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Thailand

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A. Legislation and rules

A.1 Legislation

International arbitration in Thailand is governed by the Thai Arbitration Act B.E. 2545 (2002) (the “Act”), to which no legislative amendment has been made since its enactment.

A.2 Institutions, rules and infrastructure

There are three arbitration institutions in Thailand: the Thai Commercial Arbitration Committee of the Board of Trade of Thailand (TCAC), the Thai Arbitration Institute (TAI) and the Thai Arbitration Center (THAC).

Other organizations active in the field of arbitration in Thailand include the Security and Exchange Commission, which established arbitration proceedings in 2001 for claims arising under its own laws between securities companies and private clients, as well as the Department of Insurance, which established the Office of Arbitration in 1998 to handle arbitral proceedings relating to claims under insurance policies. Shortly thereafter, the Department of Insurance

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issued a regulation requiring all insurance companies to include an arbitration clause in their policies, a development that allows beneficiaries of insurance policies to choose to process their claims through arbitration or in court, at their discretion. In the event the beneficiary decides to refer its claim to arbitration, insurance companies are required to participate in the arbitral proceedings. These regulations have led to a significant filing of arbitration cases with the Department of Insurance.

A.2.1 TCAC

The TCAC has been one of the pioneers in the arbitration field in Thailand and is active in promoting arbitration in the business community. The Committee revised its arbitration rules in 2003 to align them with the Act. Nevertheless, the TCAC is infrequently used in practice and the TAI is certainly the more prominent and active institute.

A.2.2 TAI

The TAI is the most active arbitration institute in Thailand. The TAI was originally established in 1990 under the umbrella of the Ministry of Justice. It revised and reissued its arbitration rules in 2017. The TAI Rules apply to all arbitrations organized by the TAI, except where the parties agree to use other rules and with the consent of TAI's executive director.

The new TAI Rules came into force on 31 January 2017 and include a number of changes aimed at addressing problems that arose under the 2003 TAI Rules.

To increase the efficiency of arbitral proceedings, parties are now permitted to serve and file arbitration documents by email.

Upon objection, the TAI is now empowered to dispose of a case if it finds there is no *prima facie* evidence of an arbitration agreement between the parties. However, this does not negate the arbitral



tribunal's power to rule on the validity of an arbitration agreement or the scope of its own jurisdiction.

Upon its own initiative or at a request of parties or an arbitral tribunal, the TAI is now granted broad power to consolidate proceedings for the sake of convenience, even where the arbitration agreements are not identical.

To circumvent dilatory arbitrator challenges lodged with the Thai courts pursuant to the 2003 TAI Rules, the 2017 TAI Rules stipulate that such a challenge will be decided by the tribunal, unless the TAI concludes that it is appropriate for an independent adjudicator or adjudicators to rule on the challenge; recourse to the Thai courts is no longer specifically provided for under the TAI Rules.

New provisions have been introduced in the 2017 TAI Rules relating to the applicable time periods in an arbitration, ie, the tribunal must meet with the parties and establish a preliminary timetable for the proceedings within 30 days of the tribunal being constituted and the proceedings must take no longer than 180 days. The tribunal must also render an award within 30 days of the date on which the tribunal declares the proceedings closed or of the date of submission of written closing statements, or longer upon the tribunal's request.

The 2003 TAI Rules simply provided that the arbitrator, director of TAI and TAI were not permitted to disclose an arbitral award to the public without the parties' consent. The 2017 TAI Rules unequivocally provide that arbitral proceedings, pleadings, documents, evidence, hearings, orders and award are confidential.

Parties were previously required under the 2003 TAI Rules to seek interim measures from the Thai courts and the Thai courts were only permitted to grant those interim measures that would have been available if the case had been conducted in Thai court. The 2017 TAI Rules now empower the tribunal to grant interim measures, without stipulating that any such measures must also be available in Thai court proceedings.

The changes contained in the 2017 TAI Rules are designed to promote speed, efficiency and fairness in proceedings. However, a number of these changes are potentially problematic, for example: the new rule on arbitrator challenges, which may be found to contradict the Thai Arbitration Act; the means of enforcing an interim measure granted by an arbitral tribunal without a Thai court order; and the capability and practicality of a tribunal complying with the new time period requirements for arbitration proceedings.

A.2.3 THAC

The THAC was established in 2015, pursuant to the Arbitration Center Act (2007), to support and promote international arbitration with the aim of providing an arbitration center with modern facilities in Thailand that meets international standards and can serve as the center of arbitration in ASEAN countries. The THAC has its own set of arbitration rules, modeled on the 2013 SIAC Arbitration Rules.

B. Cases

As the vast majority of arbitration cases remain confidential and the primary bodies administering arbitrations in Thailand do not publish case records, cases generally only become a matter of public record when their enforcement is challenged in Thai courts.

B.1 Enforcement of an arbitration clause

In Supreme Court case No. 3894/2559 (2016), the parties agreed to incorporate the provisions of a main construction contract in a separate sub-contract. The main construction contract contained an arbitration clause, and the sub-contract was deemed to contain this arbitration clause as well. Although the parties terminated the sub-contract, the Court ruled that this did not render the arbitration clause void or unenforceable.

In Supreme Court case No. 9686/2559 (2016), the Court considered a defendant's request to stay proceedings due to an arbitration agreement between the parties. The plaintiff had lodged a court claim



for demurrage which occurred from a delay caused by the charterer exceeding its number of lay days. The plaintiff argued that the arbitration clause was unenforceable, as the treatment of the charterer's use of the vessel beyond the time permitted was not stipulated in the charter party, thus it was not within the scope of disputes that needed to be settled by arbitration proceedings. The Supreme Court dismissed the plaintiff's case, finding that the dispute fell within the scope of the arbitration agreement in the charter party and the parties were required to settle such dispute through arbitration.

B.2 Application for interim order

In Supreme Court case No. 3883-3884/2559 (2016), the claimants had submitted a dispute to arbitration relating to property that the claimants had leased from the respondents. The respondents had entered the premises, changed the locks, cut off the supply of water and electricity and evicted the claimants' tenants from the property. These actions disrupted the claimants' enjoyment of the property, which then led to their request for the arbitral tribunal to render an order evicting the respondents from the property. Prior to the arbitral tribunal rendering its award, the claimants requested that the court issue an interim order prohibiting the respondents from entering the disputed premises; the court granted this request. Further, the respondents requested the court to issue an interim order prohibiting the claimants from amending or revoking the registration of the lease of the disputed land. The court viewed that the respondents failed to present any evidence to show that the claimants would take action to amend or revoke the registration, which would then cause damage to the respondents. Therefore, the Supreme Court dismissed the respondents' request.

B.3 Challenge of arbitrator

In Supreme Court case No. 15010/2558 (2015), the Court considered a claimant's challenge of the arbitrator appointed by the respondent, which was lodged before the claimant had appointed its own arbitrator and before the two party-appointed arbitrators had appointed a chair.

The Thai Arbitration Act requires that, unless the parties agree otherwise, an arbitrator challenge shall be initially lodged with the arbitral tribunal after the tribunal has been formed. Since the tribunal had not yet been formed, the Supreme Court found that the claimant's challenge made directly to the court was procedurally inadmissible and dismissed the case.

B.4 Enforcement of an arbitral award

Supreme Administrative Court Case No. Or. 487/2557 (2014) involved disputes arising from a public concession for wastewater treatment between a joint venture of six private entities (the "claimants") and the Pollution Control Department (the "respondent"). The claimants filed an arbitration claim against the respondent on the grounds of breach of concession, as the respondent had failed to remit payment for the claimants' construction work. The tribunal rendered an award in favor of the claimants, obligating the respondent to pay outstanding fees, plus damages and interest, and to return the claimants' performance bank guarantee.

Upon receiving copies of the ruling, the claimants filed a motion pursuant to s.39 of the Thai Arbitration Act (the "Act"), requesting that the tribunal correct typographical errors, ie, by amending the content of the award from "*the respondent shall pay the fee of Baht 6,000,000 to the claimants*" to correctly state "*the respondent shall pay the fee of Baht 6,000,000 per annum to the claimants.*" The tribunal made the corrections requested by the claimants.

The respondent refused to comply with the award. Subsequently, the claimants filed a motion to enforce the award with the Central Administrative Court. Meanwhile the respondent filed a motion to set aside the arbitral award. The respondent argued that the tribunal's corrections to the award were outside the scope of s.39 of the Act, as they constituted a significant change that increased the respondent's burden. It further claimed that the enforcement of the award would be contrary to the public policy of Thailand since the composition of the arbitral tribunal was not in accordance with the Act, which provides



that the parties' appointed arbitrator may be appointed by an order of the competent court. The respondent claimed that during the formation of the three-arbitrator tribunal, the respondent had not appointed its arbitrator within the given timeframe. As a result, the claimants had obtained an order from the civil court appointing an arbitrator for the respondent. However, since these disputes had arisen from a concession agreement, they were regarded as administrative, and therefore subject to the jurisdiction of the administrative court, not the civil court. In addition, the respondent claimed that the award did not clearly state why the respondent had to be liable to the claimants for each itemized damage. Therefore, the award was contrary to paragraph 2 of s.37 of the Act, which provides that the tribunal must clearly state the reasons for granting its award.

The Central Administrative Court ruled that there was no valid cause to set aside the award under s.40 of the Act. The respondent appealed the ruling, but the decision was upheld by the Supreme Administrative Court. The Supreme Administrative Court reasoned that, in correcting the award, the tribunal had lawfully made minor corrections of insignificant errors, pursuant to s.39 of the Act. The respondent was entitled to invoke s.10 of the Act Governing Decisions of Power and Duty Between the Courts to object to the civil court's jurisdiction in appointing an arbitrator for the respondent, but it had chosen to waive such right. Therefore, the civil court's decision was deemed lawful and final under s.18 of the Arbitration Act. Even though the claimants later filed for enforcement of the award with the Central Administrative Court, the civil court's appointment of an arbitrator was not affected, and therefore the tribunal was still empowered to consider and rule on the dispute. Hence, the Supreme Administrative Court viewed that enforcement of the award would not be contrary to public policy or good morals under s.40(2)(b) of the Act. With respect to the claim that the tribunal did not clearly mention the reasons for its decision, the Supreme Administrative Court ruled that the award had already set out that the respondent was obligated to pay the construction fee to the claimants as agreed, in the relevant

installments, upon the claimants' completion of work. Therefore, the award was made in full compliance with paragraph 2, s.37 of the Act.

B.5 Status of judgment of the court of first instance in arbitral proceedings

In the matter considered in Supreme Court Case No. 10057/2555 (2012), the insurer (the "claimant") filed an arbitration case against the reinsurer (the "respondent"), seeking compensation under a reinsurance contract. The underlying contract provided that any disputes were to be resolved by an arbitral tribunal in accordance with Thai law and the principle of *ex aequo et bono*, and shall take into account all agreements between the parties.

During the presentation of evidence in the arbitration proceedings, the respondent made its claim based on a judgment of a court of first instance. The tribunal admitted this claim and rendered an award in favor of the respondent based partially on the legal principles applied by the court of first instance in its judgment. Subsequently, the respondent filed a motion for enforcement of the award and the claimant filed a motion to challenge the award under s.40 (5) of the Act, which provides that the court may refuse enforcement of an arbitral award if the person against whom the award will be enforced furnishes proof that the arbitral proceedings were not conducted in accordance with the agreement of the parties.

The Supreme Court found that the reinsurance agreement did not clearly provide that the tribunal must decide disputes in accordance with relevant final court judgments. It also observed that s.146 of the Civil Procedure Code of Thailand provides that when deciding the same legal issue, the judgment of a higher court carries more weight than that of a lower court. Hence, considering that the decision of the court of first instance in this case could be overturned by a higher court in the future, the tribunal had no legal authority to rely on the court judgment. Therefore, the fact that the tribunal had based its ruling on the court judgment was contrary to the parties' agreement



under s.40(5) of the Act. As a consequence, the Supreme Court issued an order to refuse enforcement of the arbitral award.

B.6 Arbitration award under an investment treaty

In 2005, the German company, Walter Bau AG (in liquidation), filed for arbitration under the UNCITRAL Arbitration Rules against Thailand based on the BIT between Germany and Thailand of 24 June 2002, as well as its 1961 predecessor. The arbitration involved a dispute relating to the construction of the Don Muang Tollway (“DMT”) between Bangkok and Don Muang Airport. The claimant had a minority stake in the consortium, which contracted to construct, operate and transfer the toll operation. The claimant argued that the Thai government had violated the BIT, claiming expropriation and a violation of fair and equitable treatment. The claimant asserted that the Thai government had decided to reduce tolls charged to drivers, despite the claimant’s objections, and had made improvements to the free road networks around the toll road, which were beyond the mere “traffic management” allowed under the concession contract. As a result, the claimant suffered losses. In addition, the claimant asserted that construction invoices remained unpaid by the Thai government.

In its 1 July 2009 award, the tribunal rejected the claimant’s assertion that its disputes with Thailand prior to the effective date of the 2002 BIT should be covered by the 1961 predecessor, as the prior treaty lacked an investor-state arbitration clause. The tribunal likewise rejected the claimant’s claim of “creeping expropriation” on the grounds that none of Thailand’s actions reached the level of “creeping expropriation” as defined in *PSEG Global v. Turkey* (ICSID ARB/02/5, 19 January 2007), namely, a form of deprivation of the investor of the control of the investment or the management of the day-to-day operations of the company, interference in the administration, impeding the distribution of dividends, interference in the appointment of officials and managers, or otherwise depriving the company of its property or control, in total or in part.

However, the tribunal did find that the Thai government had breached the fair and equitable treatment provision under the 2002 BIT by violating the claimant's legitimate expectations. Specifically, the tribunal found that: the claimant had a legitimate expectation to a reasonable return on its investment, considering that the concession was semi-public and thus heavily regulated; that investors would not contemplate such a long-term investment without a legitimate expectation of a reasonable return on their investment; and that the tolls received were the only way such a return could be achieved. Despite the fact the consortium was not entitled to raise tolls without permission, the tribunal found that the Thai government was not entitled to ignore the reasonable requests of the consortium to raise tolls and that the Thai government had delayed and continuously refused the consortium's request to raise tolls for over a decade. In rendering damages, the tribunal applied a discounted cash flow analysis to the claimant's claim for lost profits and awarded EUR 29.2 million and costs of EUR 1.8 million.

C. Funding in international arbitration

Under the Thai Civil and Commercial Code and Supreme Court Precedent, arrangements by which a third party funds litigation without itself having any interest in the dispute, or with the objective of profiting from the litigation, are considered contrary to public policy and good morals, and are void.

In one case, where a third party provided litigation finance for another party, the Supreme Court found that such arrangement was made with the objective of the third party gaining benefits from disputes between other parties, which was deemed to violate public policy and good morals and was therefore void.⁴ In another case, where a third party agreed to fund all litigation costs of a plaintiff in a case, including costs incurred if the plaintiff lost the case, the Supreme Court found that the third party had done so for its own benefit and in order to encourage the plaintiff to breach a contract, which the Supreme Court

⁴ Supreme Court case no. 1584/2555.



ruled was contrary to public policy and good morals and therefore void.⁵

In light of the above, it can be inferred that third-party funding in international arbitration is not permitted in Thailand. Where third-party funding is arranged for the purposes of financing an arbitration proceeding conducted in Thailand or overseas, there would be a potential basis to challenge the recognition and enforcement of the relevant arbitral award in Thailand, as such activity could be deemed to violate public policy under Thai law, which is a basis explicitly provided under the Thai Arbitration Act to challenge or refuse enforcement of an arbitral award.

⁵ Supreme Court case no. 14114/2556.