or not, the parties thereto may agree to settle their disputes by arbitration. The parties to the contract shall be bound by such arbitration agreement.]

8. Free translation of excerpt of the 27 January 2004 Cabinet Resolution, available in Thai at http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=197224&key_word=%A1%D2%C3%B7%D3%CA%D1%AD%AD%D2%CA%D1%BB%B7%D2%B9%C3%D0%CB%C7%E8%D2%A7%C3%D1%B0%A1%D1%BA%E0%CD%A1%AA%B9%20&owner_dep=&meet_date_dd=&meet_date_mm=&meet_date_yyyy=&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=

9. The Cabinet is the primary body of the executive branch of the Thai government, composed of thirty-five of the most senior members of the government. The members are nominated by the Prime Minister who chairs the Cabinet

10. *Supra* at footnote no. 8.

11. Cabinet Resolution of 28 July 2009, available in Thai on the website of the Secretariat of the Cabinet http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99220752&key_word=%&owner_dep=&meet_date_dd=&meet_date_mm=&meet_date_yyyy=&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=

12. Free translation of excerpt of the 28 July 2009 Cabinet Resolution.

13. Minutes of the Cabinet Meeting on 31 August 2010, available in Thai only at <http://www.eppo.go.th/admin/cab/cab-2553-08-31.html#3>

14. The preamble to the United Nations Convention on Contracts for the International Sale of Goods (1980) provides that the “*development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States*”