

# Recent Arbitration Developments in Thailand: Fifth Amendment to the TAI Arbitration Rules

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## Introduction

With over three decades of history, the Thai Arbitration Institute ("**TAI**") is one of Thailand's leading arbitral institutions, having administered disputes totalling over THB 1 trillion as of 2020. Known for its neutrality and independence, TAI operates under the Office of the Judiciary with government funding, enabling it to provide administrative services without charging institutional fees – offering significant cost savings to parties.

Committed to staying current with developments in arbitration, TAI has regularly updated its Arbitration Rules of 2017 ("**TAI Arbitration Rules**"). The [Fourth Amendment \(2021\)](#) to the TAI Arbitration Rules introduced expedited procedures for disputes where parties so agree or where claims do not exceed THB 5 million – for more information, please see our April 2022 article titled "[Thai Arbitration Institute Introduces New Expedited Procedure](#)". The [most recent revision](#) ("**Fifth Amendment**") took effect on 1 September 2023, introducing subtle yet meaningful refinements.

Below, we examine the details of the Fifth Amendment and explore how parties in dispute may benefit from these developments.

## Fifth Amendment to the TAI Arbitration Rules

The Fifth Amendment applies to TAI arbitrations commencing from 1 September 2023 onwards. Parties that have commenced TAI arbitrations before 1 September 2023 may also agree to adopt the latest version of the Rules.

## Costs apportionment

Article 56, paragraph two, clarifies that the "cost of arbitration" includes the arbitrators' remuneration and expenses, which will be determined or certified by TAI in an attachment to the arbitral award.

Under paragraph one of the amended Article 57, these fees and expenses – including the fees of representatives or coordinators (i.e., legal costs) – may be apportioned between the parties by the tribunal, unless stipulated otherwise in the arbitration agreement. The tribunal should have regard to the factors set out in paragraph one, including:

- the parties' attempts to carry out the proceedings with speed and efficiency;
- the parties' good faith in the proceedings;
- the complexity and duration of the arbitration; and
- the duration of the proceedings and expertise.

Where the arbitral award does not specify the apportionment, the fees and expenses are to be borne equally by the parties.

These amendments explicitly empower a tribunal to issue a costs award, including legal fees. However, the Thai Arbitration Act B.E. 2545 (2002) (as amended in 2019) ("**TAA**") specifically excludes "lawyers' fees" from the provision on cost apportionment. Section 46, para. 1 provides "**Unless otherwise agreed by the parties, the fees and expenses incidental to the arbitral proceedings and the remunerations for arbitrator, excluding attorney's fees and expenses, shall be in accordance with that stipulated in the award of the arbitral tribunal.**" This exclusion has created past uncertainties, often raised as grounds to challenge awards granting legal costs, with the losing party arguing that the exclusion constitutes a mandatory rule under the TAA.

Recently, however, the Thai courts have provided clarity on the issue by determining that an agreement to refer disputes to arbitral institutions whose rules empower tribunals to allocate legal costs constitutes the parties' agreement (i.e. "unless otherwise agreed by the parties") that legal costs can be awarded. In Supreme Court Decision No. 1/2565 (2022), the losing party contested the tribunal's authority to award legal costs in an arbitration under the Commercial Arbitration Rules of Japan Commercial Arbitration Association ("**JCAA Rules**") as it contravenes section 46(1) of the TAA. The Supreme Court held that the parties chose to apply the JCAA Rules, of which clause 83 (Allocation of Costs) authorises the arbitral tribunal to award legal fees and expenses to the extent the arbitral tribunal deems reasonable. Therefore, the award of legal fees and costs is not incompatible with the TAA.

There are also some Court of First Instance decisions involving arbitrations under the arbitration rules of the International Chamber of Commerce (ICC) and Singapore International Arbitration Centre (SIAC) where the court affirmed the same rationale that the agreement to arbitrate under such institutional rules constitute the parties' agreement that legal costs can be allocated.

These clarifications by the Supreme Court and the Court of First Instance have been welcomed in providing for certainty and predictability for parties.

## Interest payable on deposit

Under the existing Article 58, TAI may direct a party to pay a security deposit for expenses, fees and remuneration as appropriate. If a party fails to do so, another party may cover the full amount of the required security. The Fifth Amendment adds Article 57, paragraph 2 which empowers the arbitral tribunal to determine interest on compensation when one party covers the security for expenses, fees, and arbitrator's fees on behalf of another. This provision serves as an incentive for parties to fulfil their financial obligations in arbitration, as failing to do so may lead to additional compensation costs due to accrued interest.

## **Concurrent expert evidence (hot-tubbing)**

The new Article 33/1 of the TAI Arbitration Rules allows the tribunal to order that the expert witnesses of both parties give evidence concurrently, a practice also known as "conferencing" or "hot-tubbing". The tribunal may direct both experts to testify at the same time or request them to reappear separately at a later stage to answer further questions or provide additional evidence. The examination of the witnesses is led by the tribunal, rather than by the respective counsel of the parties.

Hot-tubbing carries both advantages and disadvantages. It can streamline proceedings by enabling the tribunal to address issues methodically and quickly identify areas of agreement and disagreement between the experts. As the experts testify in each other's presence, they can comment on each other's opinions in real time, which enhances the efficiency of the process. However, it also places a significant responsibility on the tribunal to have a sufficiently thorough understanding of the complex and technical issues involved to effectively examine the expert witnesses. Moreover, the tribunal must be careful to avoid procedural irregularities, as an imbalanced examination could result in unequal treatment of the parties or opportunities to present its case. Additionally, parties give up control over the examination and cross-examination of the experts.

Another important consideration is the influence of subtle cultural factors, such as deference. For example, when parties appoint experts of differing seniority, a more junior expert may defer to a senior or more renowned expert out of respect for seniority or a reluctance to confront. Arbitrators should be mindful of these cultural nuances when deciding whether to adopt hot-tubbing, ensuring that the process remains fair and impartial for both parties.

Nevertheless, hot-tubbing has gained popularity in international arbitration, and its inclusion in the TAI Arbitration Rules provides flexibility to tribunals to adopt this practice when deemed appropriate.

## **Translation**

Under Article 30 of the TAI Arbitration Rules and section 28 of the TAA, if the parties have not agreed (in the arbitration agreement or otherwise) on the language to be used in the arbitral proceedings, the tribunal will determine the language of the proceedings. Subject to these provisions, if the arbitration agreement does not specify the language for the proceedings and the parties have not agreed on an alternative, the Statement of Claim, Statement of Defence, Counterclaim, and Answer to Counterclaim will be submitted in the language of the arbitration agreement (Article 10, paragraph 1 of the TAI Arbitration Rules).

The Fifth Amendment clarifies that if the arbitration agreement does not specify whether Thai or English should be used, or if the Statement of Claim is in a language other than Thai or English, the Claimant must provide a Thai translation of the Statement of Claim. This rule also applies to the Statement of Defence, Counterclaim, and Answer to the Counterclaim, if applicable (Article 10, paragraph 3 of the TAI Arbitration Rules).

This provision clarifies that arbitration proceedings under the TAI Arbitration Rules can be conducted in languages beyond Thai or English, while still ensuring the necessary translations are provided when required. It effectively maintains accessibility for all participants, ensuring that the tribunal and parties can fully engage with the case regardless of the language used. Additionally, it reflects TAI's foresight in accommodating future cases in languages beyond Thai and English.

## **Concluding Remarks**

While the Fifth Amendment introduces relatively subtle changes, it marks a step forward in TAI's efforts to increase efficiency and enhance cost management in arbitral proceedings. The amendments aim to reduce the need for translations, encourage consensus on expert evidence, and empower tribunals to allocate costs in line with institutional

rules, court practice, and international standards, a development further reinforced by recent court decisions upholding cost orders issued by arbitral institutions in the region.

Further improvements could be made if the TAA is amended to align with these standards, thereby preventing unmeritorious challenges to awards. Current efforts by stakeholders and institutions are being made in this regard, and such changes would help strengthen the integrity and finality of arbitral awards.

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