



HERBERT
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GUIDE TO RECOGNITION
AND ENFORCEMENT
OF ICA ARBITRATION
AWARDS IN THAILAND

LEGAL GUIDE

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Herbert Smith Freehills is an international law firm. Our office in Bangkok has a busy dispute resolution practice and our lawyers regularly act as counsel on international and local arbitration matters. Since the most recent global downturn in the world cotton markets, there have been various attempts to enforce International Cotton Association ("ICA") arbitration awards in Thailand.

In this guide, we set out the basic legal framework for the enforcement of international arbitration awards in Thailand, and discuss some of the strategic issues faced by parties seeking enforcement.

1. THAI LAW ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRATION AWARDS

Sections 41 - 45 of the Thai Arbitration Act B.E. 2545 (2002) (the "TAA") cover enforcement of arbitration awards, and no distinction is drawn between domestic and international awards.

Section 41 provides that an arbitration award made in a foreign country will only be enforced in Thailand if it is subject to an international convention, treaty, or agreement to which Thailand is a party, and then only to the extent Thailand is bound. Both Thailand and the United Kingdom are signatories to the Convention on the Recognition and Enforcement of Arbitral Awards (1958) (the "New York Convention"). So, for ICA arbitration awards rendered in Liverpool, recognition and enforcement under the New York Convention is available in Thailand.

2. ENFORCEMENT PROCEDURE AND TIMELINE

A party seeking to enforce an award in Thailand must do so within three years from the date on which the award became enforceable (TAA section 42). The party needs to file a claim with the "competent court" having jurisdiction. For most cases, this court will be the Intellectual Property and International Trade Court (the "IP&IT Court"), which was established to handle cases with an international element. The judges of the IP&IT Court generally have more experience of dealing with international commercial matters.

A typical recognition and enforcement claim will proceed as follows:

- Petitioner files the Application to enforce the award – attaching an original or certified copy of the award and an original or certified copy of the arbitration agreement (TAA section 42(2)); Thai translations of foreign language documents will be required in its required form (TAA section 43(3)).
- Respondent files a Defence – the Respondent may put forward grounds for opposition.
- Preliminary hearing – the Court will set the issues to be determined, allocate the burden of proof for each issue, and schedule an evidentiary hearing; the Court may also explore the possibility for mediation between the parties and will often act as mediator if the parties are willing to participate in mediation.
- Evidentiary hearing – this may take place over several days, sometimes not consecutive; each party will be able to put forward witnesses and documentary evidence to support their positions, and the other party will be given the opportunity to cross-examine the witnesses and rebut the evidence; hearings are generally open to the public but the Court may restrict public access or publication of certain facts in order to safeguard the public interest (Civil Procedure Code section 36).

This procedure can take between 6-18 months, depending on how aggressively the Respondent objects to enforcement. In a recent case before the IP&IT Court, we have successfully obtained a decision enforcing an ICA arbitration award in 6 months.

3. GROUNDS FOR REFUSING RECOGNITION AND ENFORCEMENT

The Court may refuse enforcement if the Respondent proves one of grounds below, which are largely as specified in Article V of the New York Convention (TAA section 43):

- the legal incapacity of a party;
 - the invalidity of the arbitration agreement;
 - the lack of proper notice of the arbitration or the appointment of the tribunal, or another event that meant that the Respondent was unable to present its case;
 - the fact that the award made a determination of an issue falling outside the scope of the arbitration agreement (provided that, if the offending part of the award can be separated from the rest, then the non-offending parts may be upheld);
 - the composition of the tribunal or some other aspect of the arbitral proceedings was not in accordance with the arbitration agreement of the parties or the law of the country where the award was made; or
 - the award has not yet become binding or has been set aside or suspended by a court in the country where it was made.
- In addition, the Court may, on its own accord, refuse the enforcement application if it finds that (TAA section 44):
- the dispute was not capable of settlement by arbitration as a matter of Thai law; or
 - recognition or enforcement would be contrary to the public policy of Thailand or the "good morals of the people".

4. ENFORCEMENT IN PRACTICE – TACTICS EMPLOYED BY RESPONDENTS

In our experience, Respondents seeking to prevent enforcement, or delay it as much as possible, employ a variety of different tactics to do so. Some common tactics that we have seen include the following.

Challenging the Petitioner's standing to file the application – public policy argument

In order to file a Complaint in the Thai courts, a number of formalities must be followed. For example, the Court will expect to see:

- a power of attorney ("POA") signed by an authorised representative of the Petitioner company appointing the Thai lawyers filing the application;
- signed and notarised copies of the passport of the authorised representative; and
- notarised official corporate documents showing that the Petitioner company exists and is properly registered under the relevant law and that the person signing the POA has power to bind the company.

If any of the formalities are not properly followed, the Petitioner exposes itself to challenge by the Respondent on the grounds that the power to sue is a matter of public policy and a Petition filed by lawyers without proper authority should be dismissed. For example, the Defendant may challenge the validity of the POA on the basis that the Petitioner company representative was not authorised to sign and bind the company as a matter of the relevant law (i.e. the company law of the Petitioner's home jurisdiction). If so, the Petitioner may need to file evidence proving the contrary in order to ensure that the application is not dismissed.

Challenging the validity of the arbitration agreement

It is not uncommon for a Respondent to challenge the validity of the arbitration agreement. For example, the Respondent may allege that the contract containing the arbitration clause was not properly executed for some reason. In these cases, the Petitioner and its counsel need to respond robustly, and often ensure that the Thai judge fully appreciates international norms when it comes to contract execution and the incorporation of arbitration agreements into cross-border agreements.

Due process arguments

Respondents often put forward allegations that the arbitration procedure did not follow due process. For example, that the Respondent was not properly notified of the tribunal's appointment and denied the right to present its case. We have even seen this argument raised where the Respondent actively participated in the arbitration proceedings.

Appeals

An appeal against a judgment granting or denying recognition or enforcement of a foreign arbitration award is generally restricted to the following grounds (TAA section 45):

- the judgment does not accord with the arbitral award;
- a judge who sat in the case gave a dissenting opinion;
- the judgment concerns provisional measures for protection; or
- the judgment, or the recognition or enforcement of the award, is contrary to public policy or the "good morals of the people".

Appeals must be filed directly to the Supreme Court or the Supreme Administrative Court. This means that the Court of Appeal is bypassed, but the option of appealing does mean that a Respondent can delay enforcement by doing so. Given the number of cases dealt with by the Supreme Court, in practice the timeline for appeal can take anywhere between two to five years (even where the basis for the appeal appears to the Petitioner to be spurious).

5. ENFORCEMENT IN PRACTICE – STRATEGIES FOR THE PETITIONER

Given the number of tactics commonly used by Respondent's to hinder enforcement (it is important to note that the above discussion contains only a few examples), Petitioners need to adopt appropriate strategies in response. In general:

- the Petitioner should seek the assistance of experienced Thai counsel at an early stage;
- the Petitioner, in conjunction with its Thai counsel, should ensure that all of the necessary formalities for filing the enforcement proceedings are met, thus reducing the scope for public policy challenges;
- the Petitioner needs to adopt a dogged approach to the enforcement, bracing itself for time wasting on the part of the Respondent; similarly, the Petitioner's Thai counsel should respond comprehensively and robustly to any objections raised by the Respondent to enforcement, leaving the judge in no doubt about the invalid or spurious nature of the objections; and
- the Petitioner and its Thai counsel should keep the potential for an early settlement with the Respondent under review, and where appropriate explore the possibility of achieving a settlement via negotiation and mediation overseen by the Thai court.

6. CONCLUSIONS

Thailand is a party to the New York Convention and it has a number of judges who are experienced at handling international commercial matters including the enforcement of foreign arbitral awards. However, the intricacies of the Thai court system mean that recognition and enforcement proceedings can be complex.

Herbert Smith Freehills' Bangkok office has a track record of success for our clients in obtaining enforcement judgments in respect of awards issued by ICA tribunals in Thailand. But parties seeking recognition and enforcement here should be under no illusions: in some cases, it can be a complicated and time consuming process.

CONTACT US



Chinnawat Thongpakdee
Managing Partner
Bangkok
T +66 2 657 3888
chinnawat.thongpakdee@hsf.com



Gavin Margetson
Partner, Head of Dispute Resolution
Bangkok/Singapore
T +66 2 657 3817 (Bangkok)
T +65 6868 8003 (Singapore)
gavin.margetson@hsf.com



Vanina Sucharitkul
Senior Associate
Bangkok
T +66 2 657 3888
vanina.sucharitkul@hsf.com

BANGKOK

Herbert Smith Freehills (Thailand) Ltd
T +66 2657 3888
F +66 2636 0657

BEIJING

Herbert Smith Freehills LLP Beijing
Representative Office (UK)
T +86 10 6535 5000
F +86 10 6535 5055

BELFAST

Herbert Smith Freehills LLP
T +44 28 9025 8200
F +44 28 9025 8201

BERLIN

Herbert Smith Freehills Germany LLP
T +49 30 2215 10400
F +49 30 2215 10499

BRISBANE

Herbert Smith Freehills
T +61 7 3258 6666
F +61 7 3258 6444

BRUSSELS

Herbert Smith Freehills LLP
T +32 2 511 7450
F +32 2 511 7772

DOHA

Herbert Smith Freehills Middle East LLP
T +974 4429 4000
F +974 4429 4001

DUBAI

Herbert Smith Freehills LLP
T +971 4 428 6300
F +971 4 365 3171

FRANKFURT

Herbert Smith Freehills Germany LLP
T +49 69 2222 82400
F +49 69 2222 82499

HONG KONG

Herbert Smith Freehills
T +852 2845 6639
F +852 2845 9099

JAKARTA

Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm
T +62 21 574 4010
F +62 21 574 4670

LONDON

Herbert Smith Freehills LLP
T +44 20 7374 8000
F +44 20 7374 0888

MADRID

Herbert Smith Freehills Spain LLP
T +34 91 423 4000
F +34 91 423 4001

MELBOURNE

Herbert Smith Freehills
T +61 3 9288 1234
F +61 3 9288 1567

MOSCOW

Herbert Smith Freehills CIS LLP
T +7 495 363 6500
F +7 495 363 6501

NEW YORK

Herbert Smith Freehills New York LLP
T +1 917 542 7600
F +1 917 542 7601

PARIS

Herbert Smith Freehills Paris LLP
T +33 1 53 57 70 70
F +33 1 53 57 70 80

PERTH

Herbert Smith Freehills
T +61 8 9211 7777
F +61 8 9211 7878

SEOUL

Herbert Smith Freehills LLP
Foreign Legal Consultant Office
T +82 2 6321 5600
F +82 2 6321 5601

SHANGHAI

Herbert Smith Freehills LLP Shanghai
Representative Office (UK)
T +86 21 2322 2000
F +86 21 2322 2322

SINGAPORE

Herbert Smith Freehills LLP
T +65 6868 8000
F +65 6868 8001

SYDNEY

Herbert Smith Freehills
T +61 2 9225 5000
F +61 2 9322 4000

TOKYO

Herbert Smith Freehills
T +81 3 5412 5412
F +81 3 5412 5413