

Newsletter No 42 (EN)

**Validity of Clauses concerning
Applicable Law, Place of Jurisdiction
and Arbitral Awards in International Contracts**

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VALIDITY OF CLAUSES IN INTERNATIONAL CONTRACTS

INTRODUCTION

This newsletter deals with the following three issues:

- I. Validity of “Applicable Law” Clauses
- II. Validity of “Place of Jurisdiction” Clauses
- III. Validity of Arbitration Clauses

The third topic concerning the validity of arbitration clauses comprises two sub-issues, which have to be distinguished: (i) the enforceability of foreign arbitral awards and (ii) the validity of arbitration clauses in Thai government related contracts. The enforceability of foreign court judgements is additionally addressed in this context.

I. Validity of “Applicable Law” Clauses

Question: Is an “Applicable Law” clause in an international contract valid and enforceable 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: An **applicable law clause is valid** and enforceable under Thai law. However, Thai courts will apply such law (in case it is a foreign law) only if a

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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.

II. 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 plaintiffs 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, a **Place of Jurisdiction clause is void.**

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

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Civil Procedure Code, which is a law governing public order, and is therefore void (SPC Case No. 951/2539 (1996)).

III. Validity of an Arbitration Clause

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”. This Convention facilitates the enforcement of awards in all contracting countries, and Thailand became a member-party 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.**

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Supporting Supreme Court Decisions:

Numerous amounts of foreign arbitral awards have been recognised and enforced by the Thai courts. Here are some recent 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 are very difficult to be enforced in Thailand as such procedure is very time consuming and not seldom very bureaucratic.

The procedure can start by the interested person submitting a request to the Ministry of Foreign Affairs of the country of the court that renders the judgement. The said Ministry will then proceed with the Ministry of Foreign Affairs of the country of the court that should enforce the judgement. The Ministry will issue a letter to the court that the judgement will be enforceable. Finally, the court enforces the foreign judgement. Each step requires a significant amount of proceeding/waiting time.

Therefore, from a formally legal point of view, both foreign arbitral awards, as well as foreign court judgement are enforceable in Thailand. However, in most cases the latter requires a long and complex procedure because in each step the validity and correctness of the foreign court order might be questioned by the parties.

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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: Recently, there is a highly controversial case. 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 government side 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.

Regardless of the high profile of this case there has been precedent of the Administrative Court that recognises arbitral clause in an administrative contract as valid and enforceable (Central Administrative Court Decision Case No. 1454/2544). The validity and enforceability is further endorsed under Section 15 of the Arbitration Act, that an arbitration clause may be

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included in contracts between a Thai government agency and a private entity, and under Clause 5 of the above-referred Notice of the Office of the Prime Minister, that the related government agency must comply with the arbitral award.

Therefore, for the time being it can be concluded that an arbitral clause in a Thai government-related contract is **valid** and enforceable in Thailand.

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.

SUMMARY

In summary:

1. An “Applicable 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 “Place of Jurisdiction” clause is void.
3. Foreign arbitral awards are recognised and enforceable in Thailand, in contrast to foreign court judgements which are due to factual circumstances in practice not enforced in Thailand.
4. Arbitration clauses in Thai government-related contracts are valid and enforceable in Thailand. However, due to the government’s current policy

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new contracts with the government, especially concession contracts, will not be agreed by the government side unless approved by the Cabinet on a case by case basis.

Wir hoffen, Ihnen mit dieser Publikation weitergeholfen zu haben und stehen Ihnen für weitergehende Informationen jederzeit gerne zur Verfügung.

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