



Newsletter No. 42 (EN)

**Validity of Clauses concerning
Choice of Law, Choice of Court
and
Arbitral Awards in International Contracts**

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I. INTRODUCTION

This newsletter deals with the following three issues:

- I. Validity of “Choice of Law” Clauses
- II. Validity of “Place of Jurisdiction” Clauses
- III. Validity of Arbitration Clauses
 1. Enforceability of foreign arbitral awards
 2. Validity of arbitration clauses in Thai government related contracts

In a majority of international transactions it is advantageous for parties to agree on a choice of law which is applicable for the interpretation of the contract and especially in case of a dispute. If parties, especially if they are of different nationality, do not include a choice of law in the contract they are subject to the respective national conflict of law rules. This might even lead to a situation where the contract is viewed under the laws of different nations depending on where proceedings are started and subsequently different outcomes at different courts. This choice of law has to be distinguished from the choice of court or choice of forum clause which determines in which country's court the proceedings in case of a dispute will take place. This can be essential to the parties since this might have an important influence on the validity of the choice of law clause and on the en-

forcement of the judgment or the arbitral award. Furthermore the choice of court clause gives the parties the opportunity to lower travel and other expenses and have their case tried in a jurisdiction with an efficient court and enforcement system.

The choice of law and choice of court are therefore important tools of safety to the parties especially in, but not limited to, international transactions.

In the following paragraphs the validity of such clauses under the Law of Thailand shall be elaborated.

II. Validity of “Choice of Law” Clauses

Question:

Is an “Choice of Law” clause in an international contract valid under Thai law?

Answer:

Sections 13, 8 of the “Conflict of Laws Act” determines:

Section 13. *The question as to what law is applicable in regard to the essential elements or effects of a contract shall be determined by the intention of the parties thereto. If such intention, expressly or implied, cannot be ascertained, the applicable law is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been concluded.*

A contract shall be deemed not to be void if it is concluded in accordance with the form prescribed by the law which governs the effects of such contract.

Section 8. *Whenever the choice of law of a foreign country shall govern the relationship of the parties is not proved to the satisfaction of the Court, the internal law of Siam (Thailand) shall apply.*

Comment:

Generally the parties can agree on a law applicable to the contract which will be honoured by Thai courts either. Besides an expressed choice the courts in Thailand also recognize implied choices which are however not recommended due to a high level of uncertainty. However, the law of another country than Thailand will only be applied if it is not contrary to the public order or the good morals of Thailand (section 3). However, Thai courts will apply such law (in case it is a foreign law) only if a copy of the relevant law involved together with a Thai translation is provided to the Court. Such requirements might be sufficiently met by presenting the relevant clauses etc.

III. Validity of “Place of Jurisdiction” Clause

Question:

Is a “Place of Jurisdiction” clause in an international contract valid and enforceable under Thai law?

Answer:

Section 4 (1) of the Civil Procedure Code and Sections 150, 151 of the Civil and Commercial Code lay out:

Section 4. *Unless otherwise provided by law,*

(1) the plaints shall be submitted to the Court within the territorial jurisdiction of which the defendant is domiciled or to the Court within the territorial jurisdiction of which the cause of action arose, whether the defendant shall have domicile within the Kingdom or not (...)

Section 150. *An act is deemed to be void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.*

Section 151. *An act is not deemed to be void on account of its deviating from a provision of any law if such law does not relate to public order or good morals.*

Comment:

Since the Civil Procedure Code is a law governing public order, it cannot be agreed to the contrary, as of Section 151 of the Civil and Commercial Code makes clear. Any contract clause that does not adhere this law is void by virtue of Section 150 of the Civil and Commercial Code. Therefore the choice of a foreign court as the exclusive forum for litigation will not prevent a Thai court from hearing the case as long as it is within the boundaries of the Civil Procedure Code, in short, if one of the parties is domiciled in Thailand or if the cause of action arose in Thailand.

Supporting Supreme Court Decision:

A clause in the bill of lading states that any case which might arise shall be submitted to the UK Courts. This clause is contrary to Section 4 (1) of the Civil Procedure Code, which is a law governing public order, and is therefore void (SPC Case No. 951/2539 (1996)).

IV. Validity of an Arbitration Clauses

Question:

(A) Enforceability of Foreign Arbitral Awards

Is an arbitral award obtained outside the territory of Thailand recognised and enforceable under Thai law?

Answer:

Section 41 of the Arbitration Act B.E. 2545 (A.D. 2002) states:

Section 41. (...) *In case the arbitral award is obtained in a foreign country, the court of jurisdiction shall adjudge to comply with the award only when such award is under enforcement of a treaty, convention or international agreement in which Thailand is a party, and the enforcement shall be effective only insofar as Thailand agrees to be obliged.*

Comment:

According to Section 41 of the Arbitration Act B.E. 2545 (A.D. 2002), if the award has been rendered in a foreign country, a *Thai court may pass* its judgement enforcing the award when

such award is subject to a treaty to which Thailand is a party.

At present, nearly all internationally trading countries have signed the 1958 “United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (New York convention). This Convention facilitates the enforcement of awards in all contracting countries including Thailand which became a member country in 1961.

Therefore, it can be generally concluded that **arbitral awards made outside Thailand are recognised and enforceable under Thai law if further requirements according to national and international law are fulfilled.**

Supporting Supreme Court Decisions:

Numerous amounts of foreign arbitral awards have been recognised and enforced by the Thai courts. Following are some examples of Supreme Court Decisions: SPC 5513/2540 (1997), SPC 7128/2540 (1997), SPC 1772/2542 (1999), SPC 8151/2542 (1999), SPC 1916/2544 (2001).

Comparison with the Enforceability of Foreign Court Judgements:

We can compare the above conclusion with the case of judgements made by a foreign court (foreign court judgements).

Foreign court judgements from most countries (except Vietnam) are not directly enforceable

in the courts of Thailand since Thailand has not signed enforcement agreements with other countries.

Due to the lack of agreements the judgement creditor will need to start proceedings again in Thailand if enforcement within Thailand is desired. Albeit the foreign judgement will be admissible as evidence in the proceedings at the Thai courts it will not be treated as conclusive and the Thai court is allowed to see further evidence and will render judgement based on the merits of the case.

Question:

(B) Validity of an Arbitral Clause in a Thai Government-related Contract

Is an arbitral clause in a Thai government-related contract valid and enforceable under Thai law?

Answer:

Section 15 of the Arbitration Act B.E. 2545 (A.D. 2002) and Clause 5 of the Notice of the Office of the Prime Minister governing Compliance with the Decisions of the Arbitrators B.E. 2544 (A.D. 2001) state:

Section 15. *Regarding a contract concluded between a government agency and a private individual, irrespective of being an administrative contract or not, both parties may agree to use the arbitration procedures to settle disputes and the said arbitration contract shall bind both parties.*

Clause 5. *A government agency shall comply with the arbitral award, except in the case the award is illegal under the applicable law, is obtained by an illegitimate act or through illegitimate procedure, or is outside the scope of the arbitration contract.*

Comment:

There was a highly controversial case regarding an arbitral agreement under the old Thai Arbitration Act. An arbitration panel awarded THB 6.2 Billion (approx. EUR 124 Mio.) in favour of a private foreign party on a concession contract concluded between the Expressway and Rapid Transit Authority (ETA) and a private consortium. Correspondingly, the Thai Attorney-General's office has put forward efforts to get such award revoked by the Administrative Court on the grounds that it would implicate the administrative law and was in conflict with the public order and his application was granted on appeal by the Supreme Court reasoning that the legal nature of the contract was administrative and therefore the execution by the governor of ETA was not in accordance with public law. Furthermore it was elaborated that the claimants did not act in good faith.

However, the Thai Arbitration Act (2002) solved the issue by stating that an arbitration agreement is valid regardless of its legal nature being administrative. Therefore the government is now bound by arbitration agreements like a private party unless the agreement is void, unenforceable or impossible of being performed.

It has to be kept in mind however that disputes regarding the enforcement of arbitral awards in administrative contracts fall under the jurisdiction of the Administrative Court which is allowed to base its decisions based on public policy and principles of law, not the Court of Justice. Besides those clarifications there is also still an ongoing uncertainty when a contract will be classified as administrative.

Note, however, that cabinet resolutions, issued on 27 January 2004 and on 4 May 2004., have established a policy that inhibits the government agencies, including private enterprises, from agreeing on arbitral clause in a new concession contract unless approved by the cabinet on a case by case basis. Moreover, many agencies nowadays have a policy in place restricting itself to no longer include an arbitral clause in any kind of contracts.

V. SUMMARY

1. A “Choice of Law” clause is valid and enforceable. However, Thai courts will apply such law (in case it is a foreign law) only if its substance has been proved to the Court by presenting a copy together with a Thai translation.

2. A “Choice of Court”, at least as long as exclusive, will not prevent a Thai court from hearing the case and rendering judgment.

Foreign arbitral awards are recognised and enforceable in Thailand, in contrast to foreign court judgements which are not directly enforceable in Thailand.

Arbitration clauses in Thai government-related contracts are valid and enforceable in Thailand. However, due to the government’s current policy arbitration clauses in new contracts with the government, especially concession contracts, might not be agreed on by the government unless approved by the Cabinet on a case by case basis.

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