



Centre for Democratic Institutions

Thai Arbitration Project Bangkok April 2000

As one component of CDI's Thai Good Governance Project, the Australia Centre for International Commercial Arbitration (ACICA) was asked to identify an arbitration expert to travel to Thailand and consult with the Thai Arbitration Institute.

Professor Michael Pryles, President of ACICA and a partner of Minter Ellison, Lawyers, was invited by the Centre for Democratic Institutions to carry out this project. Professor Pryles and his assistant Mr Gavin Denton travelled to Bangkok, Thailand on 24 April 2000 to hold discussions with, and offer assistance to, officials of the Thai Arbitration Institute.

One of the requirements of the project is to provide a report to the Centre for Democratic Institutions based on the following terms of reference:

1. Provide an overview of the background and operating environment of the Thai Arbitration Institute (TAI) of the Ministry of Justice.
2. Provide a description of the role and functions of the TAI and a broad description of the training received by Thai arbitrators.
3. Provide details of the resources available to the TAI and plans for TAI to become independent of the Ministry of Justice.
4. Provide an assessment of the broad needs of the TAI.
5. Provide an assessment of the risks, challenges and constraints facing the TAI in the delivery of its services.
6. Develop a matrix of the assistance requirements that can appropriately be provided to the TAI by foreign donors.
7. Include a brief description of the objectives and expected outcome for each activity.
8. Focusing particularly on institutional and human resource needs, identify areas where Australia might be strongly placed to provide assistance.

Background

Thailand, like many of its Asian neighbours, experienced phenomenal economic growth during the 1980s and early 1990s. During this time, international commercial arbitration became increasingly popular as an alternative to litigation, in resolving commercial disputes around the world. The exponential growth of arbitration resulted in the establishment of many international arbitration centres, including those in Australasia such as Kuala Lumpur, Hong Kong, Singapore and Australia. Consequently, as a matter of economic interest and national pride, a number of

Thai organisations including the Thai Chamber of Commerce and the Thai Law Society developed arbitration schemes of their own.

Unfortunately, the domestic response in Thailand to these fledgling arbitration schemes was disappointing. The failure of the schemes was due mainly to the fact that the Thai public found it difficult to accept arbitration as a legitimate alternative to litigation. The general perception was that arbitration lacked the integrity, acceptability and enforceability of court proceedings and court judgments.

In order to address this perception, the Thai Ministry of Justice (whose role it was to oversee the administration of arbitration under the *Arbitration Act 1987*), decided to establish an arbitration office as part of the Ministry of Justice. The purpose of aligning the Arbitration Office with the Ministry was to lend credibility to the arbitral process in an effort to achieve greater acceptance and support from the Thai public.

The result has been positive and in recent years the use of arbitration in Thailand has grown significantly. It has gained acceptance and popularity in many industries, and arbitration schemes are now firmly established within several industries and trading associations. The most successful of these in terms of the total number of cases, the total value of disputes, and the acceptance of the local business community, has been the Thai Arbitration Institute (TAI). The TAI is the new name given to the Arbitration Office, Ministry of Justice, in anticipation of its separation from the Ministry later this year. The number of disputes referred to the TAI has increased significantly since the onset of the Asian economic crisis in 1997. "During the past three years the number has doubled every year, and the trend is that the growth will continue at this rate for many years to come."¹

Current Structure of the Thai Arbitration Institute

While the name *Thai Arbitration Institute* is already being used, it is still located at the Arbitration Office, which falls under the auspices of the Ministry of Justice. It is supervised by an advisory board, known as the Arbitration Committee, which is comprised of representatives from various divisions within the Ministry of Justice, the Attorney-General's Office, the Ministry of Commerce, the Chamber of Commerce, the Law Society and the Federation of Industries. The Arbitration Committee is made up of 19 members and *ex officios*. The Arbitration Committee, however, has rarely met and has played a minor role in the development of the TAI.

Although the TAI is still under the control of the Ministry of Justice, its day to day operations are to a large degree run independently, with much of the decision making and responsibility being assumed by the Director of the TAI and his close advisors.

Future Structure of the TAI

As stated above, it is the intention of the Ministry of Justice to privatise the TAI as soon as possible. A bill establishing the Thai Arbitration Institute as an independent organisation has been drafted by the Ministry of Justice and is due to be submitted to Cabinet in the near future. Submission of the bill has been delayed for over a year while the matter of financial assistance to be rendered to the TAI is finalised.

Due to the Asian economic crisis, the Thai Government has been unable so far to provide the necessary financial support for establishing and ensuring the ongoing viability of the TAI once it is privatised. The Ministry of Justice took the decision, therefore, to extend the time for submission of the draft bill until the Thai economy showed sufficient signs of recovery. During our discussions with the Director of the TAI, Judge Voravuthi stated that he expects the draft bill to be submitted to Cabinet by the end of this year.

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Once privatised, the functions of the TAI will be much the same as they have been under the Ministry of Justice, and similar to those of other recognised international arbitration centres, such as the London Court of International Arbitration and the American Arbitration Association.

The Arbitration Committee, which is presently appointed by Cabinet, is theoretically responsible for overseeing the separation of the TAI from the Ministry. However, in practice it is the responsibility of the Director and his staff.

The successful growth of arbitration in Thailand has been largely due to the TAI's formal links with the Ministry of Justice. However, having achieved its purpose, the rationale for establishing the TAI as an independent organisation is to gain support from both international and domestic investors, as well as to improve and modernise its services without the restrictions of government bureaucracy.

Clearly, the need for external sources of funding has played a significant part in this decision. Given the economic constraints facing the Thai Government, new sources of funding are vital to ensuring the long-term viability of the TAI and the continued growth of arbitration as a mechanism for dispute resolution in Thailand.

Separating the TAI from the Ministry presents both considerable challenges and opportunities. Once privatised, the TAI will require significant assistance and resources in order to maintain (and improve) its quality of service. It will also need advice on how to generate its own sources of income, assistance in promoting itself both domestically and internationally; and help in developing training programs designed to assist TAI staff, legal practitioners and the Thai judiciary.

Changes to the Arbitration Committee under the New TAI Structure

Once the draft bill formally establishing the Thai Arbitration Institute is enacted, a committee comprised of representatives from both the public and private sectors will supervise the TAI. In essence, the structure of the new committee will not be significantly different to that of the current Arbitration Committee. However, it is important that the new committee include a number of notable international arbitration experts in order to help establish and promote the TAI both within the region and beyond.

The current composition of the Arbitration Committee (which remains largely unchanged under the new structure), is necessary to ensure the funding requirements for the TAI. However, as the Committee meets infrequently it is of minimal value to the TAI in developing long term policy proposals and providing support to the Director and staff of the TAI. Therefore it may be worthwhile considering the creation of a separate committee of academics, an officer of the Intellectual Property and International Trade Court, legal practitioners and international experts to advise, promote, and support the TAI on an ongoing basis. The committee would be responsible for:

- Developing long-term planning and policy advice;
- Promoting the TAI both domestically and internationally;
- Planning and approving a financial budget; and
- Issuing regulations for the management and administration of the TAI.

The day to day operations of the TAI will remain the responsibility of the Director. The Director's responsibilities include:

- Management of the TAI in accordance with its constitution;
- Responsibility for Human Resource Management;

- Implementing the recommendations of the Arbitration Committee and any sub-committees; and
- Fulfilling those responsibilities as provided for in the TAI's Arbitration and Conciliation Rules.

Role and Functions of the TAI

The primary role of the TAI is to assist parties to a dispute to resolve their difficulties through the use of arbitration and other forms of alternative dispute resolution. The role of the TAI is not to decide the cases in dispute, but to assist the arbitrators and the parties to the dispute by ensuring that the proceedings run smoothly. Currently, the TAI has approximately 200 active cases on its books. Of these, approximately 70% are domestic and 30% international cases.

The TAI provides support to parties by assisting with the selection of an arbitrator where necessary, by providing the necessary physical and human resources required to conduct an arbitration, and providing TAI arbitration and conciliation rules which govern the arbitration.

The TAI currently has in excess of 220 eminent lawyers and other professionals on its list of arbitrators to choose from. It also has 19 arbitrators on its *Overseas Arbitrators List*. Parties to an arbitration may also nominate a professional from outside the TAI's list of arbitrators. The TAI's list of arbitrators is divided into 15 categories, including international trade, intellectual property, carriage of goods by sea, construction contracts, etc. Furthermore, parties are free to choose the language in which they'd like the arbitration to be conducted. The languages most commonly used are Thai and English.

Training

One of the areas where the TAI requires considerable assistance is in the planning and development of training programs. At present there are no formalised training programs run by the TAI for arbitrators or staff. Training occurs on an ad hoc basis and usually when a notable expert is visiting the Institute. The TAI has identified a number of areas where training would assist them, including:

- a training program for arbitrators (including members of the Thai legal profession); and
- a training program for TAI staff in arbitration procedures, case management and administration.

Training for Arbitrators

At present there is no formal training program aimed at developing the skills of local arbitrators or for members of the Thai legal profession. The development of such a program is fundamental to establishing the TAI as a regional arbitration centre, as it is the quality of the arbitrators selected, as well as that of administrators and their professionalism, which will ultimately determine the success of the TAI.

An important element in developing a training program for arbitrators would be to devise a program that is suitable for lawyers and non-lawyers alike, such as engineers, builders, architects, etc. A separate course could be focused specifically on international arbitration.

Training of TAI Staff

There is also a need to develop both the administrative and arbitration skills of the TAI's staff. Most legal officers are recently qualified lawyers with little or no legal experience and in most cases no arbitration experience. Therefore, it would be beneficial for TAI legal officers to participate in training programs in order to strengthen their arbitration skills.

It would also be very useful for TAI staff to be provided with specialised administrative training, including the development of case management and time management skills. It is crucial to the success of the TAI, especially for international arbitrations, that the TAI adopt internationally accepted administrative procedures and to ensure that the provision of TAI services operate within a timeframe acceptable to the disputants.

It would also be invaluable for TAI staff to participate in secondments to other arbitration centres and to undertake further international training where funding was available.

Information Sessions for the Thai Judiciary

In addition to the proposed training courses mentioned above, we recommend that information sessions be developed for the Thai judiciary. The purpose of the sessions would be to inform judges about the nature of international arbitration and the important role of the Courts in assisting arbitrations, particularly under the proposed new Thai arbitration law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').

In terms of international arbitration it is necessary for the Thai judiciary to have a comprehensive understanding of the importance of the New York Convention and the authority it confers on national courts. In particular, it is important that the Thai judiciary be provided with information in relation to staying court actions commenced in breach of an arbitration agreement and the international enforceability of awards under the New York Convention.

Importantly, the New York Convention requires each Contracting State to recognise an agreement in writing where the parties have undertaken to submit a dispute to arbitration and where the subject matter of the dispute is capable of settlement by arbitration. Where a party is subject to an arbitration agreement and chooses to ignore that agreement and bring an action before a court of a Contracting State, then that court 'shall' at the request of one of the parties refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Furthermore, it is imperative that the judiciary understand their responsibilities in relation to the enforcement of foreign arbitral awards under the New York Convention. In most cases there is little scope for the court of the Contracting State not to recognise and enforce an award. However, Article 5 of the New York Convention provides limited circumstances in which the recognition and enforcement of a foreign arbitral award may be refused.

It may also be useful for the Thai judiciary, especially the Central IP & IT Court to establish relationships with other international bodies such as the Australian Institute of Judicial Administration (AIJA). There is currently some discussion within the AIJA about establishing an information program for Australian judges in relation to arbitration.

The future success of arbitration in Thailand requires the support of the Thai judiciary. The Central IP & IT Court is seen as a model court for the rest of the Thai judicial system and therefore any assistance to the Court would be a beginning point from which they would then be able to train judges in other Thai Courts. Consequently, any support that could be provided to the Thai judiciary and in particular the Central IP & IT Court would be a positive contribution to the development of arbitration in Thailand.

1.1 parties that arbitral awards would be upheld in Thailand.

Seminar on International Arbitration

At the request of the TAI Professor Michael Pryles presented an in-depth seminar on international arbitration on Wednesday 26 April 2000. The seminar was introduced by Professor

Sansern Kraichitti, a retired Chief Justice of the Supreme Court and Senator. The seminar discussed the nature of international arbitration, its development and its importance to Thailand. Professor Pryles also discussed the important nexus between international arbitration and national courts, noting that while judicial 'assistance' is required, judicial 'supervision' is seen as interference and an encumbrance.

The seminar was well attended by approximately 60 people, including members of the Thai judiciary, academics, members of the legal profession and offices of the TAI. The seminar went for approximately two hours followed by a question and answer session at the end. It is noteworthy that the seminar promoted considerable discussion among the participants, and was regarded as extremely useful.

UNCITRAL Arbitration Exercise

Following the presentation of the seminar, Professor Pryles took the participants through an UNCITRAL arbitration exercise that he devised. This was an interactive session whereby participants helped identify the relevant issues in the exercise and the steps required to carry out an arbitration under these rules. Professor Pryles led the discussion taking participants through the relevant articles of the UNCITRAL Arbitration Rules from the issuance of a notice of dispute through to the writing of the award and associated costs. This exercise was seen as particularly useful given that Thailand's proposed new arbitration act closely mirrors that of the UNCITRAL Model law.

Conclusion

The Thai Arbitration Institute faces many challenges and opportunities as it prepares for privatisation. It has already laid the foundations for establishing a successful international arbitration institute by drafting a new arbitration bill which is modelled on the UNCITRAL Model Law. Legislation has also been drafted that will separate the TAI from the Ministry of Justice. This will enable the TAI as an independent organisation to seek the support of both domestic and international investors, and create an environment in which it is able to modernise its services without the restrictions of government bureaucracy. Furthermore, the TAI has established itself in new offices, separate from the Ministry and with first class facilities for supporting arbitration.

Along with these significant opportunities come certain risks and challenges. The TAI will need to find new sources of funding to develop strategies for promoting the TAI both domestically and internationally, develop training programs for TAI staff, and broaden the skills base of arbitrators in Thailand generally. Furthermore, it is important that the TAI establish strong links with the Thai judiciary, especially the Central Intellectual Property and International Trade Court.

To a large degree it is the leadership of the TAI that will ultimately determine its success. Unfortunately, the current Director Judge Voravuthi Dvadison, is due to leave the TAI very shortly. It is vital to the ongoing success of the TAI that a dynamic and experienced leader be chosen to continue the work commenced under Judge Voravuthi's tenure.

Australia is well positioned to assist the TAI to achieve some of its goals. In particular, we are well placed to assist the TAI in developing training programs assist in the development of a business plan and contribute to the promotion of the Institute both locally and internationally.