

# Thailand Feature

## Cancellation of a foreign arbitral award

Thailand is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>1</sup>, but it was not before 1987 that it had its first Arbitration Act. In 2002, the current Arbitration Act (the “Act”) was promulgated. The 2002 Act is modeled after the United Nations Commission on International Trade Law’s Model Arbitration Law with some variations. It is with regard to one of these variations that an apparent inconsistency with the New York Convention arose.

In 2009, the Dika Court<sup>2</sup> held, in *Krungthai Feedmill PCL v. Cargill Siam Co., Ltd.*<sup>3</sup>, that a Thai court had jurisdiction to cancel a foreign arbitral award. The case involved two Thai-incorporated companies over the purchase of animal feed from Argentina. The petitioner (buyer) to have the award cancelled had entered into negotiations with the respondent (seller), a subsidiary of a foreign company, for the purchase of the animal feed. The transaction did not go through amidst the allegation from the seller that the buyer refused to open the letter of credit even though all points had been agreed in the correspondence between them. The form of purchase and sale contract supplied by the seller, which the buyer refused to sign, required any dispute to be resolved by arbitration under the GAFTA Rules of Arbitration in London.

The respondent filed for arbitration in London and won an award against the petitioner. The latter objected to the jurisdiction of the arbitrators but did not appear in the arbitration. The petitioner then petitioned the Central Intellectual Property and International Trade Court (the “IP Court”) in Thailand to cancel the award on the ground that the arbitrators had no jurisdiction as there was no agreement to arbitrate because the purchase and sale agreement which contained the arbitration clause was never concluded. Subsequently, the respondent also petitioned the IP Court in a separate action to have the award enforced. The court consolidated the two actions.

The IP Court found for the petitioner and set aside the award on the ground that there was no agreement to arbitrate and dismissed the respondent’s motion to enforce the award. The respondent petitioned the Dika Court in both cases. The Dika Court affirmed both decisions of the trial court.

Article VI of the Convention reads:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

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1 United Nations, Treaty Series, Vol. 330, p. 3; Vol. 336, p.426 and Vol. 337.

2 The Supreme Court of Thailand.

3 Cases Nos. 5511-5512/2553.

It is implied under article VI - the only article in the Convention dealing with the setting aside of an award - that an application to set aside an award must be filed with “*a competent authority in which, or under the law of which, that award was made*”<sup>4</sup>; in this case, the English court. The UNCITRAL Model Law on International Commercial Arbitration, on the other hand, left it to each State to specify the court or courts that are competent to set aside awards.<sup>5</sup> Section 40 of the Act, which is patterned after article 34 of the Model Law, states: Challenge of an arbitral award may be made by a motion for setting aside to the competent court in accordance with this section.

The term, “competent court” is defined by section 9 of the Act to be “the Central Intellectual Property and International Trade Court, or a court where the arbitral proceedings are conducted, or a court in which either party is domiciled, or a court which has jurisdiction over the dispute submitted to arbitration, as the case may be.”

Therefore, as far as the Act is concerned, the Thai court designated above has jurisdiction to review and cancel foreign arbitral awards, the Convention notwithstanding.

Another twin case was decided by the Dika Court in 2013.<sup>6</sup> The first action was brought by TPI Polene PCL (“TPI”), a Thai public company, against HC Trading International, Inc., a company incorporated in the Bahamas, to request the IP Court to set aside an award made by an arbitral tribunal in Singapore. The second action was brought by HC Trading International, Inc. (“HC”) in the same court to have the award enforced. The main issue in both actions was whether the arbitral tribunal had the authority to consider and decide the dispute when TPI was still under court-protected reorganization without the Bankruptcy Court’s permission. The IP Court dismissed TPI’s petition to have the award set aside for lack of substantive ground and ordered the award to be enforced.

TPI petitioned the Dika Court, the latter ruled in TPI’s favour and dismissed HC’s petition to have the award enforced on the ground that to enforce the award would be against public policy as it would be unfair to the other creditors. The Court stated that although there was no ground to set aside the award, HC, as a creditor, was subject to the bankruptcy law (governing reorganization) and must comply with its provisions (i.e. to request the Bankruptcy Court’s permission before submitting the dispute to arbitration).

The 2009 and 2013 cases illustrate that the Thai court has jurisdiction under the Act to accept applications to set aside foreign arbitral awards. Even though Dika Court decisions are not law, they are highly persuasive authority. International agreements do not have the force of law in Thailand unless domesticated. Section 41, paragraph 2, of the Act states<sup>7</sup>:

In the case where an arbitral award was made in a foreign country, the award shall be enforced by the competent court only if it is subject to an international convention, treaty, or agreement to which Thailand is a party. Such award shall be applicable only to the extent that Thailand commits to be bound.

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4 Art. 5 (1) (e).

5 UNCITRAL Model Law on International Commercial Arbitration, art. 34 in combination with art. 6.

6 Case No. 13535/2556 which was consolidated with Case No. 13536/2556 between the same parties.

7 The English translation of the Act was prepared by The Chartered Institute of Arbitrators Association (the Thailand branch of the Chartered Institute of Arbitrators).

There is no similar reference to the Convention in the Act in respect of cancellation or setting aside of awards.

However, shortly before the submission of this note to the printers, information has it that the Dika Court refused to set aside an arbitral award made in a foreign country on the ground of *forum non conveniens*. Unfortunately, the decision is not yet published.

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