



Newsletter No. 42 (EN)

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

September 2018

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I. Introduction

This newsletter deals with the following three issues:

- Validity of “Choice of Law” Clauses;
- Validity of “Place of Jurisdiction” Clauses;
- Validity of Arbitration Clauses;
- Enforceability of foreign arbitral awards;
- 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 same contract can be viewed under the laws of different nations, depending on where the proceedings are carried out, and subsequently different outcomes can be reached by 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. The Place of Jurisdiction clause 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 enforcement 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 a “Choice of Law” clause in an international contract valid under Thai law?

Answer:

Section 13 and Section 8 of the “Conflict of Laws Act” (“**CLA**”) 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 that 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. Besides an expressed choice of law, the CLA also recognizes implied choices which are however not recommended due to a high level of uncertainty. However, the law of another country, rather than Thailand, will only be applied if it is not contrary to the public order or the good morals of Thailand (Section 3 of the CLA).

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 during the court procedure. Such requirements might be sufficiently met by presenting the relevant clauses etc. On the other hand, if a party of the legal case fails to supply such foreign law, the court will apply Thai law to the case at hand.

III. Validity of “Place of Jurisdiction” Clauses

Question:

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

Answer:

The old Civil Procedure Code (“**CPC**”) in Section 7 (4) expressly allowed the parties to choose the court (Place of Jurisdiction). In 1991, the CPC has been amended in various areas, including deleting the old Section 7 (4). After the amendment of the CPC in 1991, there are two main legal opinions regarding the Place of Jurisdiction Clause.

Opinion 1:

The first group suggests that such clause should be null and void by the effect of Section 4 (1) of the **CPC** and Sections 150, 151 of the Civil and Commercial Code (“**CCC**”) which 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 1:

Since the CPC is a law governing public order, it cannot be agreed to the contrary, as of Section 151 of the CCC makes clear. Any contract clause that does not adhere this law is void by virtue of Section 150 of the CCC. 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 CPC, 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 CPC, which is a law governing public order, and is therefore void, since no party has a domicile in UK (SPC Case No. 951/2539 (1996)). The SPC Case No. 5809/2539 also rules in the same manner.

Opinion 2:

The second group believes that a Place of Jurisdiction clause is valid because the clause itself does not directly prohibit the jurisdiction of Thai courts, so it cannot be considered to be contradicting with the CPC.

This idea is also supported by Section 3 of the CLA which states that:

Section 5 *Whenever there is no provision in this Act or in any other laws of Siam to govern a case of conflict of laws, the general principles of private international law shall apply.”*

Comment 2:

Therefore, in the absence of any provision in the law allowing or prohibiting the validity of the “Place of Jurisdiction” clause under Thai law, the international law, which allows such a clause, shall apply.

New Supreme Court Decision:

The SPC Case No. 3537/2546 (2003) recognised the place of jurisdiction clause as a valid clause under international law. The SPC did not directly rule that this clause is void under Thai law due to the contradiction with the CPC, as described in the SPC Case No. 951/2539 (1996). This SPC Case No. 3537/2546 (2003) further ruled that since the Place of Jurisdiction clause in this case does not specify the exclusivity to the Singaporean Court because it also allows the party to file to another competent court. The parties have the right to file the case in Thailand.

Conclusion:

In conclusion, the Thai courts’ position on this issue, which can be implied from both SPCs, is that if the clause expressly prohibits the Thai courts’ jurisdiction or gives an exclusive jurisdiction to the foreign court, the clause will be considered null and void due to the contradiction with the CPC. On the other hand, if the case is filed to Thai courts where the defendant’s domicile or the cause of action arose is located, the Thai courts will hear the case despite the “Place of Jurisdiction” clause.

IV. Validity of Arbitration Clauses

Question:

1. 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 rendered outside of Thailand are recognised and enforceable under Thai law if further requirements according to national and international law are fulfilled.**

Supporting Supreme Court Decisions:

Various numbers of foreign arbitral awards have been recognised and enforced by the Thai courts. Following are some examples of Supreme Court Decisions which recognised foreign arbitral awards: SPC 5513/2540 (1997), SPC 7128/2540 (1997), SPC 1772/2542 (1999), SPC 8151/2542 (1999), SPC 1916/2544 (2001), SPC 1505/2547 (2004).

Comparison with the Enforceability of Foreign Court Judgements:

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

Foreign court judgements from most countries are not directly enforceable in the courts of

Thailand, since Thailand has not signed enforcement agreements with other countries (except the 2010 Agreement on the Enforcement of Criminal Case Judgements between Thailand and Vietnam).

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:

2. 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 155 million) 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 Court of Justice but under the jurisdiction of the Administrative Court, which is allowed to base its decisions on public policy and principles of law. 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, concluding with private enterprises, from agreeing on arbitral clauses 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 themselves to no longer include an arbitral clause in any kind of contracts.

V. Summary

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.

For a “Choice of Court”, at least the exclusivity on the Choice of Court clause 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.

*We hope that the information provided in this newsletter was helpful for you.
If you have any further questions please do not hesitate to contact us.*

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