JUDICIAL ASSISTANCE FOR ARBITRATION UNDER SECTION 14 OF THAI ARBITRATION ACT B.E. 2545[*]

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Abstract

International Commercial Arbitration has become one of the most favored dispute resolution methods in this era with an increasingly globalized world economy. One of the most significant benefits is the neutrality of the forum, which means the ability to stay out of the other party's court.

Judicial assistance is proven to be crucial to every aspect of the arbitral proceeding. Although arbitration is a private system of justice in which parties may design their own arbitral proceeding, it is still governed by law, usually by the law of the seat of the arbitration, or the law chosen by parties to govern the agreement.

The question of what law applies to determine the validity of the international arbitration agreement is still debatable among practitioners and academics. However, in order to promote international arbitration in Thailand, under section 14 of Thai Arbitration Act B.E.2545 courts should exercise their judicial power by applying Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1959) to the case.

Keywords: International Commercial Arbitration, Arbitration, Thai Arbitration, Judicial Assistance for Arbitration

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[*] This article is summarized and rearranged from the thesis "Judicial Assistance for Arbitration under Section 14 of Thai Arbitration Act B.E.2545" Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2017.

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1. Introduction

In recent decades, international commercial arbitrations have increased significantly due to foreign investments, based on a contract and treaty. Thailand has come to play a greater role in world trade and investment. This has resulted in a dramatic rise in the number of international commercial arbitrations in Thailand.

Arbitration is a private system of adjudication. Parties often choose arbitration because they do not want their dispute to be subject to a State's judicial system. In arbitration, the parties can control the process that will be used to settle potential disputes.[1]

However, the support of a court can prove crucial. Unlike arbitration tribunals, courts have coercive powers - the ability to compel a party to do something. Parties tend to call on the court for assistance when they are seeking to enforce an agreement to arbitrate, to compel a party to carry out an order, to render an award, etc.[2]

1.1 Validity of the Arbitration Agreement

Many national laws and states do not adopt the model laws uniformly leaving national courts determine the validity issue. When a court makes a ruling on the validity of an arbitration agreement in its jurisdiction, it must be determined which jurisdiction's law shall be applied to a particular issue. Additional complications develop when more than one national's laws may properly apply to the arbitration.[3] In such a scenario, the parties may agree that the seat of the arbitration is to be in country A, but the arbitration procedure is to be governed by the law of country B. If one of the parties to the agreement commences litigation in country C, an opposing party might ask a court to dismiss the case. This then raises the

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[1] Moses, Margaret L. *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press, 2012.

[2] Ibid.

[3] Moses, 'The Principles and Practice of International Commercial Arbitration' (n 1)

issue of which law should apply in making determination to dismiss? Country C's court, using its own law, might rule that the arbitration agreement is null and void, and permit the litigation to continue. On the other hand, if country B's laws were applied, a court may find the arbitral clause to be valid and enforceable.[4]

1.2 Thailand as an Arbitration-Friendly Country

Foreign investment has played a significant role in the economic development of Thailand. It can provide a source of capital, new technologies, and employment opportunities.[5] Foreign investors concerned about exposure to the differences in a host state's political and social environment, its, legal system and possible interference by the host state, seek fair and equal treatment between the parties.[6] They may find themselves entangled in costly and time-consuming legal proceedings. Because the best solution to settle the disputes; is often the solution that costs the least amount of money and time, arbitration's popularity as an alternative dispute resolution mechanism is increasing.[7]

Professor George Bermann of Columbia University School of Law has defined and outlined the characteristics of an arbitration friendly jurisdiction such as it promoted international arbitration's efficiency aspirations in terms of time and cost, it enabled party autonomy and supported the general

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[4] ธวัชชัย สุวรรณพานิช 'กฎหมายที่ใช้บังคับแก่สัญญาอนุญาโตตุลาการตาม พ.ร.บ. อนุญาโตตุลาการ พ.ศ.2545 มาตรา 14 ฉบับที่ 17 วารสารกฎหมาย คณะนิติศาสตร์ มหาวิทยาลัยอุบลราชธานี (2559) (Thawatchai Suvanpanich, 'Law Applied to the Arbitration Agreement under the Thai Arbitration Act B.E.2545' 17 Ubon Ratchathani University Law Journal 79 (2016))

[5] Anan Chantara-opakorn, 'Investment arbitration: remarks for Thailand' 39 Thammasat Law Journal 859 (2010)

[6] Ibid 860.

[7] Greenwood L, 'The Rise, Fall and Rise of International Arbitration: A View from 2030' Chartered Institute of Arbitrator 436

principle of consent, it reduced as reasonably as possible the intervention of national courts etc.[8]

Hong Kong and Singapore are the examples of the nations which use arbitration to develop and obtain economic growth. The international Court of Arbitration of the International Chamber of Commerce (ICC) has located their Asian offices in both Hong Kong and Singapore. This gives both countries opportunities to continue promoting their respective jurisdictions as pro-arbitration and business-friendly communities[9] and helps to bring increasing foreign investment into the countries.

2. Regulatory Framework

Many countries including Thailand have adopted UNCITRAL Model Law[10] as a model for their arbitration laws on International Commercial Arbitration.[11] The primary source of Thai arbitration law is the Arbitration Act of 2002, the Act was drafted to be congruent with the standards of the UNCITRAL Model law for Arbitration as well as the New York Convention[12], with minor variations. The Act came into force on April 30, 2002 replacing

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[8] Nilar NN, 'What does it mean to be 'pro-arbitration'?' *CIArb News* (24 November 2017) <http://www.ciarb.org/news/ciarb-news/news-detail/news/2017/11/24/what-does-it-mean-to-be-pro-arbitration> accessed 15 March 2018.

[9] Prasad P, 'Arbitration in Singapore and Hong Kong' Chicago Unbound, University of Chicago Law School 3

[10] The UNCITRAL Model Law for Arbitration was prepared by the United Nations Commission on International Trade Law (UNCITRAL) to promote international commercial arbitration by assisting states in reforming and modernizing their arbitration laws. Its structures contain all areas of arbitral process from the commencement of the arbitration agreement, to the last stop of enforcing the award

[11] *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* (UNCITRAL)

[12] the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

the Arbitration act B.E.2530 (1987), it governs both domestic and international commercial arbitration under the same rules.

3. Judicial Assistance for Arbitration

Court assistance in arbitration has been seen as filling gaps in arbitration's power.[13] The role of national courts through various forms of support in arbitration is very important. The issues when the judicial assistance from courts is needed always dealing with the arbitral procedure, because of the fact that courts have ***coercive powers***[14] while arbitrators do not. Under Thai arbitration act 2002, section 14 has required courts to enforce an arbitration agreement when there are specific circumstances. The act states that if a party to an arbitration agreement commences proceeding in court against the other party to the agreement without submitting the dispute to arbitration in accordance with the agreement, the party against whom the case is commenced may apply to the court to strike down the case. The application must be made no later than the date of filing the defense or within the period allowed by law for filing a defense.[15]

4. Determining Applicable Law on the Validity of the Arbitration Agreement under the New York Convention

Article II(3) of the New York Convention states that *'...The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this*

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[13] Jack J. Coe, *International Commercial Arbitration: American Principle and Practice in a Global Context* (1997)

[14] **Coercive power** is the ability to influence someone's decision making by taking something away as punishment or threatening punishment if the person does not follow instructions.

[15] Michael J. Moser JC, *Asia Arbitration Handbook* (Oxford University Press 2011)

article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.' The Article, allows national courts of Contracting States to deny the stay of court proceedings in the presence of an arbitration agreement where the validity of such an agreement is affected, but does not provide which law shall be applied to the validity issue.[16]

However, **Article V(1)(a)** provides that *'...recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The parties to the agreement referred to in* ***article II*** *were, under the law applicable to them, under some incapacity, or the said agreement is not valid under* ***the law to which the parties have subjected it*** *or, failing any indication thereon, under* ***the law of the country where the award was made****...'* Under Article V (1) (a), recognition and enforcement of the award may be refused by the enforcing court (the competent authority) if one of the grounds in the article is alleged and proven by the resisting party.[17]

Although both articles have mentioned the validity of the arbitration agreement issue, but while Article II (3) deals with the first step, or the step of recognizing the arbitration agreement, Article V (1) (a) deals with the last step, or the step of recognizing the award. Furthermore, Article II (3) is silent on the applicable law to determine the validity of the arbitration agreement, but Article v (1) (a) provides that the applicable law is ***the law [to] which the parties have subjected it*** or ***the law of the country where the award was made***. Thus, it is suitable to apply Article V(1)(a)

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[16] Loukas A. Mistelis SLB, *Arbitrability International & Comparative Perspectives* (Kluwer Law International 2009)

[17] Loukas A., 'Arbitrability International & Comparative Perspectives (Kluwer Law International 2009' (n 16)

mutatis mutandis[18] to the validity issue at the arbitration commencement stage, because to have an award set aside, annulled, or enforced at the post-award stage, the court would have to make validity determination again. If the court decides that the award cannot be enforced because it was not valid under the applicable law, a great amount of expense and time will have been lost.

4.1 Courts Apply Article V of the New York Convention Mutatis Mutandis

In Japanese Supreme Court decision 1994, *Japan Education v. Kenneth J. Feld,*[19] the issue was whether the president of a company was bound by an arbitration agreement entered by his company.[20] The court applied New York law, which had been chosen by the parties as the governing law, to the interpretation of the arbitration agreement.[21]

The German Supreme Court came to a similar conclusion, in German (F.R.) manufacturer v. Dutch distributor (1973). The court ruled that parties have the freedom to choose the law applicable to the arbitration agreement and, absent any indication of applicable law by the Parties, the *law of the country in which the award "will be made"* applies.[22]

4.2 Court Apply the Substantive Rules Approach

A "substantive rules" approach is when national arbitration laws are regulated for the purpose of promoting international arbitration, and there is explicit language specifying which law to apply to the validity of

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[18] Means that matters or things are generally the same, but to be altered, when necessary, as to names, offices, and the like.

[19] Japan Education Co. v. Kenneth J.Feld, 1499 Hanrei jiho 68 (Tokyo High Ct., May 30, 1994)

[20] *Arbitration in Asia* (Moser MJ ed, 2nd edn, 2017)

[21] Inoue A, *International Arbitration 2012: Japan* (Global Legal Group 2012) <https://www.amt-law.com/asset/res/news_2012_pdf/120831_2945.pdf> accessed 30 May 2018

[22] *8 U 129/72*, 1973 (Germany, Oberlandesgericht Karlsruhe (Higher Regional Court of Karlsruhe)

international arbitration agreements issue. Domestic courts can apply such rules in their jurisdiction without any conflict of laws issues arising.

The Swiss Law on International Arbitration is set out in Chapter 12 of the Private International Law Act 1987 (PIL Act).[23] Article 178(2) of IPL provides *"...Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."* This Swiss rule goes beyond any of the traditional conflict of laws approaches in upholding the validity of an arbitration agreement. By this provision, when an arbitration agreement is invalid under the law chosen by the parties, Swiss courts will still enforce an agreement considered to be valid under Swiss law or the law governing the main contract. This judicial assistance is extremely pro-arbitration but it can cause an enforcement issue under the New York Convention since the invalidity of an arbitration agreement according to the law chosen by the parties can justify refusal of enforcement.[24]

French arbitration law was codified in 2011. The main source of legislation on arbitration is Book IV of the Code of Civil Procedure.[25] It was developed by the Court de Cassation[26] in the *Dalico*[27] decision in 1993. The dispute in this case arose out of a contract for the construction of a water supply between the Libyan municipal authority and a Danish contractor.

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[23] *Swiss International Arbitration Law* (Swiss Chambers' Arbitration Institution 2017) <https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws> accessed 30 May 2018

[24] Swiss International Arbitration Law (n 23)

[25] French Arbitration Law 2011, embodied in Articles 1442 through 1527 of the French Code of Civil Procedure (CCP)

[26] The **Court of Cassation** (French: *Cour de cassation*) founded in 1804 is one of France's courts of last resort having jurisdiction over all matters triable in the judicial stream with scope of certifying questions of law and review in determining miscarriages of justice.

[27] French *Cour de cassation*, *20 December 1993*, *Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors*, 121 Clunet 432 (1994)

The Court of Appeals rejected the application finding that *both parties abided by the arbitration agreement without determining which law was applicable to the arbitration agreement*.[28]

5. Conclusions and Recommendations

Thai courts do not have the substantive rules approach to resolving disputes over the conflict of laws determining the validity of the international commercial arbitration, because section 14 of the Thai arbitration Act is silent on such issue. Additionally, there is still no guidance from the Supreme Court on the issue. Despite many advantages of the substantive rules approach to international arbitration, there are also some disadvantages. For example, under Swiss rules, either the Swiss rule or the law governing the main contract can be applied on the validity of an arbitration agreement. This can raise an argument during the award enforcement stage that the arbitration was invalid since it was not in accordance with the law chosen by the parties.

Since Thailand is a contracting state to the New York Convention[29], and the language and concept of law in section 14 was adopted from Article II of the Convention, it would be a solution for Thai courts to apply the Convention on the validity issue. Considering there is an attempt to project Thailand's image as an arbitration-friendly jurisdiction, judicial assistance on this issue is significant in determining the validity issue. When courts have standards of practice on international arbitration agreements that are flexible and favorable to international arbitration, then the country would have explicit factors demonstrating itself as an arbitration-friendly country.

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[28] Julian D M Lew LAM, Stefan M Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)

[29] The accession to the convention on December 21, 1959

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