

# In Thailand, does the Court have the Power to Set Aside a Foreign Arbitral Award?

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## Abstract

Thailand is a member of the Convention on Recognition and Enforcement of Foreign Arbitral Award (1958), commonly known as the New York Convention. The current Arbitration Act of Thailand was enacted in 2002 in order to comply with the New York Convention to some degree. From the start with the enactment of the new law, Thai courts appeared to have struggled to balance the role of the court in the enforcement of foreign awards, favouring the setting aside of foreign awards over enforcement. However, in several recent Supreme Court decisions Thai courts now appear to be more in line with international practice, when considering whether to set aside or enforce foreign awards.

One of the reasons for the success of arbitration as alternative dispute resolution (ADR) method is the Convention on Recognition and Enforcement of Foreign Arbitral Award (1958), commonly known as the New York Convention, signed by 168 states<sup>3</sup>.

The Convention requires courts of contracting states to give effect to private agreements to arbitrate, recognize and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for international arbitration, the New York Convention applies to arbitrations that are not considered as domestic in the state where recognition and enforcement are sought. However, the New York Convention provides grounds on which the recognition and enforcement can be refused.

The grounds to refuse the recognition and enforcement are stated in Art. V of the New York Convention<sup>4</sup> Art. V may be approached in two parts. Paragraph 1 of the said article deals with the grounds that may be relied upon to resist the recognition and enforcement of the award.

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<sup>3</sup> Contracting States of New York Convention, Retrieved from <http://www.newyorkconvention.org/list-of-contracting-states>.

<sup>4</sup> United Nations Conference of International Commercial Arbitration, "Convention of the recognition and enforcement of foreign arbitral awards", Retrieved from [21\\_english.pdf \(newyorkconvention.org\)](http://www.newyorkconvention.org/21_english.pdf)

These grounds are namely: the incapacity of a party and the invalidity of the arbitration agreement; issues related to the notification of the arbitrator's appointment or proceeding; impossibility for a party to present his case; the decision contained in the award exceed the limits set by the arbitration agreement; issues concerning the composition of the arbitral tribunal or the arbitral proceeding and lastly the setting aside of the award. Paragraph 2 of the said article deals with the arbitrability of the dispute and public policy.

Thailand became a member of the New York Convention in 1959<sup>5</sup>. However, for more than 25 years, no arbitration law was enacted in the country. It was only in 1987, that the Arbitration Act B.E. 2530<sup>6</sup> ('the Arbitration Act') was enacted. It was on the passing of the Arbitration Act that Thailand enforced the first arbitration award. The Arbitration Act, however, lacks provisions for the annulment of the award. This problem was resolved in 2002 when the new Arbitration Act B.E. 2545<sup>7</sup> ('the new Act') was passed, when the UNCITRAL Model Law (1985) came into force. In particular, the provision regarding the annulment of the award is in Section 40 paragraph 1:

*"The annulment of the arbitral award may be made by a request to the court that has jurisdiction to annul the award as provided in this section [...]"*

Likewise, a new provision dealing with refusing the recognition and enforcement of the award was introduced by Section 43, paragraph 6.

*"The court has the power to refuse recognition and enforcement of an arbitral award, even if the seat of arbitration is in another country if the party against whom it is invoked furnishes proof that: [...]"*

*6) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made [...]"*

The provisions in Section 40 of the new Act paraphrase the ones in Art. V, paragraph 1(e) of the New York Convention. However, in interpreting that part of the provision - "[...] by a competent authority of the country in which, or under the law of which, that award was made.", Thai courts have qualified the interpretation by referring to the "Court with jurisdiction [...]". This leads to interpretation problems.

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<sup>5</sup> Contracting States of New York Convention, Retrieved from <http://www.newyorkconvention.org/list+of+contracting+states>.

<sup>6</sup> Royal Gazette no.114 Section 156 p.1, retrieved from [www.ratchakitcha.soc.go.th/DATA/PDF/2530/A/156/1.PDF](http://www.ratchakitcha.soc.go.th/DATA/PDF/2530/A/156/1.PDF)

<sup>7</sup> Royal Gazette no.119 Section 39 A p.1, retrieved from [www.ratchakitcha.soc.go.th/DATA/PDF/00054010.PDF](http://www.ratchakitcha.soc.go.th/DATA/PDF/00054010.PDF) (For the English translation of this Act, please see : Office of the council of state, "Arbitration act, B.E.2545 (2002)", retrieved from [http://web.krisdika.go.th/data//document/ext825/825530\\_0001.pdf](http://web.krisdika.go.th/data//document/ext825/825530_0001.pdf))

In the Arbitration Act 2002, the court's jurisdiction is defined in Section 9<sup>8</sup>, and the same wording is also used in Section 40, so the interpretation of the latter is made in the light of the definition of Section 9. Such interpretation allows Thai courts to set aside awards made in other countries, this uncertainty in the interpretation is reflected in the different views of the Intellectual Property Court and the Supreme Court.

The Intellectual Property Court takes the view that courts have the power to set aside foreign awards in accordance with Section 9 of the Arbitration Act 2002. This is clearly the case in of Kor Khor 151-152/2550. This case concerns a sales agreement in which one party refused to open a letter of credit causing the opposing party damages. In accordance with the arbitration agreement found in the contract, the opposing party referred the dispute to arbitration. In the case, the arbitral tribunal decided in favour of the claimant, issuing an award for damages. The respondent challenged the award in the Intellectual Property Court seeking the setting aside of the award. The Court found that there was no contract between the parties, consequently, the arbitration agreement included in the contract did not exist. Accordingly, the Court set aside the award under Section 40 paragraph 1(b) and Section 43 paragraph 2 of the Arbitration Act 2002. The decision was appealed to the Supreme Court. The Supreme Court had to decide if the Intellectual Property Court had the power to set aside a foreign award. In the decision n. 5511-5512/2552, despite Section 40 of the Arbitration Act 2002 stating that the setting aside of an arbitral award had to be dealt with at the seat of arbitration, the Supreme Court, nevertheless, found that Thai courts have the power to refuse the recognition and enforcement of the award and further, has the power to set aside the award.

In n. Kor Khor 119/2557, the losing party in the, arbitration, which had the seat of arbitration in the UK, requested the Intellectual Property Court to set aside the award. The Intellectual Property Court granted the request, basing its decision on Section 25 of the Arbitration Act 2002.

The Supreme Court, has however, taken the view that under the Arbitration Act 2002, courts do not have the power to set aside foreign arbitral awards. This can be seen in the decision n. Kor Khor 80-81/2553 concerning an award rendered in Singapore. That Singapore award ruled that the claimant had to pay damages to the respondent in accordance with the terms of the sales agreement. The claimant, being dissatisfied, requested the Intellectual Property Court to set aside the award. The Intellectual Property Court rejected the request. The claimant appealed to the Supreme Court. The Supreme Court agreed with the judges of the Intellectual Property Court and rejected the appeal. In another case, the decision n. 13535-13536/2556, the Supreme Court explained that powers in Sections 40, 43 and 44 of the Arbitration Act 2002 have the same origin but are separated in different sections to comply with Art. V, paragraph 1(e) of the

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<sup>8</sup> Section 9 of Arbitration act, B.E. 2545 (2002)

“Section 9. The Central Intellectual Property and International Trade Court or the Regional Intellectual Property and International Trade Court or the Court in whose jurisdiction the arbitral proceedings are conducted or the Court in whose jurisdiction any of contractual parties is domiciled or the Court having jurisdiction to try and adjudicate disputes submitted to arbitration shall be the competent Court under this Act.”

New York Convention. Accordingly, only the court at the place of the seat of arbitration has the power to set aside the award.

In the Supreme Court decision n. 8539/2560, based on the provisions of the New York Convention and the Arbitration Act 2002, the judges decided that Thai courts only have the power to annul domestic awards or international awards, whose seat is in Thailand. On this interpretation, in the case referred to above, the Intellectual Property Court has no power to set aside the award made in the UK concerning the International Cotton Association.

Based on what was discussed above, the position regarding the power of Thai courts to set aside foreign awards appears to be unclear, with conflicting positions being taken by the Supreme Court and the Intellectual Property Court. It is hoped that in the future the views of the Supreme Court and the Intellectual Property Court on the interpretation of the Arbitration Act 2002 can be reconciled and be more consistent.

To sum up, Art. V, paragraph 1(e) of the New York Convention, seems clear in providing that an award can only be set aside by courts at the seat of arbitration. That being the case, if a foreign award is set aside by Thai courts, even in cases where Thailand is not the seat of the arbitration, such a decision appears to be contrary to the provisions of the New York Convention. Internationally, it is unlikely that other jurisdictions would take the same position as the Thai courts, simply because the position taken by Thai courts on the setting aside of foreign arbitral awards appear to be contrary to the substance and spirit of the relevant provision in the New York Convention.