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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) ("Act").

A.2 Institutions, rules and infrastructure

There are three primary arbitration institutions in Thailand: (i) The Thai Commercial Arbitration Committee of the Board of Trade of Thailand ("TCAC"); (ii) the Thai Arbitration Institute ("TAI"); and (iii) 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 the court, in 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 utilized 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 reported that in 2017, 115 new cases were filed with it worth over USD 1 billion, that it was administering 434 cases, and that 148 final awards were issued under its auspices that year.

The TAI was originally established in 1990 under the umbrella of the Ministry of Justice. 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 the Executive Director of TAI.

The TAI revised and reissued its arbitration rules in 2017, which include a number of changes aimed at addressing problems that arose under the 2003 TAI rules. 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, such as (i) the new rule on arbitrator challenges, which may be found to contradict the Thai Arbitration Act; (ii) the means of enforcing an interim measure granted by an arbitral tribunal without a

Thai court order; and (iii) 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 Act on Arbitration Center (2007), in order 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 the ASEAN countries. The THAC has its own set of arbitration rules, modeled on the 2013 SIAC Arbitration Rules. The THAC reported in 2018 that it is handling 12 cases, representing a relatively significant increase of 10 additional cases from the previous reporting period.

B. Cases

As the vast majority of arbitration cases remain confidential and the primary bodies administrating 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 Interpretation of the term “may” in an arbitration agreement

In the matter considered in Supreme Court Case No. 1115/2560 (2017), clause 22.5 of the sub-contractor agreement stipulated that

> If the final determination of the contractor is not accepted by the sub-contractor, the sub-contractor may proceed with the dispute resolution mechanism as stated in sub-clause 22.7 of this sub-contractor agreement, but would not always be required to do so.

The Supreme Court ruled that clause 22.5 did not obligate the plaintiff to seek to resolve disputes under clause 22.7 of the sub-contract by means of arbitration in all instances. Rather, the Supreme Court

viewed that the clause was meant to provide the plaintiff with an option to either file a request for arbitration or file a complaint to the court. Therefore, the plaintiff has the right to file a complaint against the defendant with the court without having to file a request for arbitration.

B.2 Dismissal of an application for enforcement of an arbitral award due to a violation of public policy.

In the matter considered in Supreme Court Case No. 840/2561 (2018), the appellant, a limited company registered under the law of the British Virgin Islands, agreed to buy a condominium unit from the respondent, a Thai registered company. The respondent did not deliver the condominium unit within the stipulated time. As a result, the appellant and the respondent executed a memorandum of understanding to cancel the sale agreement and agreed that the respondent would return the down payment paid by the appellant. The respondent did not repay the appellant. Therefore, the appellant filed an arbitration claim against the respondent at TAI. The arbitral tribunal ordered the respondent to pay THB 17,136,747.59 with interest at the rate of 10% per annum, and default interest at the rate of 15% per annum, damages of more than USD 60,000 and arbitration costs and fees to the appellant. The appellant submitted a petition to the court requesting enforcement of the arbitral award, however, the lower court refused to enforce the award. Therefore, the appellant appealed to the Supreme Court, arguing that even if the Supreme Court found that the underlying sale agreement was void, the appellant should be entitled to repayment in accordance with the principle of unjust enrichment.

The Supreme Court found that under Thai law, the appellant is deemed as an alien. As such, in order to be able to own property in Thailand, an alien must receive an investment promotion certificate from the Board of Investment as stipulated in the Condominium Act B.E. 2522 (1979), section 19(4). Since the condominium unit in question was worth approximately USD 2.3 million, and the appellant was an investment company, the court found that the appellant should

have had knowledge about the relevant Thai law and regulations, especially provisions governing the status of alien and the requirements under the Condominium Act. The court also viewed that the respondent should have confirmed that the appellant received the investment promotion certificate prior to entering into the sale agreement for the condominium unit. As such, the sale agreement entered into with the parties' knowledge that the investment promotion certificate had not yet been obtained, is considered as an agreement with an objective that is clearly prohibited by law, hence the agreement is void under section 150 of the Civil and Commercial Code.

The Supreme Court further ruled that the appellant cannot claim restitution due to unjust enrichment because section 411 of the Civil and Commercial Code stipulates that a person who has made an act of performance, the purpose of which is contrary to legal prohibitions or good morals, cannot claim restitution. This provision is considered as a provision concerning public policy. The arbitral award in favor of the appellant violates section 411 of the CCC because the payment under a void sale agreement is an action that is contrary to legal prohibitions. Consequently, the enforcement of the arbitral award would be contrary to public policy. The Supreme Court, therefore, found that it is entitled under section 44 of the Arbitration Act B.E. 2545 (2002) to dismiss the application for enforcement of the arbitral award.

B.3 Permission to appeal against the order or judgment of the court rendered pursuant to the Arbitration Act.

In Supreme Court Case No. 714/2561 (2018), the court considered the appellant's appeal of the lower court's order to enforce an arbitral award.

The appellant had appealed the lower court's order, arguing that the underlying contract in dispute was not a joint venture agreement, but actually a loan agreement. As such, it represented a concealed act, which is a dispute subject to the Unfair Contract Terms Act B.E. 2540

(1997), which only a court is empowered to consider, not an arbitral tribunal. Further, the arbitral tribunal had no power to reduce the return rate from 15% per annum to 6% per annum.

The Supreme Court found that, at the time the appellant sought to refuse enforcement of the arbitral award in accordance with section 43 of the Arbitration Act, the lower court had ruled that the appellant's objection was not grounded. The Supreme Court ruled that the appellant's appeal to the Supreme Court is considered an appeal against the lower court's consideration of the evidence, which is an appeal on a question of fact and does not fall within the exceptions for appeal under section 45 of the Arbitration Act, such as (i) The recognition or enforcement of the award is contrary to public policy; (ii) The order or judgment is contrary to the provisions of law concerning public policy; (iii) The order or judgment is not in accordance with the arbitral award; (iv) The judge who sat in the case gave a dissenting opinion; or (v) The order is an order concerning provisional order measures for permission under section 16.

Therefore, the Supreme Court refused the appeal.

B.4 Enforceability of an arbitration agreement in an employment contract

In the matter considered in Supreme Court Case No. 8335/2560 (2017), the dispute involved the termination of an employment contract, which stipulated that any disputes arising from, or in relation to, the contract shall be resolved by arbitration proceedings under Swedish law

The defendant terminated the employment contract with the plaintiff. The plaintiff filed a complaint to the Central Labour Court against the defendant for unfair termination and requesting severance pay. The Central Labour Court ruled that, as the case was brought in relation to the employment contract, the dispute should first be resolved by arbitration. Since the parties had not submitted the dispute to arbitration, and there was no reason suggesting that the arbitration

agreement is void or unenforceable, the plaintiff was not entitled to file a complaint with the Central Labour Court. The Central Labour Court dismissed the case.

The plaintiff appealed against the Central Labour Court order. The Supreme Court found that, although the parties expressed an intention in the employment contract to resolve any disputes by arbitration, the plaintiff's claim for severance pay and damages for unfair dismissal dispute arose after the employment contract had been terminated and, therefore, involved an exercise of rights pursuant to section 118 of the Labour Protection Act B.E. 2541 (1998) and section 49 of the Act for the Establishment of and Procedure for Labour Court B.E. 2522 (1979). Consequently, the plaintiff was not required to pursue its claim through arbitration under the employment contract but was entitled to directly file a claim with the Central Labour Court. The Supreme Court dismissed the order of the Central Labour Court and remanded the case to the Central Labour Court for further proceedings.

B.5 Impartiality of public prosecutor as an arbitrator

In Supreme Administrative Court Order No. Kor. 1/2560 (2017), respondent no. 2 (a public prosecutor) had represented respondent no. 4 (TOT Public Company Limited, a state-owned entity) in previous arbitration proceedings conducted 15 years earlier, and was subsequently appointed as an arbitrator in arbitration proceedings at issue in this case in 2012. The appellant challenged the impartiality of respondent no. 2 to act as arbitrator in the present case, based on his legal representation in the previous arbitration and his position as a public prosecutor.

The Supreme Administrative Court found, that although the dispute in the previous case related to the same joint venture and joint operation contract as in the present case, it was a dispute relating to the distribution of revenue in relation to VAT. The arbitral tribunal in the previous case ruled that the disputing parties should be equally liable for the VAT on behalf of services users. Such dispute differs from the

dispute in the present case, as the dispute in the present case concerns the authority of respondent no. 4 to continue to exercise its power under the joint venture and joint operation contract. Therefore, the issue in dispute in the present case has no relation to the dispute in the previous case.

Further, respondent No. 2 had not been in contact with or taken any action relating to respondent no. 4 for a period of 15 years. There is no law prohibiting a public prosecutor from being appointed as an arbitrator. In addition, rule 68 of the Regulations of the Attorney-General Regarding the Conduct of Civil Proceedings by public prosecutor B.E. 2547 (2004) provides rules relating to the appointment of a public prosecutor as an arbitrator. Therefore, a public prosecutor can be appointed as an arbitrator and there is a presumption that a public prosecutor can act impartially and independently. Consequently, the Supreme Administrative Court reversed the order of the Administrative Court, which had upheld the challenge against the arbitrator on the grounds of impartiality and dismissed the challenge against the arbitrator.

C. Diversity in arbitration

Despite the fact that some organizations in Thailand have attempted to advertise Bangkok as a competitive regional hub of international arbitration, legal and regulatory obstacles have thus far prevented the realization of this claim. In particular, Thai law precludes foreign counsel from acting in arbitrations conducted in Thailand, unless that foreign counsel is defending a case, the governing law is not Thai law, and if the award will not be enforced in Thailand. Moreover, foreign arbitrators appointed to adjudicate an arbitration conducted in Thailand must go through the inconvenient process of obtaining a work permit to do so.

At present, draft amendments to the Act have been proposed, which are aimed at easing restrictions on foreigners acting as arbitrators and counsel in arbitrations conducted in Thailand. This would be achieved by permitting foreign legal counsel and foreign arbitrators in the

newly defined category of "international arbitration," which is applicable if: (i) the parties carry on business operations in different countries at the time of concluding the contract; (ii) where the place of conducting the arbitration or the principal place of conducting the underlying contractual transaction is outside of Thailand; (iii) where the parties have clearly agreed that the dispute under the arbitration agreement involves more than one country or that the arbitration proceedings under the arbitration agreement involve international issues; or (iv) where the arbitration is conducted in a foreign language.

If the arbitration falls within the fairly broad ambit of "international arbitration" provided under the draft law, foreign arbitrators should be able to preside over arbitrations in Thailand without being required to obtain a work permit. Parties should also be allowed to be represented by foreign counsel in arbitrations in Thailand, and both arbitrators and foreign representatives should be entitled to reside provisionally in Thailand and work as an expert in line with their position in arbitration proceedings.

Although the draft amendments have been approved by the Cabinet and are pending the consideration of the National Legislative Assembly, the final form of the amendments and the date of their enactment remain uncertain. Nevertheless, the proposed draft signals a thawing of restrictions on foreigners participating in arbitrations in Thailand and should go some way to achieving greater diversity and inclusion in the field of arbitration in Thailand, as well as facilitating the attempt to make Thailand a desirable location for international arbitration proceedings.