THE MAJOR DEVIATION OF ARBITRATION ACT B.E. 2545
FROM UNCITRAL MODEL LAW ON INTERNATIONAL
COMMERCIAL ARBITRATION

BY
MR. NATTHAPON BUTSAYAWIT

AN INDEPENDENT STUDY PAPER SUBMITTED IN
PARTIAL FULFILLMENT OF THE REQUIREMENT
FOR THE DEGREE OF MASTER OF LAWS
(BUSINESS LAW)

GRADUATE SCHOOL OF LAW
ASSUMPTION UNIVERSITY

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ABSTRACT

One of the reasons that renders arbitration popular as an efficient alternative dispute resolution is that arbitral awards can be enforced almost around the globe. Therefore, this thesis aims to study the rules and importance of separation domestic and foreign arbitration in order to allow clarity and suitability in applying arbitration law in Thailand.

The finding is that arbitration law should be applied in separate manner to govern international trade matters as appears in UNCITRAL Model Law, which is adopted in certain countries and domestic matters in separate acts. The recognition and enforcement of domestic arbitral award is somewhat different from the method uses with foreign arbitral award. Therefore a good resolution is to amend Thai law to become modernized and universalized in order to compete with those of developed countries in pursuant of the concept and reasoning of the law for promoting international commercial arbitration in Thailand.

The recommendation is to apply two legislations which are necessary in order to promote and support international commercial arbitration processes in Thailand and pay close attention to administration of justice under Thai law. In other words, having an efficient arbitration system that meets international standards allows Thailand to compete with other countries.
ACKNOWLEDGEMENT

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Chapter 1
The Major Deviation of the Arbitration Act B.E. 2545 from the UNCITRAL Model law on International Commercial Arbitration

1.1 Historical Background

At present, the courts have too many cases to handle and the judicial process is rather slow. Arbitration can reduce the number of cases in the court. The often given reason for the popularity of arbitration is its speedy process and the quality arbitrator which may be experts in specific area. Arbitration is a very important way to reduce judicial proceeding of the court and provide the private parties or the state a semi-judicial proceeding to resolve disputes.

Arbitration is an alternative dispute resolution that parties may agree in a contract that the award shall be enforced by the state. Arbitral award is a decision of the arbitrator(s) after the arbitral proceeding in the cases. Arbitration is the procedure taken by both parties under the law of any state that permits the use of arbitration.

Major alternative dispute resolutions are negotiation, conciliation and arbitration. In this independent legal research, an analysis of Thai arbitration law shall be made to see whether it would be better or not to replace the existing legislation by providing two new acts, one to reflect the Model law and the other to govern Domestic Arbitration.

In the world of business, when the parties make a contract, if one party breaches the contract, the injured person can bring the case to the court. However, the injured person must wait for a long time because the judicial process would have three layers of court and it may take 2-3 years, resulting in negative affect to the business.

The foreign investors normally prefer to choose the arbitration because one of the features of arbitration, among other things, is its speed. In Thailand, there are three tiers of court, which are the court of first instance, the court of Appeal and the Supreme Court. The civil procedures are too formal. Besides, the lawyer often uses a
tactic to delay the case. This is the reason why foreigners prefer to settle their dispute by arbitration rather than bring the case to judicial process.

In arbitration there is only one tier of the arbitral tribunal, it means the award rendered by a sole arbitrator or a panel of arbitrators shall be final. The party can not appeal the award of the arbitral tribunal because it is against the purpose of the arbitration. In addition to arbitration, there are several other methods of setting and even of preventing disputes.¹

The judicial process is less costly than arbitration because the court fee is at the moment approximately 2 % and not exceeding 200,000 Bath for the first 50 million Baht. Therefore it is possible in a case from the court of first instance to Supreme Court, the court fees 6% of the claims have been paid under the Thai Civil Procedure Code. Whereas the arbitration of ICC, Article 30 of ICC Rule, in order to cover the costs of the Arbitration, provides that “After receipt of the Request, the Secretary General may request the Claimant to pay a provisional advance in an amount intention to cover the costs of arbitration until the Term of Reference have been drawn up²”. And Appendix 3 Arbitration costs and Article 1 Advance on Costs “Each request to commence arbitration pursuant to the Rule must be accompanied by an advance payment of US$ 3,000 on the administrative expenses. Such payment is non-refundable, and shall be credited to the Claimant’s portion of the advance on costs”.³ Arbitration is a private process so the parties may have to shoulder the fee of the arbitration process and the arbitrator fee (professional fee) at the market value.

Regarding the experts, the court may appoint one or more experts for specific issue. The tribunal is usually composed of experts and this is very important because if the judge or the person whose judgment decides the case does not have knowledge it can cause damage to the party and country. Therefore, the arbitration parties to dispute can choose their own arbitrators who are experts in special areas

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³ Ibid.
circumstances. On the other hand, judges may be a legal expert in general manner but they may not be expertise on the disputed subject matters.

Regarding universality of enforcement, normally the country shall adopt the sovereignty doctrine (doctrine of sovereignty) where the national court judgment can only be enforced. Hence, it is basically not possible to enforce the country judgment outside the country. However, by virtue of (1985) New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958), the arbitral award can be enforced in other member countries. This Convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.4

1.2 Hypothesis of the Study

At present, Arbitration Act B.E. 2545 follows the UNCITRAL Model Law on International Commercial Arbitration because the foreign investor believes in the provision as many countries use the Model Law type legislations to resolve the dispute. The provisions of Arbitration Act B.E. 2545 mostly come from the UNCITRAL Model law but some parts come from the Arbitration Act B.E. 2530 which is the old law. This makes foreign investors avoid to use the arbitration Act. B.E.2545. It makes Thailand lose the benefit from being the site of arbitration. On the other hand, if Thailand can become the site for arbitration it brings invisible trade to Thailand when the foreigners agree to use the arbitration Act. B.E. 2545

This thesis will show the deviations of the Arbitration Act B.E. 2545 and UNCITRAL Model Law are follows:

1. The in-court arbitration in Article 4 shows its link to domestic matters under Model Law there is not such a link.

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2. The Section 15 of the Arbitration Act B.E. 2545 is the administrative contract. This provision does not appear in the UNCITRAL Model Law. The main content of this provision is that in any contract made between a government agency and a private enterprise, regardless of whether it is an administrative contract, the parties may agree to settle any dispute by arbitration.

3. The challenge of the arbitrator in Section 20, this section is almost a duplicate of the Model Law. However, the Model Law does not allow the appeal of the Court's order, while this section allows.

4. The liability of the arbitrator in Section 23 of Arbitration Act B.E. 2545 is not appeared in the UNCITRAL Model Law. The main content of this provision is that arbitrator shall not be liable for any civil liabilities on any act performed in the court of his duty as an arbitrator. Unless it is performed willfully of with gross negligence causing damage to either party. It also provides on criminal liability of arbitrators should they take unrighteous benefit.

5. The main content of section 25 of the Arbitration Act. B.E. 2545 is taken from the UNCITRAL Model Law, but the paragraph three is not appeared in the UNCITRAL Model Law. The main content of the section 25 paragraph 3 is the arbitral tribunal may apply the provisions on the law of evidences under the Code of Civil Procedure to proceedings mutatis mutandis.

6. The award is made by majority in Section 35. Even if this section imitates from the in the UNCITRAL Model Law, but it deviates from the UNCITRAL Model Law as it does not allow the chairman of the arbitral tribunal to solely issue an award.

7. Under Section 45, the main content of this provision is that the party cannot appeal against the order judgment, which is different from the UNCITRAL Model Law.

But this thesis will emphasize on the three major deviations, namely, the challenge of the arbitration (Section 20), liability of the arbitrator (Section 23) and no appeal shall lie against the order judgment (Section 45).

The Arbitration Act B.E. 2545 should be separated in to two laws. One would be governing local arbitration the other would be governing international arbitration law. In arbitration law the parties should have autonomy to subject an arbitration to a procedural law. It was pointed out that arbitral proceedings should not be linked
exclusively to the procedural law of the territory where such proceedings took place since the parties might have a legitimate interest to subject an arbitration to particular procedural law while having equally legitimate interest in conducting arbitral proceeding in a State other than the State of the governing procedural law. Due to the convenient of arbitral proceeding, the case which is related to other countries should use the international arbitration law, while the case concerning domestic matter must use the domestic arbitration law to apply. Therefore if we can separate the arbitration law of Thailand into two acts, Thailand can then be the center of the Arbitration in the near future.

1.3 Objectives of the Study


3. To analyze the problem of the Arbitration Act B.E 2545

4. The recommend the revision of the Arbitration Act B.E.2545

1.4 Study Methodology

This independent legal Study Paper will make analysis by the method of documentary research by citing authorities from textbooks, the Arbitration Act B.E.


1.5 Scope of Research

1. The judge and the public prosecutor use the power of the state under the law, but the arbitrator is acting as a private party.


3. The law of Arbitration governing local and international level domestic law.

4. The Arbitration Act B.E. 2545 should closely follow UNCITRAL Model Law on International Commercial Arbitration

1.6 Expectation of study


2. Identify the problems of the Arbitration Act B.E.2545 of Thailand that effect on its economy.

3. To show the solution to the problems in Arbitration Act B.E.2545.

4. To show the advantage of the development of the arbitration law of Thailand.
Chapter 2

History and Characteristics of Thai Arbitration

2.1 History of Thai Arbitration

Dispute settlement by arbitration means the process a single disputing parties appoints a panel of one or more arbitrators to decide the case. The panel of a single arbitrator or arbitrators will arbitrate the disputes based on relevant evidence; the arbitral award is final and binds the parties in the dispute. This illustrates that arbitration derives from the contract between the parties, but the arbitral award is not self-effective. The execution of the award requires assistance from the court by way of issuing the writ of execution.

Now, there are many arbitral bodies responsible for dispute settlement in Thailand; for example, Thai Arbitration Institute (Ministry of Justice), the Thai Chamber of Commerce, the General Insurance Association. For international level, there are also many arbitral bodies playing an important role in settling the dispute, for example, International Chamber of Commerce (ICC) based in France, American Arbitration Association (AAA) based in New York and London Court of International Arbitration (LCIA) based in England.

Initially, Thai statutory Law relevant to the arbitration originated from Indian law. This law was enforceable until the beginning of Rattanakosintra Era, and it was prescribed in Thai Three Seals Law in King Rama I Era. Therefore, it could be said that the Three Seals Law was the first law prescribing arbitration. It defined arbitrators which used to be called Kra-la-karn as judges appointed by both parties; their awards whether right or wrong did not cause any liability. Therefore, they were different from judges appointed by the King. As stipulated in Three Seals Law, if the award of Kra-la-karn appointed by both parties was wrong, Kra-la-karn could not be liable. It was parties’ responsibilities for an execution. From the provision of the law stating that Kra-la-karn and parties to the dispute were bound by the award of Kra-la-karn, if a party did not agree with the award, they therefore did not have the right to
appeal. This shows that arbitration arises from a contract made between disputing parties. That is to say, the fundamental principle of arbitration is a contract; consequently, the arbitral proceedings such as procedures and the issuance of arbitration award do not necessarily comply with the law. This is for the reason that a contract can be agreed, as the parties wish, to be a suppletive to the law.

The fact of the case between Siam Government and Dr. M.K. Zeed called The Embargo, 1893 is:

On 20th August 1882, Siam Government announced to seize Dr. Zeed’s logs for an auction. Afterwards, on 15th July 1893, Siam Government proclaimed a royal command which stated that Dr. Zeed violated many provisions of an agreement. Thus, creditors, debtors and trustees had to report about Dr. Zeed’s obligation and property to Chiang Mai Governor within 15 days. Those who disobeyed had to be punished.

Dr. Zeed claimed for damages from the royal Government Siam. In doing so, Dr. Zeed asked U.S. Government to make a claim on his behalf by claiming that his case was in U.S. Consul Jurisdiction. Therefore, the action of Siam Government was illegal which violated mutual treaty between the United States of America and Siam Government of 1856.

Siam Government defended that Dr. Zeed breached agreements. Thus, the seizure was lawful.

On 26th July 1897, a Protocol relating to arbitration agreement between Thai Government and United States of America was enforced and effected. According to the Protocol, Sir Nicholas John Hannen a Chief Judge on behalf of the Queen of England and a Consul General of Shanghai was appointed to be an arbitrator. The arbitral proceedings took place in Thailand. On 21st March 1898, the arbitral award stated that the seizure on 20th August 1892 was unlawful which was against Article 2 of the mutual treaty between the United States of America and Siam Government of 1856 and the royal command which was proclaimed on 15th July 1893 was unfair.

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This was because Dr. Zeed did not break an agreement. Thus, Siam Government had to pay for compensation to Dr. Zeed.

It can be seen that dispute resolution by international arbitration has occurred in Thailand for a long time.

Later, the Civil Procedure Code B.E. 2477 came into effect since 1st October B.E. 2478. The Civil Procedure Code B.E. 2477 was drafted by judicial council. Dr. Charles L' Evesques was a French person who was assigned to be the drafter. In the Civil Procedure Code B.E. 2477, only one provision governing recognition and enforcement of the arbitral award was stipulated in Section 221. Also, in B.E. 2477 Thailand became a member of two conventions relating to arbitration.

2.2 The Concept of Arbitration

International arbitration may be defined as the settlement of a difference between states through the decision of one or more individuals or a tribunal chosen by the parties to the dispute. An arbitrator may be the chief of state of a nation not concerned with the dispute; an ambassador, minister, or other official; or even a private individual. When a monarch or a president is an arbitrator he usually does not act personally; indeed, he delegates most responsibilities to the appropriate legal authorities of his government. When the parties to arbitration decide to establish a tribunal, they may choose judges from their own nationals and then agree upon another individual to act as the third arbitrator. Sometimes they ask the head of another government to choose an umpire or leave the choice of the third arbitrator to the arbitrators already appointed. In several nineteenth-century cases no individuals were designated as the third arbitrator. Arbitrations may be concerned with questions of international law or facts. When arbitrations are primarily concerned with facts, as in pecuniary claims or boundary cases, the group of arbitrators is generally called a commission, but no precise distinction can be drawn between commissions and tribunals. An arbitral decision is called an award, and it may be set aside if there are

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8 Thai Royal Government Gazette Volume 52, 20th June B.E.2475, p.723.
reasons to believe that it was not given in good faith or was not in accord with international law or the preliminary special agreement, usually called a *compromis*, concluded by the parties to the arbitration\(^\text{10}\).

### 2.3 The Arbitration Act. B.E. 2530

Later, the 2530 Act came into force; therefore, the provision on out of court arbitration in Civil Procedure Code B.E2477 was annulled. As Thailand became a party to the New York Convention since 1959 the act can be seen as a mean to implement the 1958 New York Convention. As a result, Thailand abided by procedural rules of the Convention concerning the recognition and enforcement of international arbitral award. In addition, section 221 is also unenforceable in order to make the parties concluding arbitration agreement honors their contractual obligations. The parties, by avoiding settling the disputes by arbitration, tend to prefer submitting their disputes to the court\(^\text{11}\), and the court seems to justify the entry of the cases as such. This is shown in the Supreme Court judgments no.814/2482, 945/2498, 1732/2503 and 2690/2522. Due to the problem that the arbitration agreement cannot be enforceable in practice, the Arbitration Act B.E. 2530 was enacted to deal with the arbitration outside the court room and apply to international arbitration including international arbitral award.

The 2530 Act contains six chapters and 36 sections as follows. Chapter 1 concerns arbitration agreement (Section 5 – Section 10). Chapter 2 deals with the appointment of arbitrator and arbitral awards (Section 11 to Section 16), and Chapter 3 is about procedural rules (Section 17-Section 18). Chapter 4 concerns the arbitral award and the enforcement. In Section 20, it prescribes that the arbitral award must be made in writing and signed by arbitrator or adjudicators. The arbitral award shall


\(^{11}\) Wirawan Riannark, *Conceptual Development Of Certain Issues In International Commercial Arbitration*, (Master of Laws, Faculty of Law, Chulalongkorn University; 2541), p.34.
also state clearly the reasons upon which it is based. As for fee, expense and commission, they are prescribed in Chapter 5 while the enforcement of the international arbitral award was stated in Chapter 6. This is expressly in accordance with international convention into which Thailand entered. It also complies with economic and social conditions and makes the rules and proceedings on the recognition and the enforcement of international arbitral award become certain.

2.4 The Reasons behind the Arbitration Act B.E. 2530 are:

Due to Thai social and economic growth, the law relating to arbitration outside the court was a suitable means of dispute settlement as it is convenient, uncomplicated, flexible and just. As a result, it was widely recognized by investors.

As stated previously, Section 221 of the Civil Procedure Code, as the only provision dealing with the law concerning arbitration outside the court, is still ambiguous; therefore, it brings a lot of problems to the parties intending to submit their commercial disputes to arbitration. This is for the reason that arbitration agreement is practically unenforceable, and the court always justifies the entry of the case that the parties have conclude the arbitration agreement.

Thailand was a party to many international conventions such as the Geneva Protocol 1923, the Geneva Convention 1927 and the New York Convention 1958, but the domestic laws incorporating those principles were still to be enacted.

When the Arbitration Act B.E. 2530 came into force, many problems arise, for example the problem concerning arbitration agreement arising from technological data recording such as Email, and the problem relating to the number of arbitrators on a panel.

All these problems lead to the new draft of the Arbitration Act so as to solve the dispute settlement problems, to suit the social and economic conditions and comply with international arbitration law.

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13 Ibid.
In the stage of consideration of bill of the Arbitration Act B.E. 2530, the documents from UNCITRAL Conference no. A/CN9/207 setting out the essential principles in model law were concerned. However, the influence from the British lawyers which opposed the model law affected the confidence in the model law of the Arbitration Act B.E.2530 bill. This was because at that time there were two political changes; the draftsmen hence quickly adopted the bill similar to English Arbitration Act 1979 to be Thai Arbitration Act which contained more provisions on judicial review than that of English. That is to say, it looked like the Arbitration Act 1950. The draftsmen had chosen to adopt the principle of judicial review owing to the distrust of arbitral proceedings. This illustrates that the judges did not accustom to arbitral proceedings.

All these problems led to the new draft of the Arbitration Act so as to solve the dispute settlement problems and make the law suitable to the social and economic changes.

As a result, the amendment of law on arbitration outside the court is needed. To achieve this, International Commercial Arbitration Model Law by UNCITRAL, which is widely recognized was adopted with some amendment in order to fit Thai social and economic conditions and promote international commercial arbitration.

### 2.5 The Problems of the Arbitration Act. B.E. 2530 Causing its amendment, the Arbitration Act B.E. 2545

All problems lead to the amendment of the Arbitration Act B.E. 2545. The detailed explanation is the following.

As for the problem of whether the arbitration agreement arising from technological data recording can be enforceable or not, Section 11 of the Arbitration Act B.E.2545 states that

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14 Phijaisakdi Horayangkura, *Collected Articles on Commercial Dispute Settlement* (Chulalongkorn University Publisher: Adtive Print Co. Ltd., 2549), p. 29.

15 Ibid.
“An arbitration agreement shall be in writing and signed by the parties. In the case where an agreement is contained in an exchange of letters, facsimile, telegrams, telex, information with electronic signature, or other forms of communication which provide a record of the agreement, or in the case where the existence of an agreement is alleged in a claim or defense by one party and not denied by another, an arbitration agreement shall be deemed to be existed.

“A contract, which refers to a document containing an arbitration clause with the purpose of making that clause, as a part thereof shall be deemed to have an arbitration agreement.”

The words “an arbitration agreement shall be in writing” do not mean that the arbitration agreement has to conclude in the form of the formal agreement. The general agreement which contains the text showing that the parties agree to arbitration is adequate.16

An exchange of letters, facsimile, telegrams etc should contain any clause or agreement between the parties representing that the parties agree to submit their disputes to arbitration.

If such exchange falls into the scope of electronic data interchange, the Electronic Transaction Act B.E. 2544 defines “electronic data interchange” as the dispatch or receipt of information by an electronic from computer to computer using agreed standard. Electronic data interchange is not a signature as its ordinary meaning, but it is the technical process which identifies the data sender.

A contract made in writing, which refers to a document containing an arbitration clause with the purpose of making that clause, as a part thereof shall be deemed to have an arbitration agreement.

The problem of the Arbitration Act B.E. 2530 and the amendment which is incorporated in the Arbitration Act B.E. 2545 concerns the arbitral tribunal. Section 17 prescribes that

“The arbitral tribunal shall compose of arbitrators in an odd number.

“In the case where the parties determine the number of arbitrators in an even number, those arbitrators shall jointly appoint another arbitrator to be the

Chairperson of the arbitral tribunal. The procedure on an appointment of the Chairperson of the arbitral tribunal shall be in accordance with Section 18 paragraph one (2).

“If the parties are unable to agree on the number of arbitrators, there shall be a sole arbitrator.”

This section was adopted from Article 10 of UNCITRAL Model Law which is widely recognized among the states. This Article stipulates that if the parties determine the number of arbitrators in an even number, the arbitration agreement is still effective, but the parties shall jointly appoint another arbitrator to be the Chairperson of the arbitral tribunal.

As for the problem of interim measures of protection before proceeding to arbitration, Article 17 of UNCITRAL Model Law divides interim measures into three different categories as follows:

1) Measures intending to maintain arbitral process or preserve evidence that may be material from destroying prior to the issuance of the award.

2) Measures intending to prevent loss or damage and Measures intending to maintain the status of the parties prior to the issuance of the award.

3) Measures intending to maintain the effectiveness of enforcement of the arbitral award.

In principle, they are measures preventing the asset from being transferred or disposed out of the court jurisdiction in order to avoid the enforcement of arbitral award. The asset could be the subject matter of the dispute or the property liable to execution by the winning party.

From the problems mentioned, the Arbitration Act B.E. 2545 was enacted so as to as solution for the problems arising from, for example, the development of technological data recording, arbitral tribunal, qualification of arbitrator, interim measure prior to the commencement of arbitral proceedings.

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17 The Arbitration Act B.E. 2545 Section 17 paragraph 3.
18 UNCITRAL Model Law, Article 10.
20 Ibid.
2.6 The Arbitration Act B.E. 2545

2.6.1 Arbitration Agreement

An arbitration agreement means an agreement by which the parties agree to settle all or certain disputes which arise or which may arise between them in respect of a defined legal relationship, whether contractual or not, by arbitration. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separated arbitration agreement. An arbitration agreement shall be in writing and signed by the parties. In the case where an agreement is contained in an exchange of letters, facsimile, telegrams, telex, information with electronic signature, or other forms of communication which provide a record of the agreement, or in the case where the existence of an agreement is alleged in a claim or defense by one party and not denied by another, an arbitration agreement shall be deemed to exist. The validity of an arbitration agreement and the appointment of arbitrators shall not be affected even if any party is dead, dissolved, subjected to an absolute receivership order, or incompetent or quasi-incompetent by the Court order. In the case where an action in a matter which is the subject of an arbitration agreement is brought to the Court by one party without referring to the arbitral tribunal in accordance with an arbitration agreement, the others may submit, within the date for filing his or her statement or the period for filing his or her statement as prescribed by law, his or her request to dispose of the case and refer to arbitration to the competent Court. The Court shall, after making inquiries, dispose of the case, unless it appears that the arbitration agreement is void, inoperative, or incapable of being performed.

2.6.2 Arbitral Tribunal

The arbitral tribunal shall compose of arbitrators in an odd number. In the case where the parties determine the number of arbitrators in an even number,
those arbitrators shall jointly appoint another arbitrator to be the Chairperson of the arbitral tribunal. 25

An arbitrator shall be impartial, independent and possess the qualifications in the arbitration agreement; or if the parties agree to submit the dispute to an institution established for the purpose of administration arbitration, the arbitrator shall have the qualifications prescribed by the institute. 26

A prospective arbitrator shall be disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or dependence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. 27

An arbitrator may be challenge if circumstances exist that give rise to justifiable doubts as to his impartiality or dependence, or if he does not possess qualifications agreed to by the party. No party shall challenge the arbitrator whom he has appointed or in whose appointment he has participated, except where the said party did not become aware of or could not have become aware of grounds for challenge at the time of his appointment. 28

A person being appointed as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties, unless such circumstances have already been informed to the parties in advance by an arbitrator. 29

Unless otherwise agreed by the parties, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the appointment of the arbitrator or after becoming aware of circumstances referred to in Section 19 paragraph three, submit a written statement of the reasons for the challenge to the arbitrator. 25

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25 The Arbitration Act B.E. 2545 Section 17.
26 The Arbitration Act B.E. 2545 Section 19.
27 Ibid., Section 19 paragraph 2.
28 Ibid., Section 19 paragraph 3.
29 The Arbitration Act B.E. 2545 Section 19.
arbitral tribunal. If the challenged arbitrator refuses to withdraw from his or her office, or the other party refuses the challenge, the arbitral tribunal shall decide on the challenge.\(^{30}\)

If a challenge under any procedure agreed upon by the parties or under the procedure as prescribed in paragraph one is not successful, or in the case of a sole arbitrator, the challenging party may request the competent Court within thirty days as from the date of receiving a written decision on the challenge, or as from the date of the appointment of arbitrator, or as from the date of the circumstances as prescribed in Section 19 paragraph three as known to him or her, as the case may be. After having inquired the request, the Court shall have an order to allow or dismiss the request. During the Court proceedings, the arbitral tribunal and the challenged arbitrator may continue the arbitral proceedings and make an award, unless the Court otherwise orders.\(^{31}\)

In the case of necessity, the arbitral tribunal may extend the period for challenging the arbitrator under paragraph one of Section 20 for not more than fifteen days.\(^{32}\)

The arbitrator shall not be responsible for any civil liability on the carrying out of his or her functions as the arbitrator, except where he or she acts willfully, or with gross-negligence, and such acts cause damages to any party under section 23.\(^{33}\)

### 2.6.3 Jurisdiction of Arbitral Tribunal

The arbitral tribunal may decide on the issue of its own competence including the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal, and any disputes within its jurisdiction. For this purpose, it shall be deemed that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A

\(^{30}\) The Arbitration Act B.E. 2545 Section 20.

\(^{31}\) Ibid.

\(^{32}\) Ibid.

\(^{33}\) The Arbitration Act B.E. 2545 Section 23.
decision by the arbitral tribunal that the contract is void or invalid shall not affect the invalidity of the arbitration clause. 34

An objection on the competence of the arbitral tribunal shall be made no later than the date for submission of the statement of defense. A party shall not be precluded from making an objection by the fact that he or she has appointed, or participated in the appointment of an arbitrator. An objection that the arbitral tribunal performs its functions shall be raised forthwith by a party when the ground of such objection occurred during the arbitral proceedings. If there is a reasonable delay in making such objection, the arbitral tribunal may allow the parties to make an objection after the prescribed period. 35

The arbitral tribunal may adjudicate an objection on its jurisdiction either as a preliminary question or in an award on the merits. If the arbitral tribunal adjudicates as a preliminary question that it has jurisdiction, any party may request, within thirty days as from the date of receiving the notice of such adjudication, the competent Court to decide the matter. While such a request is pending before the Court, the arbitral tribunal may continue the arbitral proceedings and make an award. 36

2.6.4 Arbitration Proceedings

The parties shall, in the arbitral proceedings, be treated equally and shall be given an opportunity to present witnesses, evidences and defenses as suitable for the circumstances of the case. For the purpose of this chapter, the arbitral tribunal may apply the provisions on witness and evidence of the Civil Procedure Code to the arbitral proceedings mutatis mutandis. 37

The arbitral tribunal may appoint one or more experts to make a report on specific issues to be decided by the arbitral tribunal and require the parties to give the expert any information or to produce, or to undertake the acquisition of any documents or objects relevant to the dispute for examination. 38

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34 The Arbitration Act B.E. 2545 Section 24.
35 Ibid.
36 Ibid.
37 The Arbitration Act B.E. 2545 Section 25.
38 The Arbitration Act B.E. 2545 Section 32(1) (2).
agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his or her written or verbal report, participate in hearings where the parties have the opportunity to question him or her or to present expert witnesses in order to testify on the points at issue.\textsuperscript{39}

2.6.5 Award and Termination of Proceedings

The arbitral tribunal shall decide the dispute in accordance with the governing law as designated by the parties. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict-of-laws rules. If the parties fail to designate the governing law, the arbitral tribunal shall apply Thai law to the dispute, except where there is a conflict of laws, in which case, the arbitral tribunal shall apply the law determined by the conflict-of-laws rules which it considers applicable.\textsuperscript{40} Unless otherwise agreed by the parties, any award, order and decision of the arbitral tribunal shall be made by a majority of votes. If a majority of votes cannot be obtained, the chairperson of the arbitral tribunal shall be the person who makes the award, order or decision.\textsuperscript{41}

2.6.6 Challenge of Award

A party may apply to the competent Court to set aside the award within ninety days as from the date of receiving a copy of award or, in the case where a party requests the arbitral tribunal to correct or interpret the award or to make an additional award, within ninety days as from the date of correction, interpretation or making of the additional award. The Court shall set aside the arbitral award if a party who make the application is able to prove that a party to the arbitration agreement is incapable under the law applicable to that party and the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in the case where there is no such agreement, the law of the Kingdom of Thailand, a party who makes the application was not delivered advance notice of the appointment of the

\textsuperscript{39} Ibid.

\textsuperscript{40} The Arbitration Act B.E. 2545 Section 34.

\textsuperscript{41} The Arbitration Act B.E. 2545 Section 35.
arbitral tribunal or the hearings of the arbitral tribunal, or was otherwise unable to present his or her case, an award deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration could be separated from those not so submitted, only the part of award which contains decisions on matters not submitted to arbitration may be set aside by the Court; or if the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, in the case where there is no such agreement, was not in accordance with this Act it appears to the Court that the award deals with the dispute which shall not be settled by arbitration under the law; or the recognition or enforcement of the award is contrary to public order or good morals.  

2.6.7 Recognition and Enforcement of Awards

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application to the competent Court, shall be enforced. In the case where an award is made in a foreign country, the competent Court shall enforce such award only if it is governed by a treaty, convention or international agreement to which Thailand is a party, and it shall have effect only to the extent that Thailand agrees to be bound.  

The Court may refuse to enforce the arbitral award, irrespective of the country in which it was made, if the party against whom the enforcement is invoked can prove that under the Section 42 in Arbitration Act B.E. 2545

An order or judgment of the Court under this Act shall not be appealed, except where the recognition or enforcement of the award is contrary to public order or good morals the order or judgment is contrary to the provisions of law relating to public order or good morals; the order or judgment is not in accordance with the arbitral award; the judge who has tried the case gave a dissenting opinion in the judgment; or it is an order on provisional measure under Section 16. An appeal

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42 The Arbitration Act B.E. 2545 Section 40.
43 The Arbitration Act B.E. 2545 Section 41.
against an order or judgment under this Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be.\textsuperscript{44}

2.6.8 Fees, Expenses and Remunerations

The parties, any fee and expense incurred in the arbitral proceedings as well as commission of the arbitrator; except lawyer fee and expense, shall be in accordance with those stipulated in the arbitral award.\textsuperscript{45}

2.7 The problems in the Arbitration Act B.E. 2545

The UNCITRAL Model Law on the International Commercial Arbitration 1985 is the Model Law about arbitration that has been passed by the United Nations. Under the UNCITRAL Model Law on the International Commercial Arbitration 1985 it has no criminal liability provision. Thailand is one of the United Nations members but our law is, at certain points, very different from the Model Law, such as in the Arbitration Act B.E. 2545 has an criminal liability provision.

The Arbitration Act B.E. 2545 was applied to both domestic and international aspects. This creates the problem relating to jurisprudence. That is the arbitration act should differentiate between domestic and international aspects. Although Thai legal system is that of Civil law, jurisprudence is still applied in practice.\textsuperscript{46}

At present, the award of arbitration under the Arbitration Act B.E. 2545 was enforced by many courts e.g. Provincial Court, Civil Court and Intellectual Property and International Trade Court. Enforcement of various resolutions may lead to the various trends in jurisprudences. In my point of view, I agree with Mr. Phijaisakdi Horayangkura that the Arbitration laws in Thailand should have two Acts one for domestic arbitration and another for international arbitration. The reason behind this separation will be mentioned in the next chapter.

\textsuperscript{44} The Arbitration Act B.E. 2545 Section 45.

\textsuperscript{45} The Arbitration Act B.E. 2545 Section 46.

\textsuperscript{46} Phijaisakdi Horayangkura, Collected Articles on Commercial Dispute Settlement 1\textsuperscript{st} ed. (Bangkok: Chulalongkorn University Publisher, 2549), p.32.
Chapter 3

Concept and Characterization of Domestic arbitration and International Arbitration

Settlement of disputes by arbitration can be divided into domestic arbitration and international arbitration. It is the development of law, in making a new law, international arbitration, especially commercial matters, is to be taken into consideration. This is to differentiate its applicable law from that of the domestic arbitration. In applying the law to international arbitration, it must be freer and has a wider range than domestic arbitration. It is recognized that there are two parts of arbitration system consisting of the consent and the trial. The consent appears clearly in the arbitration agreement or arbitration clause which is the agreement generally found in a specific agreement; the trial part can be found in laws and rules of institutional on ad hoc arbitration.

When there is a settlement of dispute by arbitration which is well accepted over the world, and there is arbitration used across the world, it is necessary to determine the characteristics or nationality of arbitration for convenience in applying law in the procedure of arbitration and seeking help or intervention in the arbitration through the procedure of the court. Besides, it is significant to the recognition and enforcement of final award of arbitration in the time when it is necessary to bring the final award to be enforced in the court of the country. If there is no international definition to be applied international, commercial arbitration, there may be problems, as in the case of international arbitration in France as for is concerned with international commercial benefits, can be domestic the arbitration in England.

The international lawyers try to explain the meaning and differentiate domestic arbitration from international arbitration. Hereby, it means international commercial arbitration; one should note that the definition of foreign arbitration is a matter of recognition and enforcement under the final award of a foreign arbitration that is the result of foreign commercial arbitration from foreign country. The actual international arbitration under public international law is about boundary disputes and other political issues as explained by David as follows:
David\textsuperscript{47}: the differences of arbitration exist because the settlement of dispute by arbitration has more elements concerned with international part in new world; these differences are:

Foreign arbitration is the one done in foreign countries under the foreign law for the settlement of dispute abroad where the government power is requested to help in such arbitration such as the appointment of arbitrator, the issuance of summons to the witness or document to the enforcement of final decision.

The nationality of parties or of arbitrators or arbitration place or law applicable to the procedure of the dispute may be considered to see whether it is national arbitration or foreign arbitration. However, the rule of law applied in specifying the characteristics of a foreign arbitration is not clear and is ambivalent in many countries. Also, the legislature or the courts have unclear positions and many legal scholars are of different opinions.

Foreign arbitration is about the relationship that affects international trade, so it is concerned with special rules as it has international elements.

Lew\textsuperscript{48} defines such characteristics as nationality of arbitration. The arbitration would have many different nationalities under more than one elements of jurisdiction. If the elements concerned are more inconsistent, there would be more nationalities.

Domestic arbitration is the process with the same nationality as the court which shall enforce the final award and thereby enforce the award more easily than the final award of the foreign arbitration, which may be identified from the content of dispute, nationality, or residence of the parties, law to be applied to the enforced and arbitration place of the foreign arbitration that is to see whether there is a connection with another state or not.

International arbitration does not depend on any single nation but it is related to several nations and does not involve the power of any state. The international characteristics may be considered as follows:


1. The organization such as ICSID (International Centre for Settlement of Investment Disputes) for the arbitration procedure is under the Convention on the Settlement of Investment Disputes between the States and the National of the other Member State. It points out clearly the differences of dispute settlement by this arbitration system in comparison to the dispute settlement done by other settlement organizations, and the study into the elements of that the arbitration of ICSID can be done by looking at Article 25 of 1965 Washington convention. Any dispute able to be caught in the dispute settlement procedure under ICSID must be under the rules specified in the convention. The elements in such a matter can be divided into 3 parts, namely consent of the parties, jurisdiction ratione material, and jurisdiction ratione personae. A study of one of the provisions of the convention, the fact of the case, and by comparing with other similar law, would make it possible to notice the special characteristics of the principle provided therein like the consent that is irrevocable by one party, the imitation on the type of legal dispute occurred directly from an investment, being a subject of international law of foreign investor. These special characteristics created by the Convention aim to make this Convention achieve the goal, to create good investment climate and to be the efficient tool to settle the international investment dispute trusted by member parties of the convention.

2. The structure or the trial in international commercial arbitration is done by not relying on the domestic legal system of the state government, and it is independent from the state which the party has a linkage. The arbitration may be done under a permanent institute or ad hoc process under the Rules on Arbitration that is accepted internationally by parties such as International Chamber of Commerce or ICC, the parties may choose ad hoc arbitration under a set of developed rules at an international level such as European Convention on International Commercial Arbitration 1961, UN Economic Commissions for Europe (UNECE), for Asia and the far East (UNECAFE) developed in 1966 or United Nations Commission on the International Trade Law (UNCITRAL).

Redfern and Hunter⁴⁹ have the opinion that the domestic arbitration is another choice in proceeding the procedure before bringing the case to the court.

under the domestic law. It is about the people in the same state such as the house construction agreement where the house is built inconsistent with the plan, or the machine does not work properly. The international arbitration is about matters outside the state but done in the state for geographical convenience. One caution, Redfern and Hunter view the matter from English law perception which allows the local court to try foreign cases.

The difference is significant since the state which has a developed arbitration law and would accept freedom of parties in international arbitration system more than the one in domestic arbitration system. The criteria used to differentiate may be the nature of the dispute the nationality or the habitual place of residence of the parties to determine the difference, The Characteristics of Domestic and International Arbitration.

The characteristics of international arbitration show that the arbitration must be under a law of a country before asking for assistance in enforcement of the case (final decision of arbitrator) from the court of the other country. If the enforced party is enforced under final decision of arbitrator or may be related in other aspects that may make it necessary to find rules to determine that of what nationality such an arbitration is or the issued nationality of arbitration. Most arbitration has nationality of the states; so, it is necessary to consider three causes as follows:

Firstly, the nationality of arbitrator affects the consideration of the arbitration laws of which country would be applied for arbitration in such case. Law of arbitration shall provide about the arbitration agreement, appointment of arbitrator, and the proceeding of the case.

Secondly, the nationality of arbitration affects the consideration to the effect that court of what country would have power in providing assistance, controlling, or intervention in the proceeding such as the issuance of writ in summoning the witness or document to revoke the award of the arbitral tribunal.

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50 Kanitta Termtrisana, Legal Concept on Classification of Domestic and Foreign Arbitration, (Master of Laws Program, Faculty of Law, Chulalongkorn University; 2541), p. 26.

And lastly, the nationality of arbitration affects the recognition and enforcement of final decision of arbitration, that is, the countries invoked are the member countries of 1958 New York Convention, the final decision of international arbitration must follow the 1958 New York Convention that such countries are thereby bound.

Since the determination of characteristics of international arbitration is important, so, it is necessary to consider the rules of the characterization of domestic and international arbitration. Most of the rules applied by the international community and international convention include the territory rules or place of arbitration, nationality of parties principle or of arbitration, principle on choosing arbitral law of trial, and principle on nature of dispute. All of these are to be explained in the next section.

### 3.1 Concept of UNCITRAL Model law on International Commercial Arbitration 1985

The Model Law represents a significant further step, beyond the New York Convention, toward the development of a predicable international legal framework for commercial arbitration. Like the New York Convention, the Model Law’s efficacy is ultimately dependent upon its interpretation and application by national court. But the law goes beyond the Convention by prescribing in significantly greater details of the legal framework for international arbitration, by clarifying points of ambiguity or disagreement under the Convention.\(^52\)

#### 3.1.1 General provisions

The States that the Model Law is applicable to in international commercial arbitrations.\(^53\) The word “international” is defined in Article 1(3). An arbitration is international if the parties to the arbitration agreement have, at the time when the arbitration agreement was concluded, their places of business in

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\(^{53}\) UNCITRAL Model Law Article 1.
different States, or one of the parties has its place of business in a State other than that of the “place” of arbitration, or a substantial part of the contract is to be performed in a State different to where one of the parties has its place of business.54

3.1.2 Arbitration agreement

An “arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement55. The UNCITRAL Model Law gives a definition of arbitration agreement. It is an agreement to submit disputes to arbitration “which have arisen or which may arise” between the parties in respect of a defined legal relationship. A dispute between the parties may be contractual or otherwise. It would, however, appear that a dispute relating solely to the existence of a legal relationship would not be caught within the definition as that legal relationship has not been defined. The arbitration agreement may be part of a contract or in a separate form.

Article 7(2) requires an arbitration agreement to be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex or other means of telecommunication which provides a record of the agreement or in statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. A facsimile will therefore be caught within the definition. An arbitration agreement may also be in writing where it is referred to within a contract document.56

An arbitration agreement and substantive claim before court in which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the

55 Ibid., p. 321.
56 Ibid.
substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

The definition of "dispute" is of fundamental importance and the same problems may arise as with the different interpretations of the word 'commercial'. The courts of one country may view a set of facts and hold that a dispute arises from them. On the same set of facts another court in a different country may hold there is no dispute. The UNCITRAL Model Law provides that it is not incompatible with the arbitration agreement for a party to request before or during the proceedings that a court provide interim measures of protection.

3.1.3 Composition of Arbitral Tribunal

The composition and setting up of the arbitral tribunal. Article 10 states that the parties are free to agree the number of arbitrators but in default of agreement the number shall be three. Article 11(1) provides that a person shall not be precluded from acting as an arbitrator by reason of his nationality unless agreed otherwise by the parties. Article 11(2) states that the parties are free to agree the procedure for appointing an arbitrator. Default provisions are provided in Article 11(4) and (5) where the appointment procedure is agreed by the parties provides the default position where there is no agreement on the appointment procedure. Where there are three arbitrators each party shall nominate an arbitrator and the nominees must appoint the third arbitrator. Where one party fails to appoint, an arbitrator or the two arbitrators fail to agree on a third arbitrator the appointment is made by the court or other authority specified in Article 6. Where arbitration is to be by sole arbitrator and no agreement can be reached between the parties the appointment is made by the court or other authority specified in Article 6.

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57 Ibid., p.321.
58 Ibid.
59 Ibid., p.322.
60 Ibid.
The grounds for challenge. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Challenge procedure. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article. Failing such agreement, a party which intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in Article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award (Article 13).

3.1.4 Jurisdiction of Arbitral Tribunal

The competence of an arbitral tribunal to rule on its jurisdiction. This power is divided into two distinct areas: the separability of the arbitration agreement and the arbitral ability of the agreement. This is one of the cornerstones of the UNCITRAL Model Law. The rule that the arbitration agreement is separate to the main contract has been similarly included in s. 7 of the AA 1996.61 This

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61 Ibid.
means that even if the main contract is found to be null and void the arbitration agreement may still be binding on the parties. The arbitral tribunal may also rule on its own substantive jurisdiction. This deals with the situation where an objection is raised as to whether any matter has been referred to the arbitral tribunal for its decision. The decision of the arbitral tribunal may thereafter be challenged by the parties.  

3.1.5 Conduct of Arbitral Proceedings

The parties must be treated with “equality and each party shall be given a full opportunity of presenting his case”. This is intended to reflect principles of natural justice. The parties have the right to agree on the procedure to be followed by the arbitral tribunal. In drafting the UNCITRAL Model Law it was realized that it would be used in both civil and common law countries. Article 19(1) therefore permits the parties to agree that the arbitral proceedings be conducted either inquisitorially or in an adversarial manner. The procedure under which the arbitration is to be conducted failing any agreement is under Article 19(1). It states that the arbitral tribunal may “conduct the arbitration in such manner as it considers appropriate”. The powers conferred on the arbitral tribunal include, but are not limited to, the power to: “determine the admissibility, relevance, materiality and weight of any evidence.

Article 20 Place of arbitration states that parties are free to agree on the place of the arbitration and that failing such an agreement the place of the arbitration shall be determined by the arbitral tribunal and states that notwithstanding the provisions of Article 20(1) the arbitral tribunal may meet at any place it considers appropriate for hearing witnesses, experts or the parties, for consultation among its members, or for inspection of goods, other property or documents.

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62 Ibid.
63 Ibid., p.323.
64 Ibid.
65 The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
Article 21 Commencement of arbitral proceeding states that the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.\textsuperscript{66} That provides that the date when the arbitration proceedings commence is the date when the respondent receives a request that the dispute is to be referred to arbitration. This Article is of importance in that the date on which the request is received by the respondent will be relevant to whether there is a limitation defence to the claim. Under the UNCITRAL Model Law the mere reference to arbitration was sufficient to commence proceedings.\textsuperscript{67} The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

Expert appointed by arbitral tribunal provides that unless otherwise agreed by the parties the arbitral tribunal may appoint one or more experts to report on specific issues to be determined by the arbitral tribunal. This Article is broad enough to allow the arbitral tribunal not only to appoint experts of fact but also legal assessors.\textsuperscript{68} The expert may if so required also give oral evidence and be cross-examined at the hearing after the submission of his report. The second paragraph of Article 27(2).\textsuperscript{69} allows for the arbitral tribunal or a party with the approval of the arbitral tribunal to apply to the court for assistance in taking evidence.\textsuperscript{70}

\textsuperscript{66} UNCITRAL Model Law Article 24.

\textsuperscript{67} Andrew Tweeddale and Keren Tweeddale, \textit{A Practical Approach to Arbitration Law}, p.323.

\textsuperscript{68} Ibid., p. 324.

\textsuperscript{69} The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

\textsuperscript{70} Andrew Tweeddale and Keren Tweeddale, \textit{A Practical Approach to Arbitration Law}, p.324.
3.1.6 Making of Award and Termination of Proceedings

The arbitral tribunal shall decide the dispute in accordance with the law designated by the parties in relation to the substance of the dispute. Any designation of law or legal system is construed, unless otherwise expressed, as directly referring to the substantive law of the State and not to its conflict-of-laws rules. Only where there is no designation will the conflict-of-laws rules apply. Only where expressly requested by the parties may the arbitral tribunal act as amiable compositeur or apply principles of equity. 71

Article 29 72 provides that the decision-making of the arbitral tribunal shall be by majority or by the presiding arbitrator unless otherwise agreed. This reflects Article 31 of the UNCITRAL Arbitration Rules. Article 30 of the UNCITRAL Model Law provides for the settlement of the arbitration. Where settlement is reached the parties may request that it be embodied in an award. 73

Article 31 provides for the form and content of an award. The award is required to be made in writing and signed by the members of the arbitral tribunal or a majority of them. 74 The award is required to be reasoned unless otherwise agreed. The award must state the date and the place where the arbitration was determined. The award is deemed to have been made at that place. A signed copy of the award is required to be delivered to the parties. 75

Article 32 76 provides for the termination of the arbitral proceedings. This may occur on the publication of the final award. 77 It may also occur where the claim of the claimant is withdrawn unless the respondent objects; where the parties agree; or the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

71 Ibid.
72 UNCITRAL Model Law Article 29.
73 Andrew Tweeddale and Keren Tweeddale, A Practical Approach to Arbitration Law, p.325.
74 Ibid.
75 Ibid.
76 UNCITRAL Model Law Article 32.
77 Andrew Tweeddale and Keren Tweeddale, A Practical Approach to Arbitration Law, p.325.
3.1.7 Recourse Against Award

Application for setting aside as exclusive recourse against arbitral award provides that the award may only be set aside by a court in accordance with the provisions of this Article. The grounds on which the award may be set aside reflect those on which recognition and enforcement may be refused under the New York Convention. The grounds include: that a party to the arbitration was under some incapacity, that the agreement is not valid under the applicable law, that proper notice had not been given of the appointment of the arbitral tribunal or the proceedings, that a party was unable to present its case, that the award deals with matters outside the jurisdiction of the arbitral tribunal, that the composition of the arbitral tribunal was not in accordance with the agreement of the parties unless that agreement was contrary to the applicable law, and that the subject matter of the arbitration was not capable of settlement by arbitration under the law of the State in which the place of arbitration was located or the award is contrary to the public policy of that State.\textsuperscript{78}

An application to set aside may not be made after a period of three months from the date of receipt of the award. The court when asked to set aside the award may, where appropriate, and so requested by a party, suspend the setting-aside proceedings to enable the arbitral tribunal to eliminate the grounds for setting aside.\textsuperscript{79}

3.1.8 Recognition and Enforcement of Awards

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of the enforcing State,

\textsuperscript{78} Ibid.

\textsuperscript{79} Ibid., p.326.
the party shall supply a duly certified translation thereof into such language\textsuperscript{80}. The enforcement of awards properly made. The award, irrespective of where it is made, shall be recognized and enforced. The UNCITRAL Model Law does not therefore require reciprocity in the recognition and enforcement. Article 35(2) deals with the conditions that are required before enforcement will be allowed.\textsuperscript{81}

The UNCITRAL Model Law deals with grounds for refusing recognition and enforcement. These grounds are identical to those in the New York Convention. An application that the award should not be enforced can only be made by the party against which enforcement or recognition is sought and that party has the burden of providing proof of the ground. The grounds include the following: under the law under which the arbitration was conducted the parties were under some incapacity or the arbitration agreement was not valid; there had not been proper notice of the appointment of the arbitrator or of the arbitration proceedings; The party was unable to present its case; The award deals with a matter outside the jurisdiction of the arbitral tribunal; The composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties or failing such agreement was not in accordance with the law of the country where the arbitration took place; The award has not become binding or has been set aside or suspended in the country in which it was made.\textsuperscript{82}


In the essence, it concerns the recognition of the arbitration agreement made by the citizen of contracting state. Thailand has ratified and already become a party to this convention.

\textsuperscript{80} UNCITRAL Model Law Article 35.

\textsuperscript{81} Andrew Tweeddale and Keren Tweeddale, A Practical Approach to Arbitration Law, p.326.

\textsuperscript{82} Ibid.
3.3 Convention for the Execution of Foreign Arbitration Award, League of Nations, Geneva, 1927

In essence, it deals with recognition and enforcement of the arbitration award made under arbitration agreement subject to The Protocol 1923. Thailand ratified and became a party to the Convention on 7th July B.E2474.

3.4 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958


This Convention was made to make the recognition and enforcement of foreign arbitral award become easier than those of the 1927 Convention. Thailand became a party to this Convention by accession on 21 December B.E2502 and adhered to this Convention since 20 March B.E2503. The New York Convention enhances the recognition of arbitration and enforcement of arbitral award. It makes parties to the dispute become more confident to choose arbitration as a means of dispute settlement. This Convention generally developed arbitration into the next stage.

The 1958 New York Convention contained sixteen provisions. Seven provisions deal with substantive rules, and the others are procedural rules. The Convention can be briefly explained as following:

This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of difference between persons, whether natural or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

This convention deals with recognition of an agreement in writing under which the parties undertake to submit the dispute to arbitration, if capable. The term “agreement in writing” includes an arbitral clause in a contract or an arbitration agreement.
The Contracting State which is requested for enforcement of the arbitral award in its territory shall follow these procedures: (1) the party applying for recognition and enforcement shall supply required documents to the State where the recognition and enforcement are sought (2) If the arbitral award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such a language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.\textsuperscript{83}

Under this Convention, the recognition and enforcement of the award may be refused, if the Contracting State is able to prove to a competent authority that.\textsuperscript{84}

The parties to the arbitral agreement are under some incapacity under the applicable law, contractual clause or agreement.

The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings.

The award contains decisions on matters beyond the scope of the submission to arbitration. The State where the enforcement is sought may refuse to enforce such award in its territory.

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties.

The recognition or enforcement of the award is contrary to the public order or public policy.

When an application for the setting aside or suspension of the award has been made to a competent authority, the authority, if it considers to be proper, may adjourn the decision on the enforcement of the award and also order the other party to give suitable security. This is similar to Article 23\textsuperscript{85} of ICC rules: Conservatory and Interim Measures.

\textsuperscript{83} New York Arbitration Convention of 1958 Article 4.

\textsuperscript{84} New York Arbitration Convention of 1958 Article 5.

\textsuperscript{85} Article 23 Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being
The Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States. It also stipulates that the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 shall cease to have effect between Contracting States on their becoming bound, and to the extent that they become bound, by the Convention.

As can be seen, the New York Convention has played an important role in broadening the scope of the recognition and enforcement of international arbitral award and eased the recognition and enforcement so as to suit economic and social conditions.

3.5 Rules in Determining the Characteristics of Domestic Arbitration and International Arbitration

In considering the characteristics of arbitration to see whether it is domestic arbitration or it is international arbitration, one has to bring all rules concerned to determine the characteristics of such arbitration. The law of each country chooses different principle according to the policy and objectives in applying the law to suit economic and social condition at that time. Various rules include:

1. **Nationality of Parties or Arbitrators**
2. **Procedural Law Theory**
3. **Territorialist Theory**
4. **Nature of the Dispute**

However, in the division of principle for determining the characteristics of arbitration, some lawyers divide it into 4 rules as follows:86

First rule: it is the determination by relying on material or physical connecting factors such as the determination by place used in carrying out the

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proceeding of an arbitration to see to which country it belongs or from residence, nationality, or religion of the parties.

Second rule is the determination by qualitative tests by considering necessity in the international trade and the provision of freedom to parties to agree details concerned with the settlement of dispute by arbitration such as the law of which country to be applied in arbitration. It is considered the domestic arbitration of such country as specified in New York Convention 1958 Article 1(1) that accepts the final decision made in the country requesting for acceptance and enforcement of international arbitration as in the sample as follows:

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87 Kanitta Termtrisana, Legal Concept on Classification of Domestic and Foreign Arbitration, (Master of Laws Program, Faculty of Law, Chulalongkorn University; 2541), p. 28.

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.
The parties have domestic arbitration in Country A but apply the law of Country B in regulating the proceeding of arbitration; then, it is considered that it is a foreign arbitration for A.

In the part of third and fourth rule added by the author.

Third rule is the determination of nationality principle. The arbitration to be considered foreign arbitration depends on the nationality of arbitrator since the arbitration comes from the appointment of the parties as the user of government sovereign in making final decision to settle the dispute, in the same manner as the judge considers the case in the court, where the power in trial of the dispute of the parties is the power from the law of the state.

Fourth rule is the application concerned with the nature of the dispute; the arbitration in this manner comes from the International Chamber of Commerce or ICC that established arbitration court in Paris in 1923 with rules covering the dispute which is a foreign issue although the parties are citizens in the same state.

Currently, there is the provision concerned with the duties of arbitration court of ICC that is not the court under general meaning but it is a council functioning in controlling the arbitration under the rules for settlement of dispute by arbitration which is international business dispute and the meaning of “international business dispute” is not provided in other provisions but is explained by negative form in the statement of ICC to the effect that “the international characteristics of arbitration does not mean that the parties are to have different nationalities, however, parties can determine the exception in the agreement”.

Rules in dividing the characteristics of domestic arbitration and international arbitration are as follows:

3.5.1 Nationality of the Parties or Arbitrators

The arbitration to be considered international arbitrator depends on arbitrator since arbitration comes from the appointment of the parties as the user of government sovereign in making final decision to settle the dispute, in the same manner as the court considers the case in the court, where the power in trial that is

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89 Kanitta Termtrisana, Legal Concept on Classification of Domestic and Foreign Arbitration, p. 62.
from the parties is the power from the law of the government. And the final decision is the power of the state by court that must be done by arbitrator who is the national of the government whether a government official or citizen.\textsuperscript{90} The determination of nationality of arbitration by this method is therefore under the exclusive procedural law theory.\textsuperscript{91}

The case of foreign arbitration by considering from the nationality of the parties is an element of the consideration concerned with the relation of the parties to see whether the concerned party is the subject of the state or not; it is like the consideration on domicile, place of residence, place of incorporation or place of business of parties\textsuperscript{92} as in several international treaties and foreign legal law, UNCITRAL Model law on International Commercial Arbitration 1985, The Model Law the characteristics of international arbitration in Article 1 (3)\textsuperscript{93} by applying the

\textsuperscript{90} Ibid., p.44.
\textsuperscript{93} United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration Article 1 (3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
rules on nationality of parties and characteristics of dispute to determine international characteristics of arbitration. Besides, the international elements may arise from the fact that the parties choose place for arbitration in the country other than the one with place of business of the parties under Article 1(3)(b)(i)\textsuperscript{94}

For the case under Article 1(3)(a), considering that the parties to the Agreement have places of business in different countries or not. If it is the arbitration between parties with place of business in different state, then it is considered international arbitration under UNCITRAL Model Law by applying Nationality of the parties as the criteria.\textsuperscript{95} The arbitration in the manner that considers the condition of dispute would be explained below in other section.

It is noted that UNCITRAL Model Law on International Commercial Arbitration determines only the international characteristics of arbitration and does not specify the characteristics of domestic arbitration. This is because UNCITRAL Model Law on International Commercial Arbitration aims to apply only to the international issue that various states apply to the domestic matters of each state.\textsuperscript{96}

1. Switzerland

The arbitration law of Switzerland can be divided into arbitration law applied domestically which is the law of each state called Cantonal Law, under the Article 64 (3) of Federal Constitution of 29 May 1874, and the law of international arbitration; and since Switzerland is a federal state consisting of 26 states (cantons), so there is the Concordat for interstate arbitration and thereby applicable to international arbitration.\textsuperscript{97}


\textsuperscript{95} Ibid, p. 19.

\textsuperscript{96} Kanitta Termitrisana, \textit{Legal Concept on Classification of Domestic and Foreign Arbitration}, (Master of Laws Program, Department of Law, Chulalongkorn University; 2541), p. 48.

For the international arbitration the law applied to it is under Chapter 12 (of the Loi federale sur le droit international prive (hereinafter "LDIP")) the Swiss Private International Law Act, issued by the parliament on 18 December, 1987 to be effective on 1 January, 1989. In Swiss Private International Law Act article 176 provides the provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is situated in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. Considering from such provision, it can be seen that international arbitration under the law of Switzerland uses the nationality principle in determining the characteristics of foreign arbitration by considering that one party or both parties have normal residence in Switzerland or not. If it appears that the party has no residence in Switzerland, it shall be considered that it is a foreign arbitration that the Swiss court can recognize and enforce the final award for the parties under the rules of New York Convention.

It should be noticed that the settlement of the dispute by arbitration in Switzerland can be applied to agreement between the party with domestic residence and the agreement between party with domestic residence and the party with residence outside the country and the agreement that both parties have residences outside the country as well. However, it must be the final decision of dispute by arbitration tribunal in Switzerland, such arbitration would apply the law on arbitration of Switzerland in the proceeding and making final decision under lex loci arbtri. The expression lex arbitri simply refers to the law governing the arbitration. Three conceptual theories in arbitration would usually operate to

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98 Ibid., p.2.
99 Kanitta Termtrisana, Legal Concept on Classification of Domestic and Foreign Arbitration, p.53.
100 Robert Briner, Switzerland (National Reports), in Yearbook commercial Arbitration (Vol. XIV), p.4.
determine what lex arbitri is or at least, generally accepted to be the jurisdictional theory, contractual theory and party autonomy.\textsuperscript{102}

3.5.2 The Procedural Law Theory

The arbitration, domestic or foreign, depends on law applied to the proceeding of arbitration is the parties on the foreign that arbitral tribunal may chooses the law of a country in carrying out the trial and making final decision without considering the place of arbitration, necessity in applying the principle of choice of procedural the law is the result from the principle of determining the characteristics of arbitration by applying the Territoriality Theory and Nationality of theory.

As in the case of territoriality thereby which arbitrator does not complete the trial in a country, so the place of arbitration cannot be specified. Or the case of trying cases in many countries then be back to sign in the award in the first country of trial or the case of reliance. And nationality of arbitrator which is different from the law and the practice of several countries. So, the principle of choice of procedural law is the result of mixed theory that is the mixture of the boundary and principle of nationality of arbitrator\textsuperscript{103} because mixed theory encompasses a mixture of the above two. The commentators who support it believe that reality lies somewhere in the middle of the contractual and jurisdictional theory, namely that neither the arbitrator perform a legal function nor that the award is not a matter of the contract alone “The parties, by their agreement, created and fixed the limits of their private jurisdiction” the arbitrator’s duty is to judge but the power to do so is conferred to him by the agreement of the parties.\textsuperscript{104}


\textsuperscript{104}www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm, (last visited 10 December 2010).
The key characteristics of this mixed theory accepts that arbitration is still under the domestic state law a state for it must have law on arbitral procedure and final award of arbitration as there might be a problem occur during the trial or enforcement of the final award. The court shall try under the law to see competence of tribunal. Besides, it accepts the agreement theory in that the parties can settle the dispute conveniently, rapidly, and efficiently.\textsuperscript{105}

Under New York Convention 1958, the award of foreign arbitration of the second type is the award made in the boundary of the state where it requests the recognition and enforcement of award; but the law in such a state does not consider that it is the final decision of domestic arbitration under Article 1(1)\textsuperscript{106} of New York Convention 1958, The history of the drafting of this Convention indicated that ECOSOC proposed the principle that the arbitration which had its trial and award carried out in a country would be under the law of such a country; but contain Civil Law countries such as France, West Germany (at that time), took the position that the parties should have the right to agree to use arbitration law of other counties which is not the country where the trial and award is made as the law for the proceeding of the arbitration\textsuperscript{107}. For example, parties agree to have arbitration in West Germany by using arbitration of France, the court of Germany would consider the final decision made in its country is the final decision of foreign arbitration and the court of France would consider such final decision as the decision within France.\textsuperscript{108}


\textsuperscript{106} New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article 1(1).

\textsuperscript{107} Kanitta Termtrisana, \textit{Legal Concept on Classification of Domestic and Foreign Arbitration}, p. 56.

Principle applied in determining the characteristics of foreign arbitration is therefore the Procedural Law Theory under the principles of intention of parties. The application is the expansion of scope of application of the rule of territoriality; this makes the parties be able to bring final award to request for recognition and enforcement in the country of place of arbitration.\footnote{109}

\subsection*{3.5.3 Territoriality Theory}

In trying the case and making the award at a place the arbitration tribunal has to use of the law of such a place which is the place where the agreement is made (Lex loci contractus) or the law which parties agree to for proceeding the trial of arbitration, for the trial of the arbitral tribunal is a matter of the contract principle of private law and must be enforced under the law of a country under, Reliance on territory or place of arbitration in proceeding is to explain that arbitration is matter of private law under the exclusive private law theory\footnote{110}; the international convention or agreement and law of various countries give examples on the application of this principle.

Geneva Protocol on Arbitration Clauses, League of Nations, Geneva, 1923, The division of characteristics of domestic and international arbitration is not specified clearly in the 1923 Geneva Protocol; it merely specifies the obligation of member states that they must accept the validity of the arbitration agreement made by a subject of a party or a national of member state. They provided in Article 1\footnote{111} of this Protocol, stating that member states have a duty to recognition the validity of agreement in setting place of arbitration, regardless if the parties are not subject of that country of place of arbitration.

\footnote{109}{Kanitta Termtrisana, Legal Concept on Classification of Domestic and Foreign Arbitration, p. 57.}

\footnote{110}{Istvan Szaszy, “Recognition and Enforcement of Foreign Arbitral Awards (Comments),” The American Journal of Comparative Law: 14 (1966): 668.}
However, when considering the provision of Article 2\textsuperscript{112} which provided on the procedure of arbitration shall be that parties agree upon done under the law of the country on or under the law of the country where the arbitration trial shall take place and the award shall be made. Provision of Article 3\textsuperscript{113} provides about the obligation of member states to recognize the final award of arbitration in their own countries to enforce it by the authority and under the law in the member states as well. It can be seen that Geneva Protocol 1923 is characterized by “Localizing”, the arbitration without specifying the rules with international characteristic or International Regime. After over all consideration, it can be concluded that Geneva Protocol applies the principle of territory or place of arbitration by specifying characteristics of foreign arbitration because if arbitrator carried out trial and made award in a country then the law of such a country must be applied the proceeding of the case. Such arbitration then is the domestic arbitration of such a country.\textsuperscript{114}

For Geneva Convention on the Execution of Foreign Arbitral Awards 1927, since the Geneva Convention 1927 is the Convention to support the Geneva Protocol 1923, the award of arbitration to be enforced under the Geneva Convention shall be under the agreement made by parties as recognized by the Geneva Protocol as provided in Article 1\textsuperscript{115} of Convention that the member states shall recognize the

\textsuperscript{112} Geneva Protocol on Arbitration Clause 1923

(2) The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

\textsuperscript{113} Geneva Protocol on Arbitration Clause 1923

(3) Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national law of arbitral awards made in its own territory under the proceeding articles.


\textsuperscript{115} Geneva Convention on the Execution of Foreign Arbitral Awards 1927
final award of arbitration made under the Agreement which is subject to the Geneva Protocol 1923 to bind the parties and shall enforce such a final award under the rules and methods of member states that parties request to have award enforce if such arbitration is made in the territory of member states and parties are subject of member states. One can see that although Geneva Convention does not define

**Article 1** In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognized as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties. To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appel or pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

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final award of arbitration made under the Agreement which is subject to the Geneva Protocol 1923 to bind the parties and shall enforce such a final award under the rules and methods of member states that parties request to have award enforce if such arbitration is made in the territory of member states and parties are subject of member states. One can see that although Geneva Convention does not define

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(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appel or pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.
"Foreign Arbitration" directly, this Convention is applied to final award which has the characteristics of foreign arbitration award under the Geneva Protocol in 1923. So, the award of foreign arbitration means the award made in countries other than the country which the enforcement of award of such arbitration is being requested under the territoriality principle.\textsuperscript{116}

Under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the characteristics of international arbitration under the 1958 New York Convention would be of 2 kinds as provided in Article 1(1)\textsuperscript{117}

The provision in the Article 1 (1)\textsuperscript{118} defines foreign arbitral awards as the award made in the territory of other states that are not the states where the request for the acceptance and enforcement of award are made and shall mean the award made in the territory of the state where there is a request of recognition and enforcement of award, but the internal law of such a state does not consider it as the final award of domestic arbitration.

The award of foreign arbitration of the first type then means the final award made in the territory of other states which are not the states which the request for the recognition and enforcement is being made\textsuperscript{119}. The award of foreign arbitration of the second type shall mean the final decision that is made in the


\textsuperscript{117} Ibid.

\textsuperscript{118} New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

territory of the state where request for the recognition and enforcement of award is made, but the internal law of such a state does not consider it as the award of domestic arbitration.

The definition in the first part is the legislation using the territory principle to specify the characteristics of foreign arbitration in the same way as two appeared in the Geneva Treaties, but done in a progressive provision as there is no other conditions to apply; so the scope is much wider and as it is universal can be applied to all awards made in other states without applying nationality principle of parties. However, the New York Convention parties of same nationality bringing the foreign award allows the member states to make the reservation on 2 issues under Article 1(3). First Reservation is the Reciprocity reservation, it is the case where the state is to accept and enforce the award of arbitration made in the territory of other member states only and the member states may make the Second reservation on commercial dispute to the effect that the state would enforce the convention only for the commercial dispute arising from legal relations, whether it is to have it enforced under the New York Convention the result of contractual relations or not. The foreign final award concerned with domestic matters can be under the purview of the convention. But in the case of award of foreign arbitration made in the country of origin, it cannot be applied since it is the enforcement under the final decision of domestic arbitration.

120 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Article 1(3) When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting States. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the nation law of the State making such declaration.


122 Ibid., pp.12-22.
So, the foreign arbitration under Article 1(1) of New York Convention 1958 in the first part then applies the principle of territory as the rule in specifying the characteristics of foreign arbitration that is by considering the place for making final decision. If it is the award made in a country other than of requesting party, then it is the award of foreign arbitration under New York Convention 1958.

3.5.4 The Nature of the Dispute

Arbitration in this nature comes from International Chamber of Commerce (ICC) that established arbitration court in Paris in 1923, it introduced the concept on the nature of a dispute to be the criteria in considering whether such arbitration is international matter under ICC or not. During the initial stage, the international matters included only the disputes from the business and that concerned with different nationalities. Later on, in 1927, the rule was changed to cover the dispute which is foreign matter although the parties are citizens of same country.\textsuperscript{123}

In the rules, there is the provision concerned with the duties of arbitration court of ICC that is not a court under general meaning but it is the council for controlling the arbitration under the rules for settlement of dispute by arbitration which is international business dispute. The meaning of “international business dispute” is not provided in other provisions but is explained by negative in the statement of ICC which states “the international characteristics of arbitration does not mean that the parties are to have different nationalities, however, parties can determine the exception in the agreement”.\textsuperscript{124}

Besides, ICC interprets the word “international” for arbitration that is concerned with foreign matters to be included in the case of arbitration between foreign subsidiary of the company and the state where the subsidiary registers being and conducts business, it is thereby considered to be international matters under the ICC rule\textsuperscript{125}

\textsuperscript{123} Ibid., p. 62.
\textsuperscript{124} Ibid.
\textsuperscript{125} Alan Redfern and Martin Hunter, \textit{Law and Practice of International Commercial Arbitration}, pp.15-16.
As it has been said, ICSID (Convention on Settlement of Investment Dispute between the State and the Nationals of another State) has jurisdiction under Article 25 of ICSID Convention 1965 with three elements:

1) The nature of the disputes
2) The parties to the disputes
3) The consent of the parties

The nature of dispute is considered as first element in that it must be the dispute that the parties have legal right; for example, it is the dispute concerned with the breach of contract under law or not. The dispute must be concerned with the right or obligations or legal condition in making compensation in case where there is a violation of a right under the law. And the legal dispute must be related to the investment in disputing state.

In case of international arbitration as provided in Article 1(3)(b)(ii) of the UNCITRAL Model law on the International Commercial Arbitration 1985, it is to create a new legal principle to apply to international commercial arbitration by considering the international character of the transaction. It considers the place as being important for making payment of commercial debt or the place where the substance of dispute is most related to the parties. That is to see whether those places are the place where the parties carry out their business or not. If it is under the rules as mentioned, arbitration shall be considered the international arbitration concerned with the nature of the dispute.

The United States has a long history of law on arbitration. It also recognizes and enforces both domestic and international commercial arbitration. This is the result of federal law and state legislation together with case law. The federal law is provided in the United States Arbitration Act. It is the law to administrate the 1958 New York Convention to which the United States is member.

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The United States Arbitration Act was first set in 1925 by the congress and it has been revised a number of times. It can be applied to both existing disputes and future disputes. The revision in 1970 is meant to accommodate the accession to the 1958 New York Convention to make reservation on the reciprocity and commercial dispute under Article I (3) of the Convention by adding chapter 2 Article 201-208 to the Act. Under Article 202 the principles for foreign arbitration agreement and award under the New York Convention must have two requirements.

First the agreement on the award must be out of commercial relation be it contractual. This included transactions under Article 2 of chapter I of the United States Arbitration Act which provides on validity, irrevocability and enforcement of agreement to arbitration on commercial transaction and matters related to commerce.

Second the agreement and the award between parties having U.S. nationality shall not fall under the convention. Unless it is related to property in foreign land and on execution of enforcement of performance of obligation in foreign country on other suitable cause related to on several foreign states.

From the said provision out of the second requirement the agreement or award between an American party and foreigners or between two foreign parties shall fall under Article 202 for the agreement or award between American parties shall not fall under the New York Convention. By providing that the legal relation on international trade related to property situated in foreign country on enforcement execution in foreign country as well as other suitable matters related foreign country to be exception one can see that the application of the nationality of the parties to characterize foreign arbitration without support from the provision of the New York Convention. The arbitration law has to administer the New York Convention is inconsistent which the New York Convention. The first requirement shall be deal with under the section on the Nature of the dispute.

When considering these 4 principles in specifying the characteristics of domestic and foreign arbitration, it is found that most countries applied territory principle or place of arbitration and nationality of parties principle as the main criteria such as United States, Sweden, and Switzerland alone apply the nationality of the parties. The selection of use procedural law is the answer for the country that provides freedom to the party in choosing the arbitration law to be applied to the
proceeding such as Germany. Finally, the use of principle of nature of dispute is the concept for the promotion of international investment such as America.

For various criteria used in international agreement, it is found that the territory principle or principle arbitration place is the principle use in international agreements such as Geneva Protocol 1923, Geneva Convention 1927, New York Convention 1958 and the 1985 Model Law.

The nationality of parties principle is used in the Convention on the Settlement of Investment Dispute between the states and the National of other States and Model Law 1985, but it is not used in New York Convention 1958 for it is intended that the scope of convention be wider than both Geneva treaties and is the principle that can be used universally.

For the principle for selection of procedural law, it exists in the New York Convention 1958 which the proposal that France and Germany raised in the meeting of Convention drafting for the reason that the countries provide freedom to the parties in selecting the procedural law.

And finally, the principle concerned with the nature of dispute, exists and is applied in the Convention on Settlement of Investment Dispute between the State and the Nationals of the other State and the Model Law.

However, that Model Law is a good trend in reforming arbitration law to make it up to date and well accepted by international community as it contains 4 rules for the convenience in international commercial arbitration.
Chapter 4
Analysis of Criteria and Issues in Interpreting Foreign Laws

4.1 The Importance of UNCITRAL Model Law on International Commercial Arbitration 1985 for Thai Arbitration

At present, commercial competition and international investments are essential to many countries. Therefore, most of them direct their efforts towards promoting and supporting activities and methods leading to the successful development of capacity relating to international commerce and investments eventually leading to national economic security.

However, it is important to have a mechanism to rapidly settle disputes in commerce and investments with transparency, justice and reliability in order to eliminate commercial obstacles and support the aforementioned investments, especially by an arbitration which is generally and widely accepted from various countries. Most importantly, various countries may wish to accept and enforce the ruling of foreign arbitrators under the enforcement of international treaties, conventions or agreements to which each country is a party and it has been observed that the binding force of the court's judgment is less than that of foreign arbitral awards. Therefore, in requesting that arbitral awards to be enforced by Thai courts, it is necessary to consider initially whether an award is a domestic or foreign arbitral award. This would lead to due consideration in order to decide which criteria will be used to stipulate the characteristics of domestic and foreign arbitral awards or what should be the criteria for deciding which country will conduct the arbitral process sought by litigants.¹²⁹

¹²⁹ Kanitta Termtritsana, Legal Concepts on Classification of Domestic and Foreign Arbitration, p. 70.
4.2 The Deviation of Arbitration Act B.E.2545 from UNCITRAL Model Law on the International Commercial Arbitration 1985

The Arbitration Act of B.E. 2545 (2002) is a law passed to seek compliance with economical and social conditions in supporting the use of methods for settling civil disputes by arbitration taking place outside the courts as Thailand is a party to numerous international conventions related to foreign arbitration. It is capable to solve problems or conflicts quickly and conveniently with compromising manner. The contents of this Act set up the criteria related to the submission of disputes, trial, awards and enforcement according to arbitration awards outside the courts. However, the application to arbitrations during the past eight years to the present encountered with numerous difficulties, which is the main concern of this study.

4.2.1 The Challenge of an Arbitrator in Section 20 of Arbitration Act B.E. 2545

In certain matters, the B.E. 2545 Act does deviate from the Model Law as shown below;

Section 20 states that “Unless otherwise agreed by the parties, a party who intends to challenge an arbitrator shall submit a written statement of the reasons for the challenge to the arbitral tribunal within fifteen days after becoming aware of the appointment of the arbitrator or of the circumstances as prescribed in Section 19 paragraph three. If the challenged arbitrator refuses to withdraw from his or her office or the other party refuses the challenge, the arbitral tribunal shall decide on the challenge.

If a challenge under any procedure agreed upon by the parties or under the procedure as prescribed in paragraph one is not successful or in the case of a sole arbitrator, the challenging party may file a request to the competent Court within thirty days as from the date of receiving a written decision on the challenge, or as from the date becoming aware of the appointment of the arbitrator or of the circumstances as prescribed in Section 19 paragraph three, as the case may be. After having inquired the request, the Court shall have an order to allow or dismiss the request. During the Court proceedings, the arbitral tribunal and the challenged
arbitrator may continue the arbitral proceedings and make an award, unless the Court otherwise orders.

"In the case of necessity, the arbitral tribunal may extend the period for challenging the arbitrator under paragraph one for not more than fifteen days"

This Section is almost a duplicate of the Model Law. However, the Model Law does not allow the appeal of Court's order, while this Section of Thai law allows. The issues under Section 20 can be split into challenge and unsuccessful.

1. The challenge

Unless otherwise agreed by the parties, a party intending to challenge an arbitrator shall submit a written statement of the reasons for the challenge to the arbitral tribunal within fifteen days after becoming aware of the appointment of the arbitrator or of the circumstance which is the suspicious cause of the partiality, dependence or disqualification as agreed upon by the parties. 130

The sentence "Unless otherwise agreed by the parties" means the parties do not agree to use the Arbitration's Rules of any certain Institute, nor have any special mutual agreement having methods and procedures on the challenge of the arbitrator which differ from those stipulated in Section 20. In case where the parties agree otherwise, it shall proceed as agreed, for instance, the challenge of the arbitrator as per the Arbitration Act B.E. 2530 which was repealed shall be made to the competent Court. In this regard, the arbitration's rules, the Arbitration Institutes and the Ministry of Justice at such time set forth that the Committee of Arbitration, the Office of the Judiciary, appointed by the cabinet shall decide the matter. Therefore, in case where the parties agree to use the Arbitration's Rules of the Arbitration Institute, the Ministry of Justice, the challenge of arbitrator shall be decided by such Committee. The parties are not allowed to go straight to the Court. 131

After the Court was entirely separated from the Ministry of Justice, the Arbitration Institute was transferred to be under the Office of the Judiciary and the said Institute announced new rules called "the Rules of the Office of the Judiciary with respect to the Arbitration and the Arbitration Institute" on May 2, 2003. The

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131 Ibid.
Rules do not have the committee which is responsible for deciding on the challenge of arbitrator. Therefore, the challenge of arbitrator shall now be made in writing which explicitly declares the reasons for the challenge and is submitted to the director of the Arbitration Institute within fifteen days as from the date of receiving the name and details of such challenged arbitrator or the date of becoming aware of the circumstance of the challenge, as the case may be. Provided that the other party agrees on the challenge of arbitrator or the challenged arbitrator withdraws from his or her office after the challenge, the appointment of a new arbitrator in place of the challenged arbitrator shall be done. Although the parties do not exercise the right to appoint the arbitrator at first, if the other party refuses the challenge or the challenged arbitrator refuses to withdraw from his or her office, the director shall bring the matter to the attention of the arbitral tribunal to decide on the challenge within fifteen days.\textsuperscript{132} In the case where the challenge of arbitrator is not successful or there is only one arbitrator, the challenging party may file a request to the Court within thirty days as from the date of receiving a decision on the challenge of the arbitration tribunal.\textsuperscript{133}

Although the Rules of Thai arbitration Institute under the Office of the Judiciary with respect to the Arbitration set forth that the challenge of the arbitrator shall be made to the arbitration tribunal at first, except for the case of a sole arbitrator where the challenge can be submitted to the Court, it must be understood that the submission of the challenge to the director of the Arbitration Institute as per these Rules is not the submission to the Court, even if such director is a judge, since she or he does not act as a judge of Court, but as the executive member of the Arbitration Institute.

On the question regarding whether the arbitrator should withdraw from his office when the arbitrator is challenged, the Code of Ethics for Arbitrators prescribes that:

"in case all parties request the arbitrator to withdraw from his office on any ground, such arbitrator should withdraw himself. In case some of the parties

\textsuperscript{132}Jayawadh Bunnag, \textit{Arbitration: Theory and Practice}, p. 80.

\textsuperscript{133}Ibid.
request the arbitrator to withdraw from his office by claiming on the impartiality or independence of the arbitrator, the arbitrator should withdraw from his office unless:

(1) The agreement between the parties or the arbitral provisions prescribe the proceedings for challenging the arbitrator, the arbitrator shall comply with such proceedings;

(2) The arbitrator considers that the ground of the challenge is not material and that the arbitrator can conduct the proceedings and make decision independently and fairly, and the withdrawal of the arbitrator will delay the proceedings or increase the cost unnecessarily or obstruct the justice.\textsuperscript{134}

One can say, the Code of Ethics for Arbitrator states about this matter clearly.

It should be borne in mind that the proceeding of arbitration is a matter of the agreement between the parties. Thus, if all parties request the arbitrator to withdraw from his office, conventionally the arbitrator should withdraw himself in accordance with the wish of the parties without even a consideration of whether the arbitrator could conduct the proceedings independently and fairly. This is contrary to the proceedings of the court in which the parties cannot agree to withdraw a judge from the case. If any party wants to challenge any of the judges, the party has to conduct the proceedings complying with the Civil Procedure Code regarding the challenge of the court. This is because the duty and the power of the court are based on the laws, not on the contract or the agreement of the parties in the case. However, though the Code of Ethics is not enforceable as law, the arbitrator who does not comply with the Code of Ethics will become "a black sheep" of the arbitrators circle and will no longer be appointed as an arbitrator. It is important to note that though Clause 2 of the Code of Ethics for Arbitrators of the Arbitration Institute states that this Code shall bind the arbitrator in conducting the proceedings under the management of the Arbitration Institute, Arbitration Rules of the Arbitration Institute does not state that the Code of Ethics shall be used in the proceedings. This might be because the Arbitration Institute does not want the Code of Ethics to have the effect

\textsuperscript{134} The Code of Ethics for Arbitrators Article 16.
of contract binding. However, this Code of Ethics might become a norm for challenging the arbitrator.\textsuperscript{135}

The challenge of arbitrator is based on the fact that caused suspicion regarding the impartiality or independence of the arbitrator. This shall be considered on a case-by-case basis. Often, the fact raised by the challenging party is not strong enough to question the impartiality or independence of the arbitrator, for example, claiming that the arbitrator was a classmate of the lawyer of the other party without explaining further on how close they are or whether they are still in contact. It is difficult to accomplish in challenging the arbitrator if the allegation is raised only on the relationship without explaining on any special relationship that could lead to the suspicion on the impartiality of the arbitrator or that the arbitrator could work under the influence of the other party.

On the question of whether the arbitrator is deemed to accept the correctness of the challenge reason when the arbitrator withdraws from his office, Clause 17 (2) of the Rules of the Arbitration Institute states that “the fact that the other party agrees with the challenge of arbitrator or the fact that the arbitrator withdraws from his office does not imply the acceptance of the validity of the grounds for the challenge. This is because there is no any proof that the ground of the challenge is valid. As for the arbitrator, whether the arbitrator should withdraw from his office depends on his own moral judgment as stated previously. If the arbitrator considers that the ground of challenge is not valid and the challenging party challenges dishonestly in order to delay the proceedings of the case or to prevent the arbitrator from being appointed on any invalid ground, the arbitrator then should defend himself. However, the challenged arbitrator cannot be ensured on the outcome of the challenge, even though the arbitrator can act impartially and independently. For example, the public prosecutor was appointed to be an arbitrator in the dispute between the government and the private company and the disputed contract was reviewed by the Office of the Attorney General. Even though they said public prosecutor arbitrator had no involvement in reviewing the disputed contract and knew that he could act impartially and independently, the public prosecutor decided to withdraw from his office rather than let the challenging proceedings carry

\textsuperscript{135}Jayawadh Bunnag, \textit{Arbitration: Theory and Practice}, p. 81.
on and that the court might decide later that he cannot act independently. This is because if the court makes a decision in favour of the challenging party, it will be a waste of time and budget of the parties.\textsuperscript{136}

2. Unsuccessful Challenge of Arbitrator

According to the second paragraph of section 20 of the Arbitration Act, a challenge under any procedure agreed upon by the parties or under the procedure as prescribed in paragraph one is not successful, or in the case of a sole arbitrator, the challenging party may request the competent Court within thirty days as from the date of receiving a written decision on the challenge, or as from the date the appointment of arbitrator, or as from the date the circumstances paragraph three has known to him or her, as the case may be.

In case the challenged arbitrator refuses to withdraw from his or her party, there is a provision under Arbitration Act and a similar provision under the Model law that allows the challenging party to request assistance from the competent Court. However, there are some different points between the Arbitration Act and the Model law. According to the Arbitration Act, it does not describe that the party can appeal in such request to the Supreme Court. In case of Model Law, it deemed that the judgment of arbitration to be a final judgment.\textsuperscript{137}

During the Court proceedings, the arbitral tribunal and the challenged arbitrator may continue the arbitral proceedings and make an award, unless the Court otherwise orders. It means that no award which describes about the impartiality or independence of Arbitration is a reason to stay proceedings. Nevertheless, the challenging party may request for staying of such proceedings to the Court which may do so on the Judicial Discretion. Anyway there is some viewpoint about Model Law that there is no provision about stay of proceedings during the Court proceedings.\textsuperscript{138}

If the Court agrees with the Challenging party, it still need the proving of partiality of the Arbitrator. It is deemed to be a measure to prevent impartiality or ensure independence of Arbitrator during the Arbitration's

\textsuperscript{136} Ibid., p.83.
\textsuperscript{137} Ibid., p. 84.
\textsuperscript{138} Ibid.
proceedings. If the Court takes into consideration that Arbitrators may not be impartial and independent, such an award is revoked. It is a result from such an award against the public order or good moral unless there is the Challenging of Arbitration or not.

The last paragraph of Section 20 describes that in the case of necessity, the arbitral tribunal may extend the period for challenging the arbitrator under paragraph one for not more than fifteen days. It interpreted that the Arbitrator can be granted an extension of such a period for challenging the arbitrator unless there is such above provision. In case of Model Law and UNCITRAL Rules, there is no provision to allow such extension of the period for challenging the arbitrator.139

4.2.2 The Civil and Criminal Liability of Arbitrators in Section 23 of Arbitration Act B.E. 2545

The UNCITRAL Model Law on International Commercial Arbitration 1985 has no liability of arbitrator provision in both civil and criminal liability but B.E.2545 Act, under section 23 provides as following,

"An arbitrator shall not be liable for any civil liabilities on any act performed in the course of his duty as an arbitrator, unless it is performed willfully or with gross negligence causing damage to either party.

Any arbitrator wrongfully demanding, accepting or agreeing to accept an asset or any other benefit for himself or anyone else for doing or omitting to do any act in his duties shall be subjected to imprisonment for not more than ten years or a fine not exceeding one hundred thousand bath, or both.

Whoever giving offering or agreeing to give an asset of any other benefit to an arbitrator to induce him to do or omit to do any act or to delay an act that is contrary to his duties shall be subjected to imprisonment for not more than ten years or a fine not exceeding one hundred thousand Bath, or both".140

139 Ibid., p.85.

140 The Arbitration Act B.E. 2545, Section 23.
The advantages of using the term in "Bad Faith" are as follows:\textsuperscript{141}
Firstly, the term of "Bad Faith" is quite clearly defined to show the level of standard. Arbitrator will be liable if the arbitrator is not honest to his/her duty only.
Secondly, since arbitrator is not a civil servant most of the case the arbitrator is the one who is famous for being; an expert in the society. If such a law causes the arbitrator too easy of having sue then who will devote to be the arbitrator also who will take those risks to work as the arbitrator.

Thailand entered into the New York Convention 1958, since 21 December 1959. Under Arbitration Act B.E. 2545, either party shall request a Thai court to enforce a foreign arbitral award if the award is held in the signatory country. As mentioned above, Arbitration Act B.E. 2545 will also apply the criteria for revoking the arbitral award of the New York Convention to domestic awards, in enforcing an arbitral award, either domestic or foreign. The court will apply the same law to that award.

Therefore, if the award grants the benefit of protection under the New York Convention, it will receive such protection in Thailand.

"Arbitral liability still plays a very marginal role. It is noteworthy that an important document on international commercial arbitration such as the UNCITRAL Model Law does not even mention the topic. However, the immunity of arbitrators is a matter which is subject to increasing attention due to an enormous increase in the amount of arbitration worldwide. It also has become big business for all those involved, particularly for the users who are paying for the arbitration service and who may wish to seek redress against arbitrators".\textsuperscript{142}

So says Joel M. Douglas but, if one comes to the conclusion that as to the international arbitration, the arbitrator immunity is important not only for the arbitrator but also plays an important role for the parties who may or may not prefer the arbitrator liability provision, then intention of the parties may be very important to the arbitration tribunal.

\textsuperscript{141} Niti Nemchamnong, Liability of Arbitrator, (Master Degree Independent Study Paper, School of Law, Assumption University, 2005), p.42.

4.2.3 Limited appeals shall lie against the order or judgment of the court under Section 45 of Arbitration Act. B.E.2545

According to section 45 of Arbitration Act, an order or judgment of the Court under this Act shall not be appealed, except where:

1. the recognition or enforcement of the award is contrary to public order or good morals;
2. the order or judgment is contrary to the provisions of law relating to public order or good morals;
3. the order or judgment is not in accordance with the arbitral award;
4. The judge who has tried the case gave a dissenting opinion in the judgment; or
5. it is an order on provisional measure under Section 16.

An appeal against an order or judgment under this Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be.143

This provision is consistent with general provision which supports and promotes the Arbitration proceeding as well as validity and rapidity. Nevertheless, there are some exceptions of the order or judgment of the Court which shall not be appealed such as:144

1. The recognition or enforcement of the award is contrary to public order or good morals.145

This provision describes in case of the Court of First Instance considered that the enforcement of award is against the public order or good moral. Moreover, this provision also provides the right to any party to directly appeal such an award into Supreme Court and Administration Court. If the Court of First Instance refuses to accept such appeal, the party can appeal such order to the Court of First Instance at the same time.

144 Ibid.
145 The Arbitration Act B.E.2545 Section 45(1).
2. The order or award is contrary to the provisions of law relating to public order or good morals

This provision relates to any order or award under the Arbitration Act which the court does not enforce the award. It may be assumed that the award is contrary to law of public order or good moral and the party who dissatisfies with the award may appeal. For example, the parties agreed to use the arbitration as dispute settlement, but when dispute arose, one party rejects to use the arbitration process and choose to file the case to the court, the other party may submit the petition to the court for disposing of a case but the court dismisses the petition and resumes the proceeding; in this sense, the disposal of a case order without inquiring shall be considered as contrary to law of public order or good moral because if the court has already inquired and found the effective arbitration clause, the court cannot judge the dispute.

In this regard, if the Section 40 and Section 14 are not considered as the law of public order or good moral, the party who had the award revoked wrongfully or the party who desires to settle the disputed by the arbitrations, will have no other choice to solve their problem. Therefore, the relevant parties should follow the true intention of arbitration agreement.

3. The order or judgment is not in accordance with the arbitral award

When the arbitrators render the award, the court must enforce the award accordingly, unless there is a cause for refusal as provided in Section 43 and the court cannot revise the award. For example, the arbitrator decides the challenging party to pay the damages sum of 1,000,000 Baht to the claimant but the court considered that the compensation is too high and the court then reduced the compensation to sum of 950,000 Baht. In this regard, the claimant is entitled to appeal for such ordered. Similarly, if the court judges the challenging party to pay the damages sum of 2,000,000 Baht to the claimants; the challenging party will be able to appeal the judgment.

According to the Civil Commercial Code Section 383, if a forfeited contractual penalty is disproportionately high, it may be reduced to a reasonable amount by the court, therefore if the court sees a forfeited penalty in the award is disproportionately high, the court will be able to reduce it. The court has determinate
competency because the Civil and Commercial Code uses the word "the court" excluding the arbitrator. Nevertheless, the author disagrees with this opinion because the Arbitration Act allows the party to choose the arbitrator to decide in place of the judge, therefore, the arbitrator seems to be semi-judicial. The arbitrator should be able to reduce a forfeited penalty. If the arbitrator goes beyond the law and the award is contrary to the law of public order or good moral the court has power to examine the award. The court has no power to revises for reduction of a forfeited penalty. For example, determine a forfeited penalty for 100 times of the duty to pay. The court will not enforce the award. In conclusion, the court is not able to revise the award but able to refuse to enforce if the award contrary the law of public order or good moral.\textsuperscript{146}

In case the enforcement of award differs from recourse against award in Section 40 because in Section 40, if there is a cause for setting aside of the arbitral award, the party may submit the petition to the court for postponing of the judicial proceedings, the arbitrator may try the case anew or has another proceeding for the set aside the arbitral award cause is terminated therefore the arbitrator may revise the award. However, in case of the recognition or enforcement of the award, the arbitrator is not able to revise the award.\textsuperscript{147}

All the explained deviation may cause the foreigner to avoid Thai arbitration because they need the impartial and independent body to decide the case without the authority of the court to intervene in the process.

In the view of the foreigner, they merely want Thai court to recognize arbitration award of foreign arbitration. If Thai arbitration law complies with the standard of the international arbitration law in Model Law, Thailand should obtain the benefit from being chosen to be the place of proceeding the arbitration procedure. In this regard, Thai law should follow the concept of the UNCITRAL Model Law very closely by dividing arbitral law into two acts. One act would be applied to domestic matters and the other would be applied to international commercial arbitration for the international commercial arbitration and pays attention to international commercial necessity, as UNCITRAL Model law on

\textsuperscript{146} Jayawadh Bunnag, Arbitration: Theory and Practice, p. 204.
\textsuperscript{147} Ibid., p.206.
International Commercial Arbitration aims to apply only to the international issue. This line of argument will be mentioned in the next chapter.

4.3 International Treaties or Conventions are a Source of International Law

International treaties or conventions are a source of international law, which is clearly provided in Article 38(1) (a) of the Statute of the International Court of Justice (ICJ). ICJ shall apply to either general or specific international conventions establishing the primary source for contracting parties in considering international disputes.

Therefore, international conventions mean treaties or agreements made by the state or other subject of international laws, such as international organizations, regardless of the name of the agreements or whether the agreements are multilateral or bilateral treaties, which will result in voluntary legal obligations between the parties in line with principles pacta sunt servanda.\(^{148}\)

Furthermore, some international legal experts view international treaties or conventions only as a source of obligations between the contracting states of international treaties or conventions more than as a source of law, it is similar to agreements are only a source of debts between parties to the agreement by virtue of domestic law by accepting that international treaties or conventions are only evidence indicating or reflecting the rules and regulations of existing international laws. Furthermore, obligations under the aforementioned treaties are not considered as a law but stem from pacta sunt servanda, which is a general principle of law. Regarding, international laws applicable to treaties, obligations under treaties shall be respected and followed.\(^{149}\)


\(^{149}\) Fitzmaurice, Some Problems Regarding the Formal Sources of International Law, Symbolae Verzijl (1958) 153, 157–159, cited in Jumpot Saisonthorn, Public
Obligations under international treaties or conventions are a matter of an observance of treaties whereby a member state of a treaty shall be under the principle of *pacta sunt servanda* and must execute contract in good faith. This principle shall be similar to the one applies to domestic law of the state where parties to a contract must also be under the doctrine of *pacta sunt servanda*, namely, parties must respect the contract and execute the contract in good faith. In this regard, the legal experts also interpreted the doctrine of *pacta sunt servanda* in the section of Termination and Suspension of Treaties that it is a fundamental legal principle in forming presumption regarding the effective date and enforcement of the treaty.

Section 26 of the Vienna Convention on the Law of Treaties of 1969\(^{150}\) and Section 26 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986\(^{151}\) regarding observance and compliance with treaties mentioned *pacta sunt servanda* in a similar view that “Every treaty in force is binding upon the parties thereto and in good faith”. The prevision can be considered dependent upon the principle of good faith in compliance with various treaties whether state parties must follow or refrain from any practice as prescribed in the treaty. Therefore, the principle of *pacta sunt servanda* and good faith in compliance with treaties are the fundamental principles of law on treaties\(^{152}\). Similarly, Section 2, Article 2, of the Charter of the United Nations\(^{153}\) stipulates that state parties shall comply with obligations prompted by

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\(^{153}\) The United Nations Charter

Article 2
provision of the current charter in good faith in order to guarantee the rights and benefits of state parties. Therefore, both the principles of *pacta sunt servanda* and good faith can be deemed as one and inseparable. All states must observe *pacta sunt servanda* and comply with treaties in good faith similarly with the views of the International Law Commission.\(^{154}\)

Nevertheless, if it is appeared, during parties enter into the contract, that there is a fundamental provision to annul the consenting to be bound by the treaty, the state may refuse to comply with the obligations of the treaty by virtue of Article 46 of the Vienna Convention\(^{155}\). For example, a domestic law concerning the capacity of the state representative in consenting to be bound by the treaty, when such domestic law is extremely important and the violation of such law is obvious\(^{156}\). On the other hand, changes in government are not causes while a state can claim as an excuse to refuse to comply with the obligations of treaty made by the previous government and state cannot refer to domestic laws in order to refuse the binding force. Therefore, interpretation of duties under the convention must be meticulously made.

For this reason, it is necessary for states to comply with the obligations of treaties in good faith under the principle of *pacta sunt servanda*, hence when Thailand is a party to the Geneva Convention on the Execution of Foreign Arbitral

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2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.


\(^{155}\) Vienna Convention on the Law of Treaties 1969

Article 46

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

\(^{156}\) Jumpot Saissoonthorn, *Public International Law*, pp. 538-539.
Awards of 1927, which enforced arbitral awards made under the Geneva Protocol on Arbitration Clauses of 1923 and a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Since Article VII, Article (2) The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound, and to the extent that they become bound, by this Convention. By the aforementioned New York Convention, the Geneva Convention is obsolete. The characteristics of arbitration of the Arbitration Act of 2002, therefore, to comply with the definition of “foreign arbitral award” under Section 1, Article 1\(^{157}\) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides in Sections 34 and 35 of Arbitration Law of Thailand, to comply with the New York Convention.

Upon consideration of Section 1, Article 1, of the New York Convention,\(^{158}\) we find the definition of the terms “foreign arbitral awards” to refer to arbitrations in which the hearing and award were made in the territories of other countries, whether the state is a party to the convention. In other words, The New York Convention uses territory as criteria for defining the nationality of the arbitrator. However, the ending statement, “to be applied to arbitral award which is not considered domestic arbitration award either” comes from the proposal of representatives of France and Germany, because the laws of France and Germany which allow litigants involved in

\(^{157}\) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

Article I

(1) This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

\(^{158}\) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article 1(1).
a dispute to settle by applying the laws of other countries which are not the country of the arbitration to the case and render an arbitral award in the arbitration in their own countries. For example, if the litigants in a dispute agree to have an arbitration, the German court will consider the matter as foreign arbitration, while a French court will consider the matter a domestic arbitration. We may say that the stipulation is the result of compromise. Countries that use the principle of freedom of contract will broaden the scope of New York Convention application.

Some commissioners on the technical matter and development of the Thai arbitration systems hold the view that the principles of the draft which do not separate the arbitration act into two acts may cause problems in practice due to the difference between domestic and international arbitration which consist of different conditions. This is due to the concept of the law for implementation and the trial process in domestic matters is an issue requiring control. International issues, however, are matters concerned with necessity in international trade. Thus, both parties must be facilitated in terms of domestic judicial administration for arbitration in Thailand in order to promote Thailand as a hub for international arbitration in the region with laws that are comprehensible and do not cause confusion in legal enforcement.

However, some commissioners on the technical matter and development of Thai arbitration systems hold the view that it is appropriate to combine domestic and international arbitration laws in the draft of Arbitration Act of because dividing the Arbitration Act into two separate bills will make Thai arbitration law look even worse than before as there have been problems in using Thai arbitration during the initial stage, and it will make general investors attempt to be under the International Arbitration Act because they consider that the International Arbitration

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160 Kanitta Termtritsana, Legal Concept on Classification of Domestic and Foreign Arbitration, p. 89.


162 Ibid.
Act is more fair or credible. Separating the Domestic Arbitration Act from the International Arbitration Act will cause trouble in practice. In addition, it may cause confusion in the application of several laws.

- Arbitration outside the court concerning investment disputes between the government and private sectors may decide to use the 1965 Washington Convention. It is the convention for investment dispute settlements between the government and foreign nationals. Therefore, Thailand should consider ratifying the 1965 Washington Convention.

- Domestic commercial arbitration shall be under the Domestic Arbitration Act.
- International commercial arbitration shall be under the International Arbitration Act, if it does not fall into the scope of 1965 Washington Convention.

According to the opinion of both parties, the issue of the Arbitration Act is whether the same law shall be applied to two different issues involving international trade and domestic affairs. The user may be confused and thereby lack confidence in Thai arbitration law and wish to carry out arbitration elsewhere instead of choosing Thailand as the place of arbitration. They may choose a country where they are confident in the arbitration system as the venue for the arbitration process. The parties may also opt to use the law of the other country rather than Thai law. Such incidents are of no benefit to Thailand. Therefore, Thailand revise the arbitration law by using UNCITRAL Model Law on International Commercial Arbitration as the model for drafting in order to improve Thailand’s arbitration system to reach international level and to promote Thailand’s arbitration system for settling international civil and commercial disputes more often, which will certainly reduce the number of cases brought to domestic court.
Chapter 5
Conclusion and Recommendations

5.1 Conclusion

Settling disputes by arbitration is a convenient, rapid method for settling disputes that saves both time and expenses, maintains good relations and helps preserve confidentiality between litigants. Moreover, arbitration elicits suitable decisions for disputes as they arise in specific cases. Hence, the method of settling disputes by arbitration has become important for the society, especially in cases related to international trade and investment which has trading principle that differ from those of domestic. Arbitration aims at promoting mutual compromise and finding solutions to solve problems in a successful and speedy way. These will suit the interests of all litigants and it will lead to the achievement of goals for developing international trade systems and accelerating the growth and progress of the arbitration system of a country.

At present, the greater part of international commercial disputed is settled by arbitration involving litigants of different nationalities who would rather not use the arbitration process in the country of the other litigant due to doubtful or fear of being at a disadvantage in cases where foreign law is to be applied. But they would rather pursue the arbitration process in their own countries or in a third country in which none of the litigants hold citizenship and have no relationship or which has no stake in the dispute. Because litigants are confident they will receive neutrality, they bring the award of foreign arbitration to be recognized by the court and enforced then where the litigant does not comply with the aforementioned award.\(^{163}\)

In applying the law to treaty of the arbitration process, the authority of the court intervenes in the proceeding process and recognizes the award of foreign arbitration results in the necessity to consider the nationality of the arbitration in order to determine the characteristics that categorize domestic or foreign arbitration.

\(^{163}\) Kanitta Termitrisana, Legal Concept on Classification of Domestic and Foreign Arbitration, p. 94.
The criteria for setting the characteristics of foreign arbitration is provided by international conventions or the laws of various countries including the nationality of the litigants or the arbitrators, procedural law, territory or venue for conducting the arbitration and principle related to the conditions of the dispute. Consideration or nationality of the arbitration, therefore, is an important matter. Thus, should there be a necessity in applying the laws of any country, caution must be exercised to apply the spirit of the law and principle of the laws and the wish of the litigants have to be considered, because the authority of the courts shall be diminished in terms of helping or intervening in the decision-making process and in reviewing the decision if the arbitration is being considered foreign rather than domestic arbitration. Moreover, the recognition and enforcement of awards of foreign arbitration must comply with the 1958 New York Convention to which most countries are members. And there might be some conflict in specifying qualifications of foreign arbitration in some cases in countries using different criteria, for instance, arbitration with foreign characteristics according to French law because the issue is an international commercial dispute, but which could possibly constitute domestic arbitration in Great Britain because the litigants hold British citizenship.\textsuperscript{164}

The author holds the view that, when there are amendments to the law by virtue of the proposed draft of the Arbitration Act B.E. \ldots in compliance with the present model law, consideration must be given to finding a way to draft a law to truly achieve the objectives of arbitration and litigants. The draft act was proposed for amending arbitration law in order to be used in both domestic and foreign arbitrations. Using the same arbitration law for both issues with different characteristics might cause the person of the law to become confused and lose faith in the Thai arbitration law award enforcement of Thai law. Hence the person might not wish to carry out arbitration process in Thailand and might select another country in which he/she has confidence in the arbitration system as the venue for conducting the arbitration instead. The main content of the model law is the matter of international commercial arbitration, it therefore does not cover the domestic issues as may see in the case of joint debtors when one of the debtors is a party to an

\textsuperscript{164} Kanitta Termtrisana, \textit{Legal Concept on Classification of Domestic and Foreign Arbitration}, p. 95.
arbitration contract in which the other debtor has not involved. The court has the competence to solve the problem without sending the dispute to arbitration for a final ruling if the issue is a matter of domestic arbitration. If, however, the issue is a matter of international arbitration, the addition of the aforementioned topic will result in difficulty in the enforcement of the law.\textsuperscript{165}

Hence, applying the same law to both domestic and international characteristics might cause problems. Namely, the interpretation of one law to domestic level may be different from international level and the difficulties will increase if the disputed is related to both domestic and international. And, when it is necessary to make amendments or revisions of the law, the matter might be carried out with difficulty because the impact on international trade must be considered, then delays are created in the administration of domestic justice.\textsuperscript{166}

5.2 Recommendations

The writer holds the opinion that the aforementioned arbitration law should be the Arbitration Act for the international commercial arbitration for enforcement of different matters because each matter has its own nature and conditions for settling disputes. Litigants also require different degrees of help from the courts. If the case is a dispute involving international trade, the litigants do not usually require the help of the courts, nor do they require much court intervention in the arbitration process. The method for amending arbitration law should take place in the form of a specific law or act for carrying out the international arbitration process including the recognition and enforcement of foreign arbitral awards. It must be clear and correspond with the UNCITRAL Model Law on International Commercial Arbitration, which is widely known and accepted by international lawyers. This is to persuade foreign business men and foreign lawyers to select Thailand as a venue for carrying out arbitration and also promotes Thailand as a hub for settling international disputes as well as a hub for international trade in the future.


\textsuperscript{166} Kanitta Termtrisana, \textit{Legal Concept on Classification of Domestic and Foreign Arbitration}, p. 98.
In amending arbitration law, we should have the Arbitration Act for international commercial arbitration which will be applied to international commercial arbitration alone by using the UNCITRAL Model Law on International Commercial Arbitration as the model for drafting this act. The new law will pay attention to international commercial, therefore, the intention behind the law and application of the trial process may be different. However, the International Arbitration Act should follow the step of UNICITRAL Model Law.

Therefore, arbitral law for international trade should aim at facilitating the arbitration of foreigners in Thailand and the necessity of courts in providing assistance or intervening in the decision-making process along with review of decisions, which are less in number than cases of domestic issues. This means to promote Thailand as a hub for conducting arbitration in the region with laws that are easily understood by foreigners and without creating confusion in enforcing the law. Such laws should instill confidence in litigants that, when they come to conduct arbitration in Thailand, they will be using laws they are able to understand and can be applied internationally, including the legal opinion and procedures can be understood and has international characteristics. This shall bring convenience for conducting international commercial arbitration in Thailand.

In closing, other components are necessary in order to promote and support international commercial arbitration processes in Thailand. In other words, having an efficient arbitration system that meets international standards allows Thailand to compete with other countries. Having arbitration institutes at both the arbitration office under the Ministry of Justice in the government sector and the Thai Chamber of Commerce in the private sector shall help promoting a positive atmosphere in conducting arbitration for foreigners. Additionally, both arbitration institutes can cooperate in disseminating knowledge and understanding of arbitration.

If the proposed ideas are implemented, investors shall accept the Thai arbitration system and decide to settle their disputes by arbitration in Thailand. This will promote job’s employment in Thailand and generate income as well as promoting an influx of foreign currency. All of these can generate benefits for developing Thai economy.

167 Ibid.
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