JURISDICTION AND RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS : A THAI PERSPECTIVE[H]

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I. Introduction

Phenomenal success in economic growth and the rapid expansion of international trade and joint ventures in Asia and the Pacific in the 1980s and the early part of 1990s contributed to the mushrooming of new international commercial arbitration centres across the region from Vancouver to Sydney. While ICC Rules are still predominant in the international commercial arbitration 'market', businesses and the legal profession are looking to alternatives. Newer countries to the arbitration scene view the establishment of a 'national' arbitration centre as something akin to the pride of a nation. Foreign investors, particularly in the government contracts involving more often than not, huge infra-structural constructions are faced with the problems of, among others, seat of arbitration, applicable law and sometimes international litigation. This article is an attempt by the author to present a, more practical than academic, view from a practitioner's perspective on the issue of international commercial litigation and arbitration in Thailand.

II. Recent Trends in Dispute Resolution Mechanism in Thailand

In the publication, *The Ministry of Justice Thailand Centenary 1892-1992*, the then Permanent Secretary for Justice, *Prasert Boonsri*, had this to say in the *Foreword* :

> *Perhaps international-trade wise, the most important creativity sprung from the Ministry of Justice is the establishment of the Arbitration Office under its auspices in order to promote and administer arbitration as an alternative dispute resolution side by side with litigation administered by the court of law.*

The relative successes or shortcomings of the Arbitration Office and arbitration generally as an ADR in Thailand will be discussed later in this article. It is now proposed to discuss some novelties in the administration of civil justice in the court of justice. Perhaps three items worth mentioning in this respect:

(a) The Practice Suggestions by the President of the Supreme Court on court-annexed conciliation and arbitration.

H This represents an update version of the same article presented at the 8th Singapore Conference on International Business Law, *"Current Legal Issues in International Commercial Litigation"* 30 October-1 November 1996 at the Shangri-La Singapore. The significant change is the enactment of the Act Establishing Intellectual Property and International Trade Court and Its Procedure 1996.

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(b) The Act Establishing Intellectual Property and International Trade Court and Its Procedure 1996.
(c) The 1991 amendment to the Civil Procedure Code as to jurisdiction and service out of jurisdiction.

A. Practice Suggestions on Court-Annexed Conciliation and Arbitration

Similar to the English practice where the Lord Chancellor may issue Practice Directions, the President of the Supreme Court sometimes issues Practice Suggestions for the judges in order to achieve uniformity and fair dispensing of justice. Influenced by the much publicized use of ADR in the United States, in 1996, the President of the Supreme Court issued the Practice Suggestions on court-annexed conciliation and arbitration.[1] The Practice Suggestions may be summarized as follows:

(a) In cases where the presiding judge is of the opinion that there is a reasonable chance of amicable settlement between the parties, the court shall initiate the conciliation proceedings.

(b) In cases where the conciliation fails and the issues in dispute involve technical point of fact where the assistance of a neutral or expert may be helpful in the speedy dispensing of the case, the court, with the approval of the parties may appoint an arbitrator to rule on the matter given. The award thus rendered by the arbitrator, if approved by the court, shall be incorporated in the final judgment.
(c) In cases where the conciliation fails and the presiding judge considers that it might not be appropriate for him or her to continue sitting in the case, he or she may withdraw from the case except where it is contrary to the intention of both parties.
(d) Each court may designate a special room for conciliation purposes. The atmosphere shall be informal and the judge and lawyers will not be wearing their gowns.
(e) Where a speedy settlement is achieved, the court may consider returning the court fees to the parties. At present the court fees stand at 2.5% of the amount in dispute but not exceeding 200,000 baht (approximately US$ 6,000) payable at the filing of the Claim. This is seen as an incentive for early settlement.

Conciliation is now practised by the courts throughout the country with encouraging figures of success. Even cases at the appellate level may be settled by conciliation. It is widely used in the Bangkok and Thonburi Civil Courts, the Central Juvenile and Family Court in cases concerning family law and in the Central Labour Court in cases of labour disputes. Thai judges are familiar with mediation because under section 20 of the Civil Procedure Code the court shall, at any stage of the trial, have power to try to bring about an agreement or a compromise as to the matters in dispute. The Thai courts, when assisting a conciliation process, will depart from their traditional passive role of a

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[1] Practice Suggestions Concerning Conciliation for Settlement dated 7 March B.E.2539 (1996).The Practice Suggestions are issued by virtue of s 1 of the Statute of the Court of Justice whereby the President of the Supreme Court is empowered, in the capacity as head of the Judiciary to lay down 'directions' for the judges. In practice these 'directions' are invariably termed 'Practice Suggestions'.

judge in the adversarial system, to the role of a more active judge in the inquisitorial system. However, when the judge feels uneasy or inappropriate for him or her to continue sitting in the case, he or she shall withdraw from the case.

Court-annexed arbitration is a welcome development of 'case management'. It helps solve the problem of backlog of cases. It is particularly useful in construction cases where the services of an expert are of great importance. It can save days, weeks or even months of court time in the testimony of expert witnesses. Court-annexed arbitration often occurs at the pre-trial conference where a difficult question of fact is singled out for special consideration by a specialized arbitrator.

B. Establishment of the Intellectual Property and International Trade Court

In late 1996, the Act Establishing the Intellectual Property and International Trade Court and Its Procedure 1996 was passed by the Parliament. The Act was the culmination of a joint effort between the Ministry of Justice and the Ministry of Commerce in the wake of negotiations between Thailand and the United States as well as the European Countries on trade related aspects of intellectual property rights. In fact Thailand is exceeding its obligation under Article 41(5) of the TRIPS Agreement[2] by establishing the IP & IT court.[3] Article 41(5) simply states:

> *It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general... Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.*

However, the IP & IT Court is established to create a 'user-friendly' forum with specialized expertise to serve commerce and industry. International trade is added to the jurisdiction of the court for the reason that in a country like Thailand specialized Bench and Bar in IP and IT should be grouped together for easy access and administration. Not least for want of sufficient workload to warrant a separate court !

The followings are some of the prominent features in the new court system:

- Liberal use of Rules of the Court to facilitate the efficiency of the forum.
- Exclusive jurisdiction in the enforcement of arbitral awards in intellectual property and international trade matters.
- Panel of three judges to constitute a quorum. Two of whom must be career judges with expertise in IP or IT matters. The third member of the panel shall be an associate judge who is a lay person with expertise in the matters. A double guarantee of specialization !
- Availability, for the first time in Thai procedural law, of the '*Anton Piller* Order' type of procedure.
- Possibility of the appointment of expert witness as *amicus curiae.*

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[2] The Agreement on Trade-Related Aspects of Intellectual Property Rights. See Ariyanuntaka 'Enforcement of IP Rights in Accordance with Obligations under the TRIPS Agreement : A Thai Perspective', *Botbandit* (Journal of the Thai Bar Association) December 1995, at 179.

[3] Under the Act, a Central Intellectual Property and International Trade Court is established with the jurisdiction of Bangkok Metropolis and its vicinities with the possibility of additional Regional IP & IT Courts to be established later by Act of Parliament.(ss 5 and 6)

- Leap-frog procedure where appeals lie directly to the IP & IT Division of the Supreme Court.

While establishing a new court is not an easy task, the promotion of it to international commerce and industry is most difficult of all. One will have to create the right 'legal environments' to attract international commercial litigation. Reputation, integrity, expertise, convenience, accessibility, expenses, respect and the enforceability of judgment in jurisdictions where it matters most are but some of the criteria one considers hard when choosing a forum to conduct international commercial litigation.

C. Jurisdiction and Service out of Jurisdiction

1. *Jurisdiction*

In 1991 there was a change in the philosophy concerning the claim of jurisdiction from that of a restrictive principle to a more liberal approach. Prior to the coming into force of the Amendment of the Civil Procedure (12th Amendment) Act B.E. 2534 (1991),[4] the Thai Civil Procedure Code[5]took a narrow approach in its claim of jurisdiction outside the Kingdom of Thailand. Under the old regime, there were only two instances whereby a plaintiff could bring a claim of right *in personam* against a defendant who was not domiciled in Thailand *i.e.* in the case where the plaintiff who was domiciled in Thailand claimed against a defendant who was not domiciled in Thailand but appeared temporarily here and was properly served with process within the jurisdiction,[6]and in the case where the plaintiff and defendant are both of Thai nationality, the claim can be brought to a court of first instance in Bangkok.

In 1991, a radical change has been made in the Thai Civil Procedure Code. The change has enabled the plaintiff to sue a defendant not domiciled in Thailand and facilitates the service of process outside the jurisdiction. Prior to 1991, Thailand was considered a domicile-based country when a plaintiff wanted to invoke the jurisdiction of a Thai court. Normally the plaintiff had to show that the defendant was domiciled in Thailand to initiate a civil case of right *in personam*. The 1991 amendment to the Civil Procedure Code has extended the jurisdiction of the Thai court in two respects:

(a) The extension of the concept of domicile
(b) The extension of jurisdiction beyond the domicile of the defendant.

(i) *Extension of the Concept of Domicile*

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4 The amendment took effect on 28 August 1991 the following day after its publication in the Government Gazette.

5 Published in the Government Gazette Vol. 52 p.723 dated 20 June 1935 and took effect on the same day of its publication.

6 A good illustration to a common law mind is the case of *Maharanee of Baroda* V.*Wildenstein* 1972] 2 Q.B. 283, where the defendant was served with a writ when on a short visit to England to attend the Ascot. There were no reported cases in Thailand quite as vivid to the case cited and thus the question of abuse of process e.g. the situation where the defendant was induced by fraud or was forced to come within the jurisdiction so that he or she might be served with a writ was merely a moot problem.

After the 1991 amendment, a defendant who is not domiciled in Thailand shall be deemed to be domiciled in Thailand for the purpose of bringing a civil action if:

(a) the defendant was domiciled in Thailand within the period of two years prior to the instigation of the action;
(b) the defendant carries on his business or used to carry on his business, in whole or in part, by himself or through an agent or a liaison, in Thailand within the period of two years prior to the instigation of the action.[7]

(ii) *Extension of Jurisdiction beyond the Domicile of the Defendant*

A civil proceeding may be commenced by a plaintiff in a claim against the defendant in a contentious case or by a petitioner in a petition to move the court to enforce his right in a non-contentious case. In a contentious case where the proceedings being initiated by a statement of claim, the jurisdiction of the court has been extended to include the following cases:

(a) The court where the cause of action arises can claim jurisdiction as well as the court where the defendant has domicile. This means the plaintiff has the choice of suing the defendant in the court where the defendant is domiciled or in the court where the cause of action arises, irrespective of whether the defendant is or is not domiciled within the territorial jurisdiction of the court.[8]
(b) The cause of action that arises in a Thai vessel or on a Thai aircraft outside the Thai territory shall be under the jurisdiction of the Civil Court.[9]This means, irrespective of the domicile of the defendant or the plaintiff, all the causes of action that arise in a Thai vessel or on a Thai aircraft outside the Thai territory can be brought to the Civil Court in Bangkok for adjudication. If the vessel or aircraft is within the Thai territory, of course, the court with the competent jurisdiction would be the court where the defendant is domiciled or the court where the cause of action arises.
(c) A claim concerning property or the right or benefit therefrom shall be brought to the court where the property is situated, irrespective of whether the defendant is domiciled in Thailand or not, or in the court where the defendant has domicile.[10]
(d) Any claim outside (c) where the defendant is not domiciled in Thailand and where the cause of action does not arise in Thailand, if the plaintiff is of Thai nationality or is domiciled in Thailand, the claim shall be brought to the Civil Court or the court where the plaintiff has domicile.[11]

However the 1991 amendment did take away the freedom of the parties in a contract to agree on the forum where the claim shall be instituted. Under the old regime,[12] the parties to a contract can agree before the dispute arises as to the choice of the forum. The provisions were abused by hire-purchase companies as well as financial institutions in choosing the Civil Court in Bangkok as their preferred choice due to the

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7 S. 3(2) Civil Procedure Code.
8 S. 4(1) Civil Procedure Code.
9 S. 3(1) Civil Procedure Code.
10 S. 4 *bis* Civil Procedure Code.
11 S. 4 *ter* Civil Procedure Code.
12 The old s 7(4) Civil Procedure Code.

proximity to their head offices often to the disadvantage of the consumers in the provinces. It is regrettable now that *bona fide* parties to the contract cannot agree on the choice of the court where their dispute shall be submitted. It is now left to the application of the law.

An interesting point to be raised here is the question whether this rule will be applicable to the choice of forum clause between a competent Thai court and a competent foreign court? For example, could the parties in a contract of sale between a buyer in Bangkok and a seller in London choose the High Court in London as the forum to litigate? It is suggested that the choice of forum clause is enforceable and the rule of the Thai Civil Procedural Code shall not apply here. It is submitted that the rule under the Thai Civil Procedural Code is applicable as between two or more Thai courts. However, in the decision of the Supreme Court no. 951/2539 (1996), the Supreme Court ruled that a competent Thai court *i.e.* the court where the defendant is domiciled, has the jurisdiction to consider the case on the face of a choice of forum clause where the High Court in London was chosen by the parties at the time of the contract. The decision was made under the old law where it was stipulated that in a choice of forum agreement the forum chosen must be a forum connected with the parties or the cause of action. The High Court of London has no connection with the parties or the cause of action in the present case and hence is not a competent court. In so deciding, the Supreme Court opted to apply the Thai Procedure Code which is contrary to what has been suggested above. It is interesting to hear the view of the IP & IT Court once the same question of law is raised there.

2 *Service of Process out of Jurisdiction*

Since the 1991 amendment to the Civil Procedure Code has enlarged the jurisdiction of the court to cover the defendants who are not domiciled in the territorial jurisdiction, it is necessary for the Civil Procedure to facilitate the service of process out of jurisdiction.

(a) Service of Process outside the Jurisdiction under Bilateral Treaties

At present, Thailand has entered into two bi-lateral treaties with Indonesia and the People's Republic of China respectively on the service of judicial documents and taking of evidence.[13] It is about to sign two similar agreements with Australia and Spain. The objective of all the four agreements is to establish a direct contact between the Ministry of Justice of Thailand and the Ministries of Justice in Indonesia, China, Australia and Spain for service of process, judicial documents and mutual assistance in the taking of evidence between the courts in Thailand and their counterparts in Indonesia, China, Australia and Spain. These agreements will shorten the process of mutual assistance by bypassing the diplomatic channel, in other words, instead of going via the Ministries of Foreign Affairs and the Embassies of their respective countries before going to the Ministries of Justice and then the courts, the request for assistance can be addressed directly to the court of the other country through the Ministry of

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[13] Agreement on Judicial Co-operation between the Kingdom of Thailand and the Republic of Indonesia dated 8th March 1978 and the Agreement on Judicial Assistance in Civil and Commercial Matters and Co-operation in Arbitration between the Kingdom of Thailand and the People's Republic of China dated 16th March 1994.

Justice and hence saves some valuable time in the process. In practice, the true value of the agreements has yet to be proved. The treaty between Indonesia and Thailand came out to be a gesture of goodwill between the two countries more than anything else because since its inception in 1978, not a single request has yet been made by either Party under the Treaty.

(b) Service of Process outside the Jurisdiction under the 1991 Amendment

Seven new sections, s 83*bis* to s 83*octies*, have been added to the Civil Procedure Code in 1991 to accommodate service of process out of jurisdiction. In order to appreciate how the system works, it is necessary to examine each section in detail:

(i) *Service of writ of summons and statement of claim*

In the case where the defendant is not domiciled within the Kingdom, the writ of summons and the statement of claim shall be served on the defendant at the place of his domicile or the place of his business abroad.[14]

(ii) *Duty of the Plaintiff*

It shall be the duty of the plaintiff to file a motion with the court within seven days from the day of the filing of the claim to move the court to arrange the service of the process abroad.[15] At this stage one will have to examine whether the country where the service of process is to be effected is a country with which Thailand has a reciprocal treatment in the serving of process. It is indicated earlier that Indonesia and the People's Republic of China are the only two countries at the moment which enjoy that status. Otherwise the plaintiff will have to furnish, together with the motion, a translation of the writ, the statement of claim together with other relevant documents to be sent to the defendant. The translation can either be in the official language of the country where service is to be effected or in English. The plaintiff will also have to provide a certificate of the translation and the security for expenses incurred by the service, which is different from country to country, but most of which are nominal.

(iii) *Duty of the Court*

In the country where there exists an agreement on mutual assistance in the serving of judicial documents, the procedure will be in accordance with the agreement. In other cases, the Civil Procedure Code will apply. The court will dispatch the writ, the statement of claim, accompanying documents and the translation thereof together with the certificate to the Ministry of Justice. The diplomatic channel will then be used *i.e.* the documents will be sent to the Ministry of Foreign Affairs, then to the Thai Embassy in the relevant country, and from there to the Ministry of Foreign Affairs of the receiving country and the Ministry of Justice or the relevant administrative office of the court and finally to the court where the service of process is to be effected.[16]

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[14] S. 83*bis* Civil Procedure Code.
[15] S. 83*quater* Civil Procedure Code.
[16] S. 83*septies* Civil Procedure Code.

(iv) *Failure to Effect Service of Process on the Defendant Abroad and Discretion of the Court*

If after 180 days have elapsed since the court has dispatched a request to the Ministry of Justice for service of process out of the territorial jurisdiction and no report of the service has been received, or in the case where the plaintiff, in an *ex-parte* application, can convince the court that:

(a) the service of process cannot be effected because the domicile or the place of business of the defendant abroad cannot be located; or
(b) the service of process cannot be effected for other reasons;[17]

the court may order that the writ and the statement of claim be posted at the court. And if it considers appropriate, the court may also order the publication in the press or any other means to make the defendant aware of the claim against him. This may include the publication in the local newspaper at the place where the defendant is or is claimed to be domiciled or broadcast on the local radio station *etc.* The means of service mentioned above shall have effect after 60 days have elapsed.

III Recognition and Enforcement of Foreign Judgments

A. GENERAL

Basically there are two methods of enforcing a judgment outside the jurisdiction of the court where the judgment is pronounced. The first method is to bring a new action in the foreign country where enforcement is sought. This action will normally be based on the judgment which has been obtained and not on the original cause of action between the parties. Secondly, where reciprocal treatment exists, it may be possible to register the judgment in the foreign country where it is sought to be executed and then to enforce it directly in the same manner as a judgment given in the court of that country. The method of bringing an action upon the judgment is dilatory and cumbersome because the plaintiff is compelled to conduct two cases in order to obtain enforcement of the judgment. The method of direct enforcement is more satisfactory and much favoured in modern law.

Unlike the enforcement of foreign arbitral awards, there are no international conventions on the global basis for the enforcement of foreign judgments. On the regional basis, in Europe, there exists the Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments. The objective of the Convention is to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments obtained in one Member State throughout the rest of the Member States. The philosophy is that judgments should be able to circulate freely within the Contracting States to the Convention which ensures that the economic life in the region is not

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[17] S. 83*octies* Civil Procedure Code. The Code does not give any detail which constitutes 'other reasons' where the service of process cannot be effected. There are no reported cases on the matter so far. However, academics have cited contrary to public policy and encroachment of sovereignty as examples of 'other reasons'. See Suchart Suksumit '*Commentary on the Amendment to the Civil Procedure Act (12th Amendment) B.E. 2534,* Krungsiam Printing Group, at 64.

disturbed and trade is thereby encouraged. In order to achieve this the Convention provides that recognition is automatic and enforcement is largely a procedural matter.[18]

B. Thailand and the Enforcement of Foreign Judgments

There are currently no provisions in the Civil Procedure Code or the Conflict of Laws Act B.E. 2481 (1938) which deal specifically with the enforcement of foreign judgments. Thailand has not, as yet, entered into any relationships, bilateral or otherwise, for the reciprocal enforcement of judgments.[19]Customary international law is silent on the subject.[20] However, one can find a reported case, Supreme Court Decision No. 585/2461 (1918), which dealt with enforcement of foreign judgment in Thailand. Considering that the doctrine *stare decisis* is observed in the Thai judicial system, the case may be cited as the only judicial authority available on the subject of enforcement of foreign judgments.

The fact of the case were as follows. The plaintiff, a *Fam Thi Lian,* a Vietnamese citizen entered into a contract of sale with the defendant, a *Tan Wan Neo,* also of Vietnamese subject whereby the defendant sold 15 rickshaws and two bicycles to the plaintiff. The plaintiff claimed that he had paid the defendant for the price but the defendant failed to deliver the goods. The contract was concluded in Saigon. The plaintiff then sued the defendant in Saigon Civil Court. The Court gave judgment for the plaintiff. The defendant fled to Bangkok where the plaintiff sought enforcement of Saigon Civil Court judgment. The Supreme Court of Siam, reversing both the Bangkok Civil Court and the Court of Appeal, held that:

> *The principle underlying recognition and enforcement of foreign judgments is one of mutual respect among nations. The court of Siam will recognize and enforce judgment rendered by a foreign court provided that the judgment was given by the court of competent jurisdiction. The judgment must also be final and conclusive on the merits of the case. In this case, the plaintiff and the defendant were both Vietnamese citizens and thus, the Saigon Civil Court enjoyed competent jurisdiction over the case. However, the judgment of the*

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[18] In the UK, the Administration of Justice Act 1920 and the Foreign Judgment (Reciprocal Enforcement) Act 1933 enable foreign judgments to be admitted to direct enforcement in England upon registration in the English court after compliance with certain conditions, provided that substantial reciprocity to the UK is granted and the benefits under the Act have been extended to the foreign country in question by Order in Council. In essence the 1920 Act and the 1933 Act apply widely to the Commonwealth and some European countries. See Dicey and Morris, *The Conflict of Laws (12th edn, 1993) Sweet and Maxwell, Ch 14.*

[19] In 1980 negotiations were held between the Governments of Thailand and France on the judicial co-operation in civil matters. The French delegations had initiated reciprocal enforcement of judgment in civil matters into the agenda, but the Thai counterparts did not think it was in the best interest of the country to enter into such an agreement at the time and thus the negotiations were concentrated on judicial co-operation prior to judgment which unfortunately left uncompleted. In 1996 Australia and Spain have shown interest in negotiating an agreement on reciprocal enforcement of civil judgments with Thailand but the negotiations only succeeded in so far as the co-operation prior to judgment.

[20] The Conflict of Laws Act B.E. 2481 (1938) s 3 provides 'Whenever there are no provisions in this Act or in any other law of Siam to govern a case of conflict of laws, the general principles of private international law shall apply"

> *Saigon Civil Court was given in default. The plaintiff failed to prove the Vietnamese civil procedural law concerning the finality and conclusiveness of the judgment given in default. Under the Civil Procedural Act B.E. 2452 (1909) of Thailand, the defendant who had been declared by the court to be in default of appearance and against whom a judgment had been given, may apply for a new trial within fifteen days from the date of judgment. Upon failure to prove otherwise, the Court of Siam will hold that judgment given in default is not final and conclusive.*

The plaintiff's claims were dismissed. However, the Supreme Court ruled that the plaintiff was entitled to bring a new action in Siam on the same cause of action against the same defendant.

Critics commented that the decision was heavily influenced by English law since *Phrya Debvidura* (*Boonchuay Vanikkul),* the President of the Supreme Court, who wrote the opinion of the Court was educated in England.[21]Nonetheless, this seems to be the position of Thai law on the recognition and enforcement of foreign judgments.

Under the English law, a method of enforcing foreign judgments is by way of action at common law. Under Rule 189 of *Dicey and Morris* on *The Conflict of Laws,* subject to certain exceptions, a foreign judgment *in personam* may be enforced by action or counterclaim for the amount due if the judgment is for a debt, or a definite sum of money and is final and conclusive. A foreign judgment which is liable to be abrogated or varied by the court which pronounced it is not a final judgment. But it has been suggested in England, and held in Canada, that a default judgment may be final and conclusive; even though it is liable to be set aside in the very court which rendered it.[22] Otherwise, the clearer the plaintiff's case, the more useless his judgment would be. The learned authors of *The Conflict of Laws* also comment[23]that since the plaintiff for the enforcement of foreign judgment can apply for summary judgment under Order 14 of the Rules of the Supreme Court on the ground that the defendant has no defence to the claim; coupled with the tendency of English judges narrowly to circumscribe the defences that may be pleaded to an action on a foreign judgment, means that foreign judgments are in practice enforceable at common law much more easily than they are in the Continent, where enforcement is easy in theory but difficult in practice because of the tendency of the courts to enlarge the scope of the defence that enforcement would be contrary to *ordre public* or public policy.

IV. International Commercial Arbitration

Schmitthoff, in his celebrated book *The Export Trade*, observes:

> *It is almost a truism to state that arbitration is better than litigation, conciliation better than arbitration, and prevention of legal disputes better than conciliation.*[24]

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[21] The learned judge obtained a first class honours from Gray's Inn before he was called to the English Bar.

[22] Dicey and Morris, *The Conflict of Laws*, *supra*, n 18, at 463-2.

[23] *Ibid*, at 457.

[24] Schmitthoff, *The Export Trade* (6th edn), Steven & Sons, p 365.

The advantages of arbitration compared to litigation are traditionally listed as follows:

(a) privacy.
(b) tribunal of the parties' choice.
(c) informality of proceedings.
(d) speed and efficiency.
(e) lower costs.[25]
(f) finality of the award.

Effective enforcement of foreign judgments and foreign arbitral awards plays an important part in global promotion of international trade. The ultimate end of both litigation and arbitration from the plaintiff's or claimant's point of view is the effective enforcement of the judgment or award. The most certain method to ensure the enforceability of a judgment is to litigate in the national court of the defendant. But most international businessmen and their lawyers are reluctant to sue in the defendant's national court. The alternatives are arbitration or litigation in the national court of the plaintiff or, possibly, in a neutral country. Unless the defendant has sufficient assets in the place where the litigation takes place, the plaintiff will have to seek enforcement of the judgment in another country. In case of arbitration, if the respondent does not voluntarily pay, the claimant will have to seek judicial assistance in the enforcement of the award regardless of where the arbitration took place.

A. Enforcement of Foreign Arbitral Awards

In purely domestic disputes, the debate whether to arbitrate or litigate may be finely balanced, much may depend upon the circumstances of each case. However, where the dispute is set in an international context, the balance comes down firmly in favour of arbitration. The main reason being while there are no international conventions on the global basis for the enforcement of foreign judgments, there is a widely accepted international convention governing the enforcement of foreign arbitral awards, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The

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[25] In many cases whether arbitration incurs lower costs than litigation is debatable. With respect to one of the direct costs -filing fees and other tribunal fees-arbitration can be more expensive than all other forms of dispute resolution including litigation. Since in most jurisdictions filing fees and court fees are nominal. In the Los Angeles Superior Court, for example, the filing fee for a civil suit is $ 99, on the other hand in Thailand, court fee is calculated at 2.5% of the amount in dispute but not exceeding ฿ 200,000 (approx. $ 6,000). The International Chamber of Commerce (ICC) Court of Arbitration's filing of registration fee is $ 2,000 and an additional administrative charge, a percentage of the amount in dispute is added. In an apparent effort to counter its reputation for being too expensive, the ICC announced that the administrative charge is now capped at $ 50,500 regardless of the amount in contention. Attention must also be given to the fact that while judges work may be described as public service most arbitrators charge for fees. Two other factors must also be taken into consideration. First, attorney fees can be huge if the trial lasts a long time. Secondly, in comparing arbitration costs to litigation costs, one must remember that arbitral awards are not themselves enforceable and if the losing party does not voluntarily pay additional costs for a judicial enforcement proceeding will be incurred.
See McDermott in an excellent article, 'A Comparison of Arbitration Conciliation and Litigation for Resolving International Trade Disputes', a paper presented at the 1989 Bangkok Conference on International Arbitration organized jointly by the Thai Law Society, the International Bar Association, the Law Association for Asia and Pacific and the Asia-Pacific Lawyers Association.

New York Convention of 1958, a convention under the auspices of the United Nations to replace the League of Nations' Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, is easily the most important international treaty relating to international commercial arbitration. The New York Convention is generally regarded as a major force behind the rapid development of arbitration as a means of resolving international trade disputes in recent decades. As of to-day, a total of 114 nations have acceded to the convention including the major trading nations e.g. the USA, USSR, Japan, France, Switzerland, the Federal Republic of Germany and the UK as well as African countries such as Nigeria and Ghana, Arab countries such as Kuwait and Egypt and Latin American countries such as Chile, Cuba and Mexico. In the Asean region: Thailand acceded to the New York Convention in 1959, Cambodia in 1960, Philippines in 1967, Indonesia in 1981, Malaysia in 1985, Singapore in 1986, Vietnam in 1995 and Brunei Darussalam in 1996.

B. Scope of the New York Convention

Article I of the Convention provides that the Convention shall apply to:

> *arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ... it shall also apply to arbitral awards not considered as domestic awards...*

However, Article I also provides that:

> *any State may on the basis of reciprocity declare that it will apply the Convention to ... awards made only in the territory of another Contracting State... to differences arising out of legal relationships ... which are considered as commercial under the national law of the State making such declaration.*

The two exceptions are referred to as the '*reciprocity reservation'* and the '*commercial reservation'* respectively.

The Convention requires a minimum of conditions to be fulfilled by the party seeking enforcement. The enforcing party need only supply the duly authenticated original award or a certified copy thereof and the original arbitration agreement or a certified copy of it. After submitting the described documents, the party submitted will have established a *prima facie* right to obtain enforcement of the award. It is up to the other party against whom enforcement is sought to prove the existence of one or more of the grounds for refusal of enforcement enumerated in Article V of the Convention. These are the only grounds upon which enforcement may be refused, the court before which enforcement is sought may not review the merits of the award. The grounds for refusing to enforce an award are:

(a) invalidity of the arbitration agreement.
(b) violation of due process.
(c) arbitrator exceeded his authority.
(d) irregularity in the composition of the arbitral tribunal or arbitral procedure.
(e) award not binding, suspended or set aside by a competent authority of the country in which, or under the law of which, that award was made.

In addition, under Article V (2), there are two other grounds for refusal of enforcement which can be raised by a court on its own motion:

(a) non-arbitrability of the subject matter.
(b) public policy of the enforcing country.[26]

C. Thailand and the Enforcement of Foreign Arbitral Awards

The present decade has witnessed unprecedented growth in commerce and industry in Thailand. The law and the legal profession have been swift to react to this phenomenon. Arbitration has emerged as an alternative dispute resolution in commerce and industry. Thailand is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The New York Convention is plainly a considerable improvement upon the Geneva Convention, since it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards. It replaces the Geneva Convention as between States which are parties to both Conventions. At present all State Parties to the Geneva Convention have joined New York and thus rendering the significance of the Geneva Convention more academic than practical.[27] On the bilateral basis, Thailand has entered into a bilateral treaty with the United States of America - the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America 1968. Article II, 3 of the Treaty provides that arbitration agreements between nationals, including companies, of the two countries shall not be unenforceable merely because the arbitration is to be held in the other country or because one or more arbitrators are not nationals of the country where enforcement is sought. Treaty, convention and international agreement on arbitration of which Thailand is a party are ratified by Parliament in the Arbitration Act B.E. 2530 (1987). Section 29 of the Act provides:

> *Foreign arbitral awards shall be recognized and enforced in the Kingdom of Thailand only if it is made in pursuant to the treaty, convention or international agreement to which Thailand is a party and it shall have effect only as far as Thailand accedes to be bound.*
>
> *Foreign arbitral awards made in pursuant to the treaty, convention or international agreement to which Thailand becomes a party after the effective date of this Act shall be recognized and enforced in the Kingdom of Thailand in accordance with this Act, subject to the conditions prescribed in the Royal Decree.*

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[26] See McDermott, *A Survey of Methods for the Enforcement of Foreign Judgments and Foreign Arbitral Awards in the Asia-Pacific Region,* in conjunction with the article cited in note 25 *supra*, this paper is presented by the learned author at the 1989 Bangkok Conference. See also Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (2nd edn, 1991) Sweet & Maxwell.

[27] The last two countries of the Geneva Convention which acceded to the New York Convention were Portugal on 18 October 1994 and Mauritius on 19 June 1996.

One interesting feature of the Arbitration Act 1987 concerning ratification is that the Act not only gives ratification to treaty, convention and international agreement on the recognition and enforcement of foreign arbitral awards to which Thailand is already a party *before* the enactment of the Act, but also to the same *after* the enactment of the Act. That is, the Act, in essence, gives a *carte blanche* to foreign arbitral awards in the future. This may be understood as a very positive attitude towards international commercial arbitration by the Parliament. The Thai Supreme Court shares a similar attitude by enforcing foreign arbitral awards long before the enactment of the Arbitration Act 1987.[28]

D. Scope of the Arbitration Act 1987

The Arbitration Act B.E. 2530 (1987) covers both domestic and international commercial arbitration. Under section 6, an arbitration agreement must be evidenced in writing in order to be enforceable. The writing may be in the form of correspondence, telegram, telex or other similar documents. If any party to an arbitration agreement commences any legal proceedings in the court against the other party contrary to the arbitration agreement, the other party may apply to the court, before the day of hearing of evidence or the day of judgment if there is no hearing of evidence, to stay the proceedings. If the court is satisfied that there is no ground to render the arbitration agreement null or unenforceable, the court shall make an order staying the proceedings. In the arbitral process, an arbitrator may seek judicial assistance in compelling the testimony of witnesses, production of documents or other evidence, granting interim measures to protect the interests of the parties prior to the award or the ruling of the court on question of law.

The arbitral award must be made in writing signed by the arbitrator or umpire, as the case may be, stipulating clearly the reason given for the award. Unless otherwise agreed by the parties, the award must be given within 180 days from the day of the appointment of the arbitrator or umpire. The period, if not extended by mutual agreement, may be extended with leave from the court.

There are two sets of provisions for the enforcement of arbitral awards, one for the domestic awards and the other for foreign awards.

1. Domestic Awards

The court may refuse to enforce a domestic award if the award is contrary to the law applicable to the dispute, or derived from an unlawful act or means, or falls outside the scope of the arbitration agreement. Appeal against the order or judgment of the court is prohibited unless :

(a) there is allegation that the arbitrator or umpire did not act in good faith or one of the parties used fraud ;
(b) the order or judgment is contrary to public order ;
(c) the order or judgment does not conform with the arbitral award ;
(d) the inquiring judge made a dissent or certified that there is good

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[28] See, for examples, Supreme Court Decision Nos. 465/2478 (1935) and 698/2521 (1978).

cause for appeal ; or

(e) the order is made provisional pending arbitral process for the protection of interests of the party.

2. Foreign Awards

Foreign arbitral awards mean awards made by arbitration conducted abroad or mainly abroad and one of the parties is not of Thai nationality. To enforce a foreign award, the party seeking the enforcement must submit its application to the court of competent jurisdiction within one year of the delivery of the award to the other party. The application must be accompanied by the following documents :

(a) the original award or a certified true copy thereof ;
(b) the original arbitration agreement or a certified true copy thereof ; and
(c) a Thai translation of both the award and the arbitration agreement to which the translator has sworn as to the correctness and duly certified by an officer of the Ministry of Foreign Affairs, a Thai consulate or diplomatic delegate abroad.

The Act has a separate provision relating to the enforcement of awards under the Geneva Convention and under the New York Convention. And since, as between the states who are parties to both Conventions, the New York Convention has replaced the Geneva Convention of 1927. In effect, the Geneva Convention is now only relevant for arbitral awards made in Mauritius. It is proposed to deal only with the enforcement to the awards made in pursuant to the New York Convention. Sections 34 and 35 of the Arbitration Act 1987 provide that the New York Convention awards may be denied of enforcement upon proof that[29] :

(a) either party is incompetent according to the law applicable to the party ;
(b) the arbitration agreement is not legally binding according to the law of the country agreed upon or of the country of the award where no such agreement exist ;
(c) the adverse party was not given adequate notice prior to the appointment of the arbitrator or the commencement of arbitration proceedings or was unable to participate in the arbitration for other reasons ;
(d) the award is outside the scope of the arbitration agreement ;
(e) the arbitrator was not appointed in compliance with the arbitration agreement or, if no agreement was made on the appointment procedure, under the law of the country where the award was rendered ;
(f) the award is not final or has been revoked or suspended ;
(g) the subject matter of the dispute is not arbitrable under Thai law ; or
(h) enforcement of the award would be contrary to public order or good morals or the principle of international reciprocity

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Public order, *ordre public* or public policy may be cited by the court to deny enforcement of foreign judgments in Thailand much in the same way that judges in the Continent of Europe enlarge the scope of the defence to the enforcement of foreign

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[29] The enforcement of Geneva Convention awards is provided in ss 32 and 33.

judgments by revoking *ordre public*. It is feared , albeit no court decisions have confirmed it, that the award given without reason and contrary to Section 20 (the award must be accompanied by reason clearly stated), may be unenforceable as contrary to natural justice and hence against public policy. It is always advisable to have the awards fully reasoned in order to seek enforcement in the civil law countries.

E. Harmonization of the Law relating to the Enforcement of Foreign Judgments and Arbitral Awards in Asean

In the field of enforcement of foreign arbitral awards, Thailand, Cambodia, the Philippines, Indonesia, Malaysia, Singapore, Vietnam and Brunei Darussalam have, respectively, acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This creates an international obligation for the countries concerned to implement the Convention in domestic law.[30] Laos and Myanmar might give a serious thought of accession to the Convention. Given the atmosphere of progress in industry, investment and international trade in this region of the world, accession to the Convention is a wise choice, at least, as far as Thailand is concerned.

Harmonization of the law relating to the enforcement of foreign judgments is a much more difficult matter. There are no international conventions on the global basis for the enforcement of foreign judgments. It is suggested that any achievement on this matter in the Asean region will best be conducted on the bilateral basis. Considerations must be given to the extent of jurisdiction claimed by each Party State and the judgments for reciprocal treatment confined to specific areas. A good example of legal harmonization in the Asean region, an encouraging starting point, is the Agreement Concerning Judicial Cooperation between Indonesia and Thailand in 1978 which falls short of reciprocal enforcement of judgments.

F. A Critique of International Commercial Arbitration in Thailand[31]

In recent times, commerce and industry have often found arbitration as the preferred means of dispute resolution to litigation in law court. More and more businessmen and lawyers with international dealings often find the inclusion of an arbitration clause in their contracts almost a standard practice. In recent past, the arbitration clause invariably incorporated the rules and the service of arbitration centres abroad. Thailand has thus been the receiving end of the enforcement of foreign arbitral awards. It was thought, in many quarters, that as a matter of economic interest, if not national pride, Thailand should establish an arbitration centre of its own to promote and administer domestic arbitration with the capability of undertaking international commercial arbitration. The Thai Board of Trade had the first attempt. The Law Society had also a similar scheme. Law professors and academics attempted with *ad*

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30 In a 1984 decision, the Indonesian Supreme Court (Judgment of August 20, 1984) held that, due to the absence of implementing legislation, Indonesian Courts were not bound by the Convention and therefore foreign arbitral awards are not enforceable. See *McDermott* in the article cited in note 26 *supra*. The situation has since been corrected.

31 See Hutter, 'International Commercial Arbitration in Thailand' *Botbandit* (Journal of the Thai Bar Association) December 1992, at 1, for a critical analysis of the legal environments of international commercial arbitration in Thailand.

hoc arbitration too. All with little success. The principal factor thought to be underlining the above predicament was unacceptance from the public. The public found it hard to accept the forum as a replacement for the court of justice in terms of integrity, acceptability and enforceability of the awards.

The first serious attempt to deal collectively and effectively with international commercial arbitration in Thailand was the establishment of the Arbitration Office, Ministry of Justice in 1990. The Ministry of Justice, which is entrusted by the Arbitration act B.E. 2530 (1987) to oversee its administration took pains in explaining its role and the assurance of independence and neutrality of an arbitration centre administered by a government organ. In the booklet introducing the Arbitration Office, it states:[32]

> *The role of the Ministry in this Office is to lend the creditability of the Ministry of Justice to the Office and hence, hopefully, the acceptability from the public...*
>
> *The Arbitration Office has its own conciliation and arbitration rules. These rules are based upon the UNCITRAL and AAA rules. At present the Office has enlisted 128 eminent lawyers and other professionals in its list of arbitrators. Parties are free to nominate qualified professionals from outside the list as arbitrators. The list of arbitrators are classified into 15 categories, for example, international trade, investment, intellectual property, carriage of goods by sea, malpractices, construction contracts etc. While Thai and English are the languages often used in arbitration at the Arbitration Office. Parties are free to choose any other languages of their preference. Chinese is sometimes used in the arbitral process. Foreign lawyers are welcome either as arbitrator or legal adviser in the arbitration which involves foreign party. Albeit a body sponsored by the Government, the Arbitration Office maintains its independence and integrity intact by the Thai Government. The Office has no control over the discretion of the arbitrators in each case. It merely acts as secretariat to the arbitral process...*

Laos has now an arbitration office within the Ministry of Justice. Ironically, in Thailand a special committee has been set up to 'privatize' the Office from the Ministry of Justice. A calculated move after assurance that the Arbitration Office has created a reputation on its own and can administer without budgetary support from the Government.

1. Problems Obstacles and Remedies for the Development of Arbitration in Thailand[33]

The problems, obstacles and remedies for the development of arbitration in Thailand can be viewed from three perspectives: the Executive, the Legislature and the Judiciary.

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[32] Ministry of Justice, *The Thai Arbitration Institute, Arbitration under the Auspices of the Ministry of Justice*, at 4.

[33] See The Arbitration Office, 'Report on the Promotion and Development of Arbitration in Thailand' *Botbandit* (Journal of the Thai Bar Association) June 1994, at 21.

From the Executive point of view, one would like to see governmental departments and state enterprises resort more to alternative dispute resolution. Heads of governmental departments and state enterprises tend to take their grievances to court or defend their cases until final judgment of the highest court in the land. The trend derives from the fact that these heads of governmental departments and state enterprises try to avoid personal responsibility of any alleged 'wrong decision'. The policy is that it is always safer to wait and observe only the final judgment of the court. This lack of courage to settle the dispute at an early stage or to attempt out-of-court settlement for fear of criticism of lack of transparency may work against the reputation of the government. A recent dispute between the Express and Rapid Transit Authority of Thailand, Ministry of Interior and Bangkok Expressway Company Limited, a consortium led by Kumakai Kumi of Japan on the Second Stage Expressway Agreement whereby the Express and Rapid Transit Authority took Bangkok Expressway to the Civil Court on the face of an arbitration clause in the contract between them. The case brought serious repercussion on the Thai-Japan relationship on investment of infra-structure constructions and the reputation of the embryonic arbitration system in Thailand.[34] Another criticism one might raise against the attitude of governmental departments and state enterprises is the tendency to defer payment under the arbitral award until the final judgment enforcing the award has been pronounced. To remedy these problems and obstacles to arbitration, the Arbitration Office, through the Ministry of Justice has recently proposed to the Cabinet to issue a resolution to the effect that governmental departments and state enterprises shall resort more to alternative dispute resolution and shall exercise their discretion to have an early resolution to the dispute. It is hoped that the Cabinet resolution, when issued, will give more courage to heads of governmental departments and state enterprises to end their dispute quickly and constructively by whichever means which is fair, speedy and efficient.

From the Legislature point of view, the most urgent piece of legislation which needs to be looked at in order to create a more congenial atmosphere to international commercial arbitration is the law governing the practice of foreign lawyers in Thailand: the Alien Occupation Act B.E. 2521 (1978) and clause 39 of the Schedule to the Royal Decree B.E. 2522 (1979) regarding occupations and professions which are prohibited to aliens. In essence the law prohibits aliens from 'providing legal service'. The Ministry of Justice has proposed an amendment to exclude the 'service of a foreign arbitrator or a foreign attorney in an arbitral proceedings where the case involves a foreign party, regardless of the applicable law, provided that the party engaging the foreign arbitrator or attorney has also engaged a local attorney in the case'. A slight modification of the Singapore experience after the *Turner's case*[35] and the amendment to the Legal Profession Act thereafter.

The present predicament is that the Arbitration Office has successfully persuaded the Ministry of Labour and Social Welfare to issue work permits to foreign arbitrators to practice in Thailand on the contention that the work of an arbitrator is not that of giving legal service but he or she is working in a quasi-judicial capacity. The work of a judge

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[34] See Maolanont, 'If You Have a Client Like 'Ninomiya' of Kumakai Kumi' *Botbandit* (Journal of the Thai Bar Association) December 1993, at 31.

[35] [1988] 2 MLJ 280.

is not giving legal service but dispensing justice, likewise the work of an arbitrator. As far as the attorney is concerned, he or she is treated as a representative of the party so no legal qualification is asked. In practice, foreign arbitrators and attorneys are active at the Arbitration Office of the Ministry of Justice. However, the proposal for the amendment to the Act is now taking seriously in the relevant circles.

The requirement under the Revenue Code for an arbitrator to 'affix and cancel' a stamp duty in the amount of 0.1% of the award is also proposed to be canceled for creating unwarranted burden on the arbitrators.

Lastly, when one looks at the Judiciary's perspective, there are certain reforms that one wishes would happen. It is very fortunate that the enforcement of arbitral awards and the motions filed under the Arbitration Act will, in the near future, be under the jurisdiction of the Intellectual Property and International Trade Court. With the mechanism of the 'rules of the court', it is hoped that the practice of arbitration law will be more unified and consistent in view of the specialized Bench and Bar to be established.

However, one would hope that the court will construe more leniently the existence of a valid arbitration clause. In a number of court decisions,[36] the Supreme Court held that since an arbitration clause is an agreement which restricts the right of a party to resort to the court of justice and hence the clause must be construed narrowly and strictly. In a number of cases, loosely worded arbitration clauses: 'If an arbitrator will have to be appointed, the party shall be obliged by the award', 'amicable arbitration in Hamburg', 'If an arbitration has to be set up, it shall be in Bangkok' etc. are held to be unenforceable and hence the court entertains jurisdiction over the dispute. It is feared that the word *may* as in the clause, *the party may submit the dispute to arbitration,* may be unenforceable for the word *may* denotes a choice to the party and not a strict restriction on the parties. Here is an example:[37]

> *Clause 27: Settlement of Disputes*
> *27.1 Reference to Arbitration*
>
> *Unless otherwise stated in this Agreement, any dispute, controversy or claim arising out of or in connection with this Agreement shall first be submitted to the Panel in order to ascertain whether an amicable settlement can be achieved, and in the event that no such resolution can be achieved within 60 days or such other period as may be agreed between the parties, either party may settle such dispute or controversy by submitting it to arbitration in accordance with the Arbitration Act of Thailand.*

The caveat is that, for the moment, it is always prudent to draft in a more mandatory form *e.g.* the claimant *shall* submit the dispute to arbitration.

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[36] For examples, See Supreme Court Decision Nos. 945/2498 (1955), 49/2502 (1959), 3429/2530 (1987).

[37] This example is taken from the Second Stage Expressway Agreement between Expressway and Rapid Transit Authority of Thailand Ministry of Interior and Bangkok Expressway Company Limited.

V. Conclusion

With the expansion of trade and investment in the Asia-Pacific region and the growing needs for effective mechanism and management for international commercial litigation, arbitration and other forms of alternative dispute resolution; many arbitration centres have been established in the region in direct competition with the more established centres in Europe and America. One sees less, but increasing attempt to create or promote international litigation as an alternative to arbitration. Both forms, of course, incorporate conciliation or settlement conference in their agenda. Prospective clients will have more opportunity than in the past for forum shopping. A predictable phenomenon in the climate of free market economy. The more difficult question is 'quality control'.

In Thailand, a serious attempt is being made by the Arbitration Office to reform the existing Arbitration Act which, following the old English tradition, treats domestic and foreign arbitration in different regimes. It is now in the process of drafting a single Act applicable to both domestic and foreign arbitration. Attitudes of people having interest in arbitration are also changing, in a more congenial way. The Ministry of Finance is drafting the implementation Act for the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) of which Thailand has signed on December 6, 1985 but has failed to ratify so far.

With the 1991 amendment to the Civil Procedure Code, a more extensive claim of jurisdiction has been made. This will inevitably or naturally be followed by the introduction of reciprocal enforcement of civil and commercial judgments agreements, bilaterally or multilaterally. Something dreaded only in recent past. With the establishment of the Intellectual Property and International Trade Court, it seems to be the only logical solution if one were to give a full meaning to the word '*International Trade Court'*
