Joint Foreign Chambers of Commerce in Thailand

JFCCT / EABC Policy Recommendations about Arbitration: v 1.8A

The Development of Arbitration in support of Thailand as an economic centre and as a data services hub

JFCCT and EABC see value for the economy and in 'doing business' in Thailand through supporting arbitration efforts to make Thailand and more attractive seat for arbitration. In most commercial instances, investors and trading parties value fair and neutral dispute resolution and seek out locations which will provide it. An investee nation's Courts, or the Courts of one of the parties to a trade agreement, are often not perceived to provide cost effectiveness, neutrality (and thus trust) or speed. Courts have an important role in upholding and applying Thai and other law but for international dispute resolution, arbitration is preferred. Currently, favoured seats for international arbitration in the region are Singapore (eg SIAC) and Hong Kong (eg HKIAC).

Thailand's arbitration law follows the UNCITAL model law on international commercial arbitration.

Thailand is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Foreign arbitral awards can be enforced in Thailand, and a Thailand award can be enforced in some 165 member states.

An advantage of arbitration is a more flexible use of agreed or foreign law as the law governing an agreement (or the 'proper law' of the agreement). Thai law is generally not favoured over say English law or (often for finance agreements) New York law. Singapore law is often chosen where a system of law in the region is desired.

Thailand can become a strong centre for arbitration without the need to specify Thai law as the governing law of a contract.

To these ends, JFCCT recommends the following ***policy initiatives.***

1. Government contracts

Arbitration should be an accessible means of dispute resolution in all ***government contracts***. Since 2015, contracts with government continue to require a curial (Court) means of dispute resolution in three broad areas:

i. PPP
ii. Concessions
iii. Contracts needing cabinet approval under a 2005 Decree (see Annex for more details)

As a matter of practice however, many agencies are reluctant to agreeing to including arbitration as the means of dispute resolution. It is understood that standard procedure in accordance with Comptroller-General's Department, Ministry of Finance requirements or guidance, is generally not to include arbitration clauses in any government contracts.

The non-availability of arbitration has a special impact on SMEs.

More details appear in the Annex.

2. Ease of working as an arbitrator advocate.

Under a 1979 Decree, practice of law (meaning 'legal or law suit services' applying Thai law) is one of 39 activities not open to foreigners. But a work permit is available for arbitrator advocate's work or where an arbitrator meets certain criteria. This is generally thought to be because arbitration where Thai law is not applied does not amount to providing the proscribed services.

Prima facie, an arbitrator or arbitrator advocacy is carrying out "work" if the location is Thailand (regardless of the seat) even under the narrower definition of "work" effected by the 23 June 2017 Labour Decree (as amended by the 27 March 2018 Labour Decree).

In reviewing the 39 professions not open to foreigners which appears in a 1979 Decree, JFCCT and EABC hav focused on arbitration as different to the general rule that providing "legal or lawsuit services" is prohibited for foreigners. If the conditions of the arbitration exception are met, the arbitration activity is allowed to be done and a work permit is available[1]. This situation applies to arbitrators and arbitrator advocates.

In the administrative practice of issuing Work Permits, there does not appear to be a distinction between being an arbitrator and being an arbitrator advocate.

It is also important to consider the Lawyers Act of Thailand for guidance on protections offered (see Annex).

Taking all factors into account and the need to enhance and support Arbitration work in Thailand for all *international arbitrations*, we ***recommend*** that foreigners be able to act as arbitrators and arbitrator advocates, regardless of:

- The proper law of the contract / governing law of the dispute; or
- Where an arbitral award will be enforced.

and should not need a work permit for such work. The same should apply for those tasks – for example recorders, translators directly supporting the arbitration. The Minister of Labour

[1] Work Permit designated for arbitrators at least as "arbitrator"

has power to issue a Notification stating activities which would not need a work permit. Being an arbitrator or arbitrator advocate should not need a work permit, without limitation.
For *domestic arbitrations*, we would recommend the same treatment as for international, that is there should not be a restriction.

See full details in the Annex.

There is a big opportunity for Thailand to occupy the mid-level range of disputes in the region, but clear and unrestrictive rules which welcome foreign arbitrators and arbitrator advocates are needed.

Big regional arbitration centres like HKIAC and SIAC charge high rates (not to mention the arbitrators' fees for those on their rosters), which make using their services difficult for smaller contracts (with a value, say, of USD 250,000 – USD 10 million). The arbitral centre in Kuala Lumpur aims to fill this void. This is an area where Thailand could capture a large portion of the regional market share, particularly given Bangkok's location and status in the region.

3. Arbitrators should not need a work permit

"Work" is currently defined very broadly in Thailand. In considering the Minister of Labour's new powers granted by the 23 June 2017 Decree (as amended by a 27 March 2018 Decree), it has been recommended that no work permit be needed for Arbitrators conducting commercial or government arbitrations in Thailand, regardless of the proper law of the contract or choice of law, or whether the arbitral award needs to be enforced in Thailand. Please refer to a major Policy update from JFCCT / EABC released 7 March 2018 which includes the text in English and Thai of a proposed Ministerial Declaration about what is not 'work', and that Policy update's revision in light of the 27 March 2018 Decree.

A simple business visa is proposed (or visa-free entry) for all 'non work' situations.

4. Rule of Law enhancement

JFCCT and EABC have developed a policy recommendation about promoting **Rule of Law** which includes consultation as a Good Regulatory Practice per APEC. (see separate document, summarized in the Annex). A Rule of Law Index is published by the World Justice Project (Thailand has slipped for 2017/2018 over 2016). A related issue about Rule of Law strength is the Corruption Perception Index (CPI) published by Transparency International (Thailand has improved for 2017 (96th out of 180 countries; over 2016 101st out of 176 countries) but the government is reported not to be satisfied with the ranking). Arbitration fits well with this Rule of Law policy.

5. FDI increases with effective arbitration availability

It is useful to consider the positive correlation between **FDI** and arbitration availability. See World Bank study (2013). All investors ask about cost effective, neutral & impartial dispute resolution and by reputation and understanding, an arbitral process is generally the more attractive means.

6. Good support for resolution of Investor-State disputes

Following on from the learnings from the World Bank report (item 5), Investor-State disputes need trusted resolution. Most FTAs contain an Investor-State Dispute Settlement chapter. In providing an overview of status of planned bilateral FTAs in the ASEAN region on 1 March 2018, EU Commissioner Malmstrom noted that ISDS is most often linked with ICSID. She also noted that the arbitral proceedings often take place under the auspices or though the seats of LCIA, ICC (ICC's International Court of Arbitration), SIAC and HKIAC.

Thailand may usefully consider why in the context of investor-state disputes, full membership of the World Bank's **ICSID** is not effected yet. (ICSID is now over 50 years old, with some 166 signatories only 8 of which – Thailand, Russia and some Caribbean and African included – are not full members.). This topic has also been advised to the World Bank in Thailand. https://icsid.worldbank.org/en/ .

Given the number of FTAs to which Thailand is party and Thailand's aspirations as a regional centre for trade, investment and innovation, and the many incentives for investment, it seems opportune to strengthen capabilities in investor-state dispute resolution in Thailand.

7.Specialist Arbitration for the Digital Economy.

Arbitrators who specialize in or a especially trained or with good experience in digital business matters will be increasing high demand due to the need to resolve disputes in a trusted way, efficiently and cost effectively. Laws in Thailand such as the proposed Personal Data Protection Law, developments to the Electronic Transactions Act, eCommerce legislation and others give rise to situations needing effective dispute resolution by arbitration amongst other meansThe Internet Corporation for Assigned Names and Numbers ("ICANN") has implemented a programme for the introduction of new generic Top-Level Domain Names ("gTLDs"). All disputes arising out of the application for new gTLDs will be resolved following the programme's dispute resolution procedure: the New gTLD Dispute Resolution Procedure.

The New gTLD Dispute Resolution Procedure is administered by three institutions: the International Centre for Dispute Resolution (ICDR), the ICC International Centre for ADR

(Centre) and the Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO) [2].

The Internet & Jurisdiction Policy Network www.internetjurisdiction.net aims to achieve harmonization considering competing claims to jurisdiction about different aspects of cross border data flows. Effective and respected arbitration plays an important role. An on-line dispute resolution format for internet-related and eCommerce disputes has proven popular and some arbitration centres are developing these further.

It is understood that in Thailand THAC for example is developing an Online Dispute Resolution (ODR) platform specifically (initially) for eCommerce companies with launch planned in late 2018. ODR would provide a platform for e-buyers to resolve disputes without the need for in-person meetings. Typically a process could use mediation first, then arbitration.

Annexes

About Recommendation 1

https://hsfnotes.com/arbitration/2015/11/25/thai-government-lifts-total-ban-on-arbitration-clauses-in-state-contracts/ posted 25 Nov 2015 .

THAI GOVERNMENT LIFTS TOTAL BAN ON ARBITRATION CLAUSES IN STATE CONTRACTS

A recent [July 2015] Thai Cabinet resolution relaxes the restriction on arbitration clauses in some public contracts. The resolution is seen as a positive move for arbitration and investment in Thailand, but more remains to be done.

The New Cabinet Resolution
On 14 July 2015, the Thai Cabinet passed a resolution (the "**2015 Resolution**") amending a 2009 resolution (the "**2009 Resolution**") which prohibited the inclusion of arbitration clauses in all contracts entered into by private contracts with the public sector unless approved by the Cabinet on a case-by-case basis. Under the 2015 Resolution, Cabinet approval for arbitration clauses will now only be required for three types of contract, as explained further below.

Although a Cabinet resolution is a statement of government policy and does not have the binding status of a law, decree or regulation, in practice Cabinet resolutions will be followed by all of those affected. In this case, all Thai ministries, government departments and other public bodies were notified of the 2015 Resolution on 17 July 2015.

Background
The 2009 Resolution was issued in response to the Thai government's defeat in an investment arbitration brought by Walter Bau under the German-Thai Bilateral Investment Treaty.[1] On 1 July

[2] Source information: ICC https://iccwbo.org/dispute-resolution-services/icann-gtld-process/ see also ICANN: https://newgtlds.icann.org/en/

2009, the UNCITRAL tribunal awarded Walter Bau over 29 million Euros plus interest and legal costs of around 2 million Euros. By the end of the same month, the Cabinet had issued the 2009 Resolution, reasoning that when disputes arising out of government contracts with the private sector, particularly in large projects or concessions, are submitted 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*".[2]

An earlier Cabinet Resolution issued in 2004 (the "**2004 Resolution**") had already placed restrictions on the inclusion of arbitration clauses in concession agreements. This was also in response to an adverse arbitration award against the Thai government – an award of US$150m against the Expressway and Transit Authority following an expressway construction dispute.[3] The 2009 Resolution, expanding the restriction to all public sector contracts, was a further blow to arbitration in Thailand.

2015: a new dawn for arbitration in Thailand?
The 2015 Resolution is obviously a very positive move for arbitration in Thailand. But equally important are the Ministry of Justice's reasons for requesting the new resolution. The Ministry concluded, rightly, that the 2004 and 2009 resolutions gave the impression that the government does not support arbitration as a method of resolving disputes, with negative consequences for the image of Thailand and investor confidence. In addition, as Thai state agencies increasingly look to invest outside of Thailand, the 2009 Resolution was seen as hindering that potential.

What contracts are still affected by the restriction on arbitration clauses?
In the meantime, the three types of contract to which the restriction still applies are as follows.

1. Public Private Partnerships ("PPP")
The new Private Investment in State Undertaking Act B.E. 2556 (2013) sets out a legal framework for private sector participation in developing infrastructure and public services. It applies to PPP projects with a value of more than THB 1 billion, or where ministerial regulations prescribe.

Recent high profile PPP projects in Thailand include projects in the energy sector (power plants constructed in conjunction with EGAT), telecommunications (AIS Mobile, Telecom Asia, ThaiCom) transport (BTS SkyTrain, BMCL Underground Train, Don Muang Tollway) and water and sanitation (Municipal Solid Waste Management and Thai Tap Water (TTW) Water Production and Distribution). Cabinet approval for arbitration clauses in these types of contract will still be required under the 2015 Resolution.

2. Concession agreements
There is no clear definition of what constitutes a "concession agreement" for the purposes of the 2015 Resolution. However, legal scholars generally understand this to mean agreements granting the private sector the right to operate public services for a limited period at their own risk and using their own funds. "…Notably, even though arbitration clauses in concession agreements in the oil and gas sector are already permitted by the Thai Petroleum Act B.E. 2514 (1971), it is not yet confirmed whether the 2015 Resolution would still be applied for the next bidding round for oil and gas concessions in the Gulf of Thailand.

3. Contracts that require Cabinet approval under Royal Decree 2005
This category is a catch-all provision to encompass all types of contracts that require Cabinet approval, and includes any large-scale investment (THB 1 billion plus) projects involving the public sector.

Obtaining Cabinet approval

Under the 2009 Resolution, Cabinet approval for arbitration clauses was not impossible. For example, the Cabinet approved the use of arbitration in contracts between the government and the European Organisation for Nuclear Research and between Thai Airways and the International Air Transport Association ("**IATA**").

Hopefully, the new positivity towards arbitration will mean that obtaining Cabinet approval for those contracts that are still restricted by the 2015 Resolution is even more likely. There is, for example, recognition that it may be expedient to accept arbitration clauses in PPP contracts and concession contracts.

Looking ahead

While the restriction on arbitration clauses has not been fully lifted, international investors will remain wary about the investment climate in Thailand. However, the relaxation of the restriction in the 2015 Resolution is a welcome step. It demonstrates that the Ministry of Justice recognises that it needs to accept and promote arbitration in order to improve the investment climate in Thailand. This, together with the Ministry's decision to establish a new arbitration institution, the Thailand Arbitration Center ("**THAC**"),[4] are positive signs for the future of arbitration in Thailand.

Additional About Recommendation 1: special case of SMEs.

The impact on SMEs of not being able to arbitrate disputes in private – government contracts is more acute than for other companies. The number of SMEs participating in government procurement is significant. In order to deliver goods or service to the public sector, most SMEs need credit lines with their financial institution to finance the delivery of goods or service such as bank guarantees or loans to procure goods or service, etc. Unlike large companies or MNCs, SMEs do not have high liquidity. If litigation is the only dispute resolution open, it is a time-consuming and costly process. Litigation has an immediate impact on SMEs' financial status. The longer the litigation process, the higher the prospect of an SME going out of business due to the financial obligation to financial institution, even where the SME would ultimately have been successful in the litigation. If there is an arbitration clause in the contract, the dispute can be resolved faster consequently reducing the financial obligation of SMEs and allowing SMEs to maintain their business. Fairness is thus an even more crucial factor when SMEs are involved. Turning away SMEs due to concerns about lack of an effective dispute resolution process would have negative consequences.

Additional : About Recommendation 1

Foreign Court decisions

Lexology http://www.tilleke.com/resources/dispute-resolution-provisions-thailand-contracts
April 7, 2015

Foreign investors that enter into Thailand-related investment transactions should consider using Thai courts as their venue for resolving disputes. While cross-border agreements commonly name jurisdictions such as New York, England, Singapore, or Hong Kong as the litigation setting, this

approach is impractical for Thailand transactions. Foreign judgments are not enforceable in the Kingdom, so a plaintiff would have to initiate a new lawsuit in Thailand to pursue a defendant's Thai assets or otherwise enforce a contract.

Foreign judgments can be used as evidence in Thailand—but that is it. Courts place varying degrees of weight on the foreign judgment's evidentiary value. If the foreign judgment was based on a procedural issue and not the underlying merits of the case, the value would be low. The value of foreign judgments obtained by default is negligible. Ultimately, the evidentiary weight of the judgment is arbitrary and determined at the discretion of the Thai court.

Thailand has a special court to handle cross-border cases. The Intellectual Property and International Trade Court (IP&IT Court) began hearing cases in 1997 in response to the growing number of disputes involving foreign parties. The IP&IT Court has jurisdiction over disputes involving international commercial agreements and international trade (including anti-dumping actions), among others. The IP&IT Court is based in Bangkok, but its jurisdiction extends to all of Thailand.

Although foreign judgments are not enforceable in Thailand, Thai courts are empowered to apply foreign law to a contract. This is made possible by Thailand's Conflict of Laws Act. In practice, however, applying foreign law can be challenging. First, the court will only apply the foreign law if it does not conflict with the "public order and good morals" of Thailand, which is interpreted broadly. Second, the foreign law must be proved to the "satisfaction" of the court. If it is not, the court will apply Thai law.

Further, foreign experts must testify in court on the foreign law. This is often impractical for the litigants. And even if the court agrees to apply the foreign law, a judge's understanding of the law may be much different from the parties' interpretation, leading to unpredictable results. For these reasons, it is usually more practical to use Thai law as the contract's governing law.

Importantly, foreign arbitral awards are enforceable in Thailand, as Thailand is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (otherwise known as the New York Convention). This makes foreign arbitration a more viable option for Thailand contracts than foreign court proceedings. With this in mind, a new action must still be brought in Thailand to enforce the foreign arbitral award.

To enforce the award, a claimant must ask the IP&IT Court (which has jurisdiction over foreign arbitral enforcement cases) to first recognize the foreign award. If the court recognizes the validity of the foreign award, it will allow the award to be enforced. The court only looks at procedural and due process matters related to the foreign arbitral proceeding, and not the underlying merits. If the court concludes that the respondent had a fair opportunity to present a case, it will generally recognize the foreign award.

Parties to cross-border contracts typically choose their dispute resolution venue based on convenience, familiarity, and experience with international litigation. However, the necessity to re-

litigate a case in Thailand often renders choosing another jurisdiction impractical. A foreign locale can be useful for dispute adjudication in the limited circumstance that a Thailand-based party has assets outside of Thailand. But if this is not the case, Thailand is the most practical choice. And with the growing number of international cases being heard at the IP&IT Court, foreign litigants can expect a fair and impartial hearing.

About Recommendations 2 and 3: Working as an Arbitrator Advocate or Arbitrator

The 1979 Decree restricting some 39 professions from being open to foreigners restricts 'legal or lawsuit services' from being open to foreigners. 'Legal or lawsuit services' is essentially about practicing Thai law.

There is an exception about or at least a distinction in relation to arbitration work which does not make a distinction between whether the person is acting as an arbitrator or an advocate in the arbitration, and allows that the arbitration activity can be done (subject to conditions). The exception, based on one firm's experience[3]: *"Providing legal services or engaging in legal work, except arbitration work, and work relating to defense of cases at arbitration level, provided the law governing the dispute under consideration by the arbitrators is not Thai law, or[4] it is a case where there is no need to apply for the enforcement of such arbitration award in Thailand*." [5]. The correct reading seems to be that both of these conditions need to apply for the exception to be valid, that is 'or' in effect means 'and'.

A Work Permit is available for such work, and if as an arbitrator at least, the designation is 'arbitrator'. It is understood that, depending on the timing and duration, the work could be 'urgent and necessary' thus supporting a WP-10 as 'urgent duty' work or otherwise under a WP-1. Such urgent duty cases may or may not be contemplated by the 29 June 2017 Decree which expedited some 16 activities as being deemed to be urgent and necessary[6] thus expediting the process. That Decree however was repealed by a 27 March 2018 Decree, which contemplates a replacement.

When there is a case involving a Thai party which has assets in Thailand and assets abroad, assuming the originating party wins its claim, it could enforce the arbitral award either in Thailand or in the jurisdiction where the assets are located. In the above case, there would be no way of knowing at the outset whether the arbitral award would have to be enforced in Thailand. This would be at the originating party's discretion, assuming it won the case.

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[3] See note 4

[4] We take the 'or' to be conjunctive rather than disjunctive. Thus both conditions need to apply in order for the exception to be valid. Thus the 'or' reads as 'and'.

[5] http://www.tilleke.com/resources/thailand-legal-basics p.137 which is based on the firm's experience of handling arbitration matters

[6] See Baker & McKenzie explanation at https://www.bakermckenzie.com/en/insight/publications/2017/07/new-urgent-duty-work-permits

The question, therefore, is whether a foreign arbitrator can lawfully participate on the arbitration tribunal or as an advocate in those proceedings. Since there's no way to ascertain whether the award might be enforced in Thailand or otherwise before the foreigner performs his/her "work" in Thailand, it may be difficult to qualify ex ante for the exception. As a matter of practice, it may however be anticipated that it would not be enforced in Thailand and the issue may only arise should that be necessary later.

The only possibly relevant aspect is thus whether Thai law is the proper (substantive) law of the dispute (but please see recommendations at the end of this section below). An arbitrator advocate should be able to work on the arbitration regardless of any other element, including enforcement of the arbitral award in Thailand. Our recommendation is that applications for Work Permits and Visas need to be revised and upgraded significantly JFCCT and EABC have released detailed composite Recommendations about Work Permit and Visa.

It is understood that in all cases using the THAC (or other centre's) Rules does not amount to apply Thai (procedural) law for these purposes. The Thai law reference is about substantive rather than procedural law.

The Lawyers Act of Thailand B.E. 2528 (A.D. 1985) is also an important reference. Section 33 provides in part:

> **"**No person who is not registered as a Lawyer and not holding a valid License or has ceased to be or has been prohibited from being a Lawyer shall be allowed to appear as a litigation lawyer in court, prepare a complaint or an answer, submit an appeal or answer the appeal, either at the Appeal Court level or at the Supreme Court level, a motion, a petition or statements incidental to court proceedings on behalf of another person….."

The Act applies only to Thai nationals. The Act prohibits non lawyers (ie those not holding a Licence from the Lawyers Council) from doing Court work. It does not prevent anyone from rendering legal advice about Thai law. Thus Thai persons who are not lawyers can and often do provide legal advice about Thai law.

Foreigners are governed differently. As noted, under the 1979 Decree, foreigners cannot do legal work in Thai Courts or provide advice on Thai law. That is, the prohibition is wider.

It is worth noting that the Lawyers Act offers no consumer protection about unqualified persons rendering legal advice about Thai law.

Taking all factors into account and the need to enhance and support Arbitration work in Thailand for all *international arbitrations*, we ***recommend*** that foreigners be able to act as arbitrators and arbitrator advocates, regardless of:

- The proper law of the contract / governing law of the dispute; or
- Where the arbitral award will be enforced.

and should not need a work permit for such work. The same should apply for those tasks – for example recorders, translators directly supporting the arbitration The Minister of Labour has power to issue a Notification stating activities which would not need a work permit. Being an arbitrator or arbitrator advocate should not need a work permit, without limitation.

For *domestic arbitrations*, we would recommend the same treatment as for international, that is there should not be a restriction.

It is noted that a proposal to amend the Arbitration Act would change s. 33/1 of that law to allow that arbitrator advocates or arbitrators would be experts in all 'International Arbitral Proceedings' and apparently would not need a work permit.

About item 4: Rule of Law policy

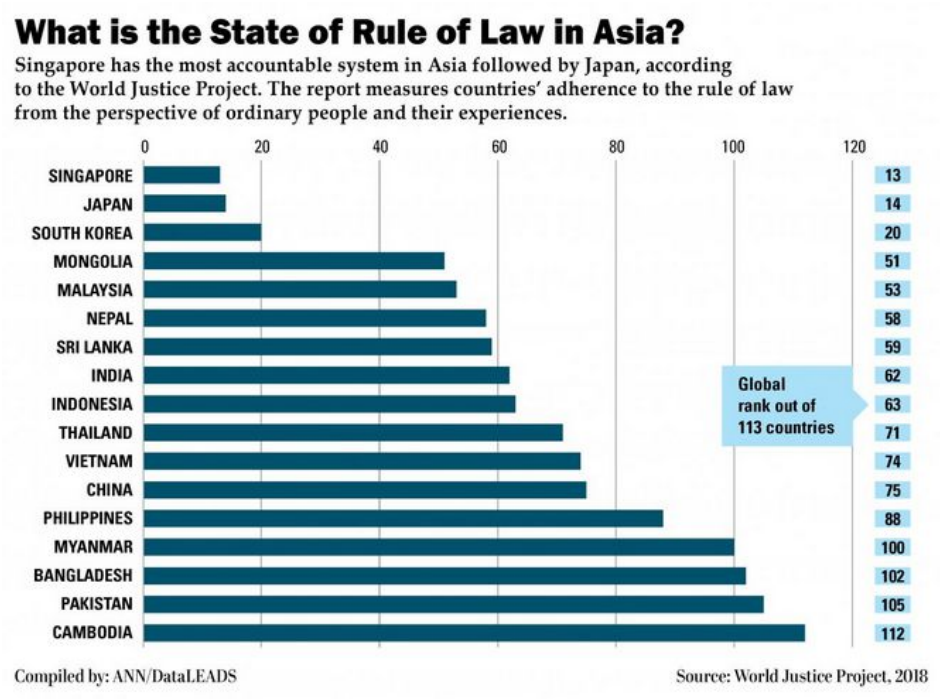
Respect for the law in Thailand is weak. There is a belief that if you have money and connections you can get around an issue. Weak Rule of Law is an investment and 'doing business' obstacle. See explanation of Rule of Law www.jfcct.org/major-business-issues/glossary/

The World Justice Project (WJP) Rule of Law Index provides an indication of how strong the Rule of Law is. "Thailand dropped seven positions for overall rule of law performance (from 64 in the 2016 WJP Rule of Law Index) to 71 out of 113 countries in the 2017-2018 edition. Its score places it at 10 out of 15 countries in the East Asia and Pacific region and 23 out of 36 among upper-middle income countries"[7].

"WJP Rule of Law Index® is the world's leading source for original data on the rule of law. The Index relies on more than 110,000 household and 3,000 expert surveys to measure how the rule of law is experienced and perceived in practical, everyday situations by the general public worldwide.

"Performance is measured using 44 indicators across eight primary rule of law factors, each of which is scored and ranked globally and against regional and income peers: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice"[8].

[7] https://worldjusticeproject.org/sites/default/files/documents/ROLIndex_2017-2018_Thailand_eng_0.pdf
[8] ibidem



Development and Content – typical

A typical legal / administrative model in practice (with some expections):

- A new law with a centralised power with a committee usually chaired by PM or nominee; majority are career bureaucrats, minority are subject matter experts. Example: proposed Fintech development board under a draft Fintech law in MoF; but sandbox development and regional Fintech MoUs are done by Bank of Thailand.
- Vague and over-reaching provisions, sometime impossible to comply with or very difficult, time consuming or expensive ('if you've done nothing wrong you have nothing to worry about'). Example: Computer Crimes Act.
- Selective enforcement, which is open to bribery.
- Rushed or token consultation and usually only one step, with little or no industry education or industry buy-in.
- Well-intentioned but poorly conceived laws. Example: (a) LFA; (b) Issued but then withdrawn NBTC Notifications on registration of tourist SIM; OTT regulation; (c) IHQ-type laws where the intent is thwarted by work permit and visa issues; (d) half measure improvements to companies doing business – eg conduct of board meetings – thwarted by pointless additional restrictions (eg restrictions in holding meetings by phone); or thwarted by work permit and visa issues.

- Opaque process in the development and consultation about draft laws – lack of clarity about drafts (no release date, no mark up, no version control, no explaination of what was taken in and why)

JFCCT and EABC propose a major rethink and re-setting about respect for law and the primacy of the Rule of Law, as follows:

1.Consultation

Proposals for a proper consultation process are long-standing:

i. Concept paper with response times
ii. Public hearing
iii. Summary of responses
iv. First draft law with explanation
v. Public hearing
vi. Second draft with markups and explanation
vii. Final comments
viii. Final version for submission to NLA

Proper consultation is a key part of the APEC Report on Good Regulatory Practices (GRP) **here**, authored by Scott Jacobs and team. A Regulatory Impact Assessment (RIA) would be needed most likely at the Concept paper or first draft stage.

Section 77 of the Constitution of the Kingdom of Thailand provides (Council of State translation):

> **Section 77.** The State should introduce laws only to the extent of necessity, and repeal or revise laws that are no longer necessary or unsuitable to the circumstances, or are obstacles to livelihoods or engagement in occupations, without delay, so as to abstain from the imposition of burdens upon the public. The State should also undertake to ensure that the public has convenient access to the laws and are able to understand the them easily in order to correctly comply with the laws.
>
> Prior to the enactment of every law, the State should conduct consultation with stakeholders, analyse any impacts that may occur from the law thoroughly and systematically, and should also disclose the results of the consultation and analysis to the public, and take them into consideration at every stage of the legislative process. When the law has come into force, the State should undertake an evaluation of the outcomes of the law at every specified period of time, for which consultation with stakeholders shall be conducted, with a view to developing all laws to be suitable to and appropriate for the changing contexts.
>
> The State should employ a permit system and a committee system in a law only in cases of necessity, should prescribe rules for the exercise of discretion by State officials and a period of time for carrying out each step provided by the law in a clear manner, and should prescribe criminal penalties only for serious offences.

2. Permanent law reform commission

The function of law reform in Thailand itself needs reform. Often there is no real structural reform, but just add ons – consider a huge hopper with uncatalogued and un cross-referenced laws, into which are dumped new laws. This is called reform but it is not. There are some but few exceptions where there is real structural reform.

A permanent law reform commission in the British Commonwealth / European style which takes references about laws – holistic approach about the subject matter, consultation and reform. This is one of the practices used in Korea after their successful regulatory guillotine approach and a key recommendation of the APEC report and the Korean expert.

One subject or reference could be the Civil Procedure Code. The current Code was inspired by the French CPC of the 1910's and does not appear ever to have been comprehensively reviewed. Similarly the Civil and Commercial Code. Thailand has for some time been bypassing the Codes to some extent with specific statutes and supporting secondary legislation (Regulations/Notifications).

3. Court reports

Even though Thailand is essentially a civil law jurisdiction, law reports (reports of court cases) do have precendent and persuasive value and need to be reported clearly so that rules can be discerned and applied. Some Supreme Court judgments may be

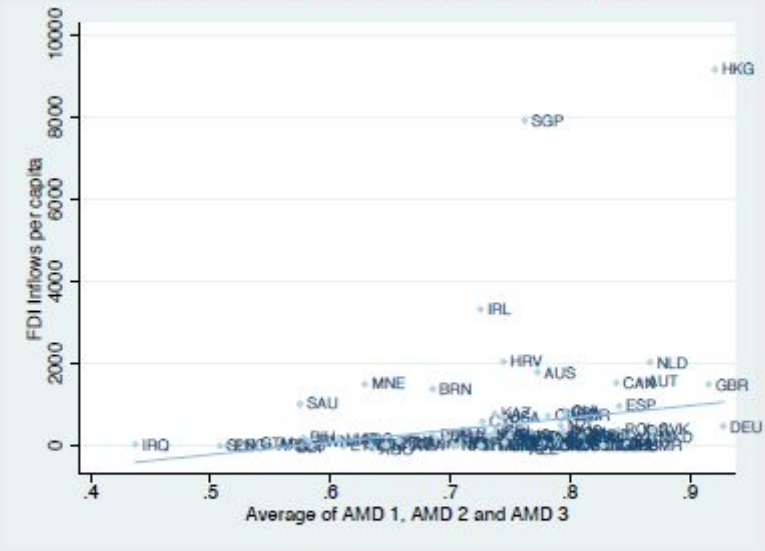
4.Guillotine practices (see details elsewhere)

The Guillotine project first phase looked at 'doing business' issues, focusing on eight of the ten World Bank criteria.

About item 5: FDI and Arbitration

The October 2013 World Bank study shows a positive correlation between ADM (relevantly in three modes) and FDI inflows (pp 13-14).

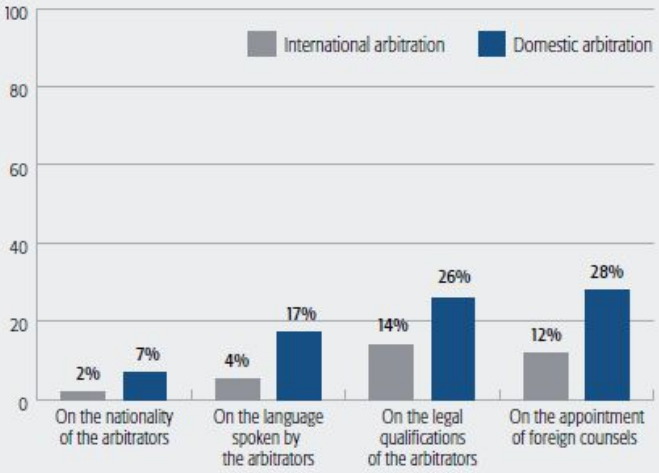
FIGURE 12: Correlation between the average of AMD 1, AMD 2 and AMD 3, and FDI inflows per capita over a five-year average



Note: The Pearson correlation is 0.225 and significant at the 5% level. The correlation exists, even if a little bit weaker, after controlling for outliers (Hong Kong SAR, China; and Singapore).
Source: UNCTADstat for FDI data.

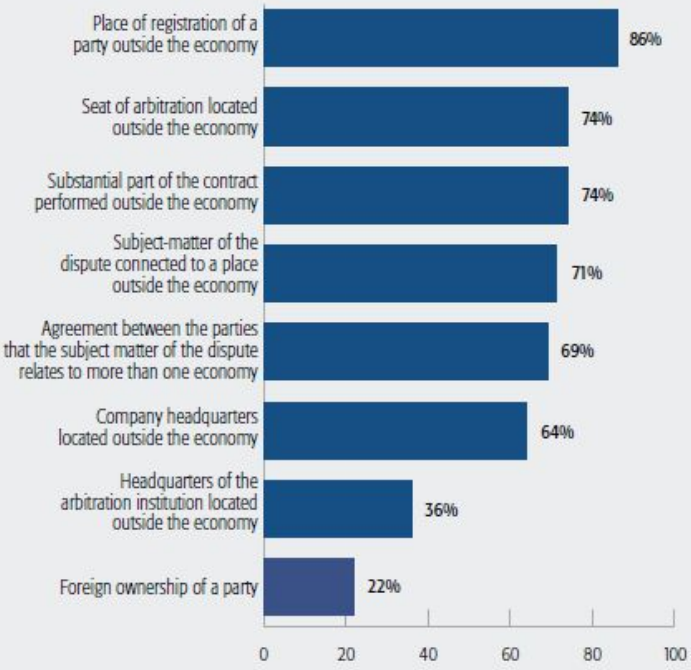
Other positive correlations are shown between Arbitration availbility with Global Competitiveness Indicators, Governance Effectiveness Indicators etc

FIGURE 4: Restrictions on the appointment of arbitrators and foreign counsels



Note: These restrictions have been measured across economies which distinguish between international and domestic arbitration and provide for two distinct legal regimes.
Source: FDI Regulations database, 2012.

FIGURE 6: Factors by which arbitration is recognized as international, in %



Note: These restrictions have been measured across economies which distinguish between international and domestic arbitration and provide for two distinct legal regimes.
Source: FDI Regulations database, 2012.

Glossary: see also www.jfcct.org/major-business-issues/glossary