

THE IMPACT OF ACCESSION TO THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS ON THAI LAW AND PRACTICE^{*}

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Abstract

The Hague Convention on Choice of Court Agreements aims at promoting the validity of exclusive jurisdiction clauses in international civil and commercial contracts as well as facilitating the recognition and enforcement of judgments rendered by the chosen court in all Contracting States to the Convention. To date, Thailand has not yet signed this Convention, and it still applies its domestic law and judicial practice to examine the validity of choice of court agreements as well as recognise and enforce foreign judgments; nonetheless, comparing to the Convention, Thailand's existing legal regime does not set out specific rules governing the relevant issues, which gives rise to the legal uncertainty to foreign enterprises whether their choice of court forum agreement and the judgment pursuant to such an agreement would be recognized by the Thai court.

Because of the aforesaid problem, this article explores whether Thailand should become a Contracting Party to the Convention and whether such an accession will have any impact on Thailand's current law

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and practice. This article finds that although Thailand's current legal regime is somewhat incompatible with some provisions of the Convention, it should still accede to the Convention by making declarations accordingly so that it will not be bound by those provisions of the Convention, which will enable the Thai court to apply a uniform and internationalized rule without conflicting with its current law and practice.

Keywords: Accession, the Hague Convention on Choice of Court Agreements, the Validity of Choice of Court Agreements, Recognition and Enforcement of Foreign Judgments, Thailand

1. Introduction

The Hague Convention of 30 June 2005 on Choice of Court Agreements (“the Convention”) aims to promote parties’ choice of court in international civil and commercial contracts, which ensures that the forum selection clause designating an exclusive court to adjudicate the dispute between parties is recognised in the chosen court and in any unchosen court of a Contracting State to the Convention. Furthermore, the Convention also provides legal certainty to affirm that judgments obtained pursuant to the choice of court agreements become enforceable in other Contracting States.¹ To date, there are 35 Contracting Parties to the Convention.

Currently, Thailand has not yet become a Contracting Party to the Convention.² In this light, Thailand still applies its domestic law and judicial practice to examine the validity of the choice of court clauses as well as recognise and enforce judgments rendered by foreign courts, which gives rise to concerns whether the current legal framework of Thailand provides explicit rules for dealing with the examination of the validity of jurisdiction clauses entered into by the parties in international commercial contracts and the recognition and enforcement of judgments rendered by the chosen court in accordance with parties’ choice.

In consideration of the aforesaid issues, it gives rise to a concern whether the current regulatory framework of Thailand is in support of its ‘Thailand 4.0 policy’³ and the ‘Eastern Economic Corridor (“EEC”)’ project⁴

¹ William J. JR Woodward, ‘Saving The Hague Choice of Court Convention’ (2014) Penn Law: Legal Scholarship Repository 664-665 <http://scholarship.law.upenn.edu/cgi/view_content.cgi?article=1170&context=jil> accessed 25 October 2018

² Hague Convention on Private International Law, ‘Status Table of the Hague Convention of 30 June 2005 on Choice of Court Agreements’ <www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 25 October 2018

³ BOI of North America’s Blog, ‘Government of Thailand Announces New 4.0 Investment Attraction Policies’ <<http://thinkasiainvestthailand.com/boiblog/index>>

aiming to attract more foreign investments into the country. However, in order to attract more foreign investments under those schemes, Thailand's current regulatory framework should be conducive to promoting those international commercial activities, and that being said, Thailand should consider to become a Contracting State to the Convention in order to promote its legal regime to become more internationalized and create a business-friendly regulatory environment for foreign investors.

Consequently, this paper will mainly analyse the legal impact of the Convention on Thailand's existing legal regime in the event that Thailand decides to accede to the Convention. The analysis will focus on whether the provisions of the Convention are consistent or conflict with the existing law and practice of Thailand. For any inconsistency between the provisions of the Convention and Thailand's current legal regime, this paper will propose Thailand to make declarations accordingly so that the application of the Convention will be compatible with its current legal regime.

2. Thailand's Current Legal Regime Governing the Validity of Choice of Court Agreements and Recognition and Enforcement of Foreign judgments

2.1 The Validity of Choice of Court Agreements

In regard to the examining the validity of choice of court agreement under Thailand's current legal regime, the current Civil Procedure Code of Thailand ("Thai CPC")⁵ does not lay down specific rules governing this issue. However, when the original version of Thai CPC came into effect on 1 October 1935, its Section 7 (4) expressly granted the parties to choose a

php/40-government-of-thailand-announces-new-4-0-investment-attraction-policies>
accessed 25 October 2018

⁴ Easter Economic Corridor Office, 'Investing in the EEC' <<https://www.eeco.or.th/en/content/investing-eec>> accessed 25 October 2018

⁵ Civil Procedure Code B.E. 2477 (1934)

court jurisdiction to adjudicate their disputes.⁶ Nonetheless, upon the 1934 version of Thai CPC was amended in 1991, the content of Section 7 (4) was entirely removed from the 1991 version,⁷ and such amendment has resulted in the current version of Thai CPC to be silent on what elements are required in order for a jurisdiction clause to be valid under Thai law.

At present, there are three different Thai laws containing inconclusive provisions related to governing the validity of choice of court agreement including Civil and Commercial Code (“Thai CCC”),⁸ Conflict of Laws Act,⁹ and Unfair Contract Terms Act.¹⁰ According to the general principle of Thai CCC, it stipulates that an act is void if its purpose is explicitly prohibited by law or is contrary to public order or good morals.¹¹ This principle was referred by the Thai Supreme Court (“the Court”) in the case no. 951/2539 (1996 A.D.). Upon the Court in this case examined the validity of a choice of court agreement involving an international commercial case, it decided that the forum selection agreement as stated in the bill of landing by choosing a UK court to adjudicate disputes arising from the international carriage service was invalid since none of parties to the contract had domicile in the UK. Furthermore, the Court ruled that the choice of court clause was deemed to be contrary to Section 4 (1) of Thai CPC, which merely allowed the parties to file a claim to the court where the defendant had domicile or where the cause of action arose, and when

⁶ Kanokluck Amornworawit, Panha Thangkotmai Waduai Khotoklongueaksan Nai Sanyathurakit Kankharahwangprathet [Legal Problems Concerning Choice of Court Agreement in International Business Contract] (Masters of Law Degree Thesis, Thammasat University 2009) (กนกluck อัมรวิทย์, ปัญหาทางกฎหมายว่าด้วยข้อตกลงเลือกศาลในสัญญาธุรกิจการค้าระหว่างประเทศ) (วิทยานิพนธ์ปริญญามหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ 2552)

⁷ ibid

⁸ Civil and Commercial Code B.E. 2468 (1925)

⁹ Conflict of Laws Act B.E. 2481 (1938)

¹⁰ Unfair Contract Terms Act B.E. 2540 (1997)

¹¹ Civil and Commercial Code B.E. 2468 (1925), s 150

parties entered into a choice of court agreement that conflicts with Section 4 (1) of Thai CPC, such an act was considered to violate public order; hence, the forum selection agreement was void.¹² In consideration of the Court's ruling in this case, it can be deemed that when a Thai court examines the validity of a choice of court agreement, one of principles to be applied is that a legal act or agreement of the parties must not violate law or contradict public order or morals.

In addition, Thailand's Conflict of Laws Act sets forth that if there is no any other Thai law applicable to matters involving the conflict of law issues, the private international law shall apply.¹³ However, it is unclear whether this provision has been applied by the Thai court in practice. In regard to the Thai Supreme Court's decision in case no. 3537/2546 (2003 A.D.), the Court in this case did refer that the parties' choice of court agreement designating a court of Singapore to assert jurisdiction over their disputes was valid in accordance with the 'principle of private international law'. Nevertheless, the Court did not expressly state whether its decision was based on the section 3 of Conflict of Laws Act. In addition, the Court in this case further ruled that since the choice of court clause did not expressly designate the court of Singapore as an exclusive jurisdiction; thus, it could be deemed that the parties in this case were still entitled to file their claim to the Thai court as another competent jurisdiction.¹⁴

In regard to the aforementioned case, it can be implied that if parties in international commercial contracts select a foreign court to adjudicate their dispute without specifying such a court as an exclusive jurisdiction, the Thai court is unlikely to dismiss the claim submitted to its jurisdiction. In this light, unlike the practice of the countries with common law systems, the Thai court still exercises its jurisdiction over the dispute

¹² The Decision of the Thai Supreme Court no. 951/2539 (1996 A.D.) <<https://deka.in.th/view-3853.html>> accessed 26 October 2018

¹³ Conflict of Laws Act B.E. 2481 (1938), s 3

¹⁴ The Decision of the Thai Supreme Court no. 3537/2546 (2003 A.D.) <<https://deka.in.th/view-50331.html>> accessed 26 October 2018

although parties' claim may fall under the basic principles of private international law including a case has already been submitted to another jurisdiction pursuant to 'lis alibi pendens' principle, or a case should be heard by another appropriate forum according to 'forum non conveniens' principle. Additionally, in comparison to the Court's decision no. 951/2539 (1996 A.D.), it can be observed from the Court's ruling in this case that the Court did not consider the forum selection clause had violated public order, but rather recognised the parties' choice pursuant to the party autonomy doctrine.

Nevertheless, in regard to the ruling of this Court, an interesting point to be raised here is the question whether a Thai court will still exercise its jurisdiction over the dispute provided that parties' choice explicitly designates a certain foreign jurisdiction as 'an exclusive court' whereas a Thai court is also deemed as a competent court based on the place where either party has domicile or where the cause of action arises. In regard to this question, the author views that considering the inconsistent decisions of the Thai Supreme Court in the aforesaid two cases,¹⁵ it can be concluded that two different approaches could be applied to this issue. First, a Thai court may consider such a choice of court agreement to be valid in accordance with the party autonomy doctrine as applied by the Court's decision no. 3537/2546 (2003 A.D.). Secondly, a Thai court may not give effect to such a choice of court agreement due to violating public order according to the decision of the Court no. 951/2539 (1996 A.D.).

In regard to the international civil and commercial contracts entered into between the consumer and the business or professional operator where the terms and conditions are prepared by the parties of unequal bargaining power. In this light, the provision of forum selection in such a contract can be considered as unfair contract terms under Unfair Contract Terms Act.¹⁶ According to section 4 of Unfair Contract Terms Act, the terms

¹⁵ The Decision of the Thai Supreme Court no. 951/2539 (1996 A.D.) and no. 3537/2546 (2003 A.D.)

¹⁶ Unfair Contract Terms Act B.E. 2540 (1997), s 4

in a contract between the consumer and the business operator are considered unfair if such terms cause an imbalance in the parties' rights and obligations and creates more burden to the consumer than what could have been anticipated by a reasonable person. In this regard, a Thai court can examine and order such unfair contract terms to be only effective and enforceable as they are appropriate and fair depending on the facts of the case.¹⁷

Aside from considering whether the terms of contract render any advantage to the business operator over the consumer, a Thai court also needs to examine other circumstances, such as the good faith of the parties, bargaining power, economic status knowledge, anticipation, time and place of making the contract, and any potential negative effects on the consumer.¹⁸ Nevertheless, to date, the Thai Supreme Court has not yet made a ruling on the validity of choice of court agreement in an international commercial contract involving one party to the contract as a consumer. However, considering the decision of the Thai Supreme Court no. 3368/2552 (2009 A.D.), the Court gave effect to the arbitration clause in the international carriage contract entered by the parties who were both Thai nationals and domiciled in Thailand. The parties agreed to designate the Singapore International Arbitration Center to arbitrate their disputes. The Court in this case ruled that the arbitration clause was not prepared by one side only, but it was mutually agreed by both parties, so such a clause did not render any advantage or disadvantage to neither party; thus, it was not deemed as unfair contract terms.¹⁹

In reference to the aforesaid decision, the author views that if the holding in this case was applied to the choice of court clause in an

¹⁷ Nantika Tipayamontri, 'Consumer Protection Laws in Thailand' Thai-American Business Journal (May-June 2004) 19 <www.amchamthailand.com/asp/view_doc.asp?DocCID=1055> accessed 26 October 2018

¹⁸ Unfair Contract Terms Act B.E. 2540 (1997), s 10

¹⁹ The Decision of the Thai Supreme Court no. 3368/2552 (2009 A.D.) <<https://deka.in.th/view-502744.html>> accessed 26 October 2018

international commercial contract, whether a jurisdiction clause in a such international commercial contract would be deemed as unfair contract terms depends on whether the chosen forum would create any significant disadvantage to one of parties particularly the consumer. Furthermore, in reference to the ruling in this case, it can also be implied that if the chosen jurisdiction was a court of a third country; in other words, the chosen court was located neither at consumer's domicile nor at the business operator's domicile, it may not be deemed to cause significant imbalance between the parties. However, if the court based on the business operator's own domicile was chosen as the exclusive jurisdiction, an interesting question to be raised here is whether such a jurisdictional clause was considered to be fair to the consumer although the main purpose of such a clause could be chosen in a good faith and to protect the business from unreasonable commercial risks rather than hinder the consumer's rights from taking legal action.

Furthermore, another concern which should be noted here is whether a Thai court will still give effect to a jurisdiction clause that the parties mutually choose a third country's court to decide their dispute in order to avoid unfair contract term situation. In this regard, the Thai Supreme Court in case no. 3882/2549 (2006 A.D.) decided that a jurisdiction clause designating a court in Hong Kong to adjudicate the dispute arising from the international carriage from Thailand to Spain was invalid since the Hong Kong court did not have any connection with the parties or their dispute as none of parties had domiciled in Hong Kong. In addition, since the cause of action arose in Thailand rather than Hong Kong, and most of evidence related to the dispute was located in Thailand, Thailand's Intellectual Property and International Trade Court should be the proper venue to hear the dispute.²⁰ In reference to this ruling, it should be noted that in an international commercial contract although a business operator and a consumer select a court of a third country to hear their dispute, such

²⁰ The Decision of the Thai Supreme Court no. 3882/2549 (2006 A.D.) <<http://www.deka.in.th/view-267755.html>> accessed 26 October 2018

a jurisdiction clause may not be upheld by a Thai court due to the lack of connection between the chosen jurisdiction and the parties or disputes involved.

2.2 Recognition and Enforcement of Foreign Judgments

With regard to the issue of recognition and enforcement of foreign judgment in Thailand, currently Thailand does not have any specific law governing the recognition and enforcement foreign judgments. Up to now, Thailand has not yet acceded to the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.²¹ However, this issue was earlier addressed by the judicial practice in the decision of the Thai Supreme Court no. 585/2461 (1918 A.D.).²² Although the decision in this case was rendered in the early 20th century, its ruling has become a substantial precedent for a Thai court to apply when dealing with the issue regarding the recognition and enforcement of foreign judgments.²³

In reference to the facts of the aforementioned case, it was related to the breach of a sale contract concluded by both Vietnamese parties in Saigon, Vietnam, and the plaintiff brought a claim against the defendant for failing to deliver goods to him with the Saigon Civil Court, and the Saigon Civil Court rendered the judgment in favor of the Plaintiff. The plaintiff then sought enforcement of Saigon Court's judgment with the Thai court where

²¹ Hague Convention on Private International Law, 'Status Table of Contracting Parties of The Hague Convention on the Recognition and Enforcement of Foreign Judgments' <www.hcch.net/en/instruments/conventions/status-table/?cid=78> accessed 27 October 2018

²² The Decision of the Thai Supreme Court no. 585/2461 (1918 A.D.)

²³ Panthip Kanjanajitra Saisoonthorn, Panhanguankhai Kanraprong Khamphiphaksa Khongsantangprathet [Problems on Conditions for Recognition of Foreign Judgments] (Law Journal Thammasat University, 22 (2)) 205) (พันธุ์ทิพย์ กาญจนะจิตร สายสุนทร, ปัญหาเบื้องต้นของการรับรองคำพิพากษาของศาลต่างประเทศ (วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ ปีที่ 22 ฉบับที่ 2) 205)

the defendant was domiciled, and this case was eventually appealed to the Thai Supreme Court. The Court held that the principle of recognition and enforcement of foreign judgments was one of mutual respect among nations; thus, the Thai court shall recognise and enforce judgment rendered by a foreign court under two principles including i) the judgment was given by the court of competent jurisdiction; ii) that such a judgment was final and conclusive on the merits of the case. However, since the judgment of this case was given in default due to the failure of defendant to make an appearance in the court, the plaintiff had a burden to prove to the Thai court that such a judgment was final, and the defendant would not be able to pursue this matter further; nevertheless, the plaintiff failed to submit any proof supporting this issue; therefore, the Court in this case eventually denied to recognise and enforce the judgment rendered by the Saigon Civil Court.

Consequently, the decision of the Thai Supreme Court in this case lays down two significant principles for the recognition and enforcement of foreign judgments in Thailand. First, the foreign court adjudicating the case must be a competent jurisdiction. Secondly, the foreign judgment must be final and conclusive, which means that the parties in the suit are barred from challenging the decision made by the foreign court as per the doctrine of *res judicata*.²⁴ Furthermore, the ruling in this case also provides that in the event that a Thai court refuses to recognise and enforce a foreign judgment, a new trial based on the merits can be initiated in Thailand, and such a foreign judgment and documentary evidence generated during the litigation procedure in a foreign court can be used as evidence at a new trial.²⁵

With respect to the above analysis, it can be concluded that Thailand's current domestic law and judicial practice governing the validity of a choice of court clause in international civil and commercial contracts

²⁴ ibid

²⁵ ibid

are somewhat unpredictable and unspecific; particularly several issues as discussed above are not covered by the current legal regime of Thailand. Additionally, in regard to the issue of recognition and enforcement of foreign judgments, although the Thai Supreme Court no. 585/2461 (1918 A.D) laid down certain principles for dealing with this matter, in comparison to the uniform substantive rules, those principles established by the judicial practice are still considered to be unsettled, which cannot assure what other circumstances should also be taken into consideration to affirm that a foreign judgment is fully recognised and enforceable by the Thai court.

3. An Analysis of Legal Impact of The Convention on Thai Law and Practice

In reference to the legal framework of the Convention, the fundamental concepts of the Convention are primarily set forth based on the ‘three basic rules’ including i) the court of a Contracting State designated by an exclusive choice of court agreement must exercise its jurisdiction; ii) a non-chosen court of a Contracting State must not assert its jurisdiction over the dispute between the parties that have been designated by the parties to have an exclusive court exercise its jurisdiction, and iii) a judgment rendered by the chosen court must be recognised and enforced by the courts of other Contracting States. Although the Convention lays out these uniform rules to ensure that choice of court agreements and judgments rendered pursuant to such agreements will be honoured by Contracting States, it provides a number of exceptions to these basic rules so that the application of the Convention can be compatible with the domestic law of Contracting States. Nonetheless, in comparison to the Convention, the current legal framework of Thailand does not lay down explicit rules governing the examination of jurisdictional clause and the recognition and enforcement of foreign judgments. Thus, an analysis of legal impacts of the Convention on Thailand’s current legal framework will significantly point out whether the accession of Thailand to the Convention

will give rise to any discrepancy between the Convention and Thailand's current legal regime.

3.1 Scope of the Application of the Convention

The scope of application of the Convention only covers agreements involving the international civil and commercial matter.²⁶ However, certain international civil and commercial agreements, such as consumer contracts, employment contracts, family matters, carriage of passengers and goods, and certain intellectual property matters do not fall under the scope of the Convention.²⁷ In regard to Thailand's current legal regime, it does not expressly lay down what matter is allowed or disallowed for parties involved in international commercial contracts to set forth a forum selection clause. Nevertheless, at present, Unfair Contract Terms Act of Thailand sets forth a specific rule governing the issue on the validity of choice of court agreements made between business operators and consumers. In case that the jurisdiction clause in such an agreement creates any significant disadvantage to one party, in particular a consumer, who is considered to be a vulnerable party, such a forum selection clause shall be voided.²⁸ Nonetheless, since the scope of the Convention is exclusive of the consumer contract, in the event that Thailand accedes to the Convention, a Thai court can still exercise its jurisdiction to examine the validity of a forum selection clause in consumer contracts pursuant to its Unfair Contract Terms Act without conflicting with the scope of application of the Convention.

In addition, in the event that a Thai government is acting in its commercial capacity, although the Convention does not exclude the proceedings involved in the Thai government or its agency as a party,²⁹ the application of the Convention in such a case will not affect the privileges

²⁶ The Hague Convention on Choice of Court Agreements, art 1 (1)

²⁷ *ibid.*, art 2 (1) (2)

²⁸ Unfair Contract Terms Act B.E. 2540 (1997), s 4 and s 10

²⁹ The Hague Convention on Choice of Court Agreements, art 2 (5)

and immunities of States,³⁰ and in this light, when Thailand accedes to the Convention, the principle of sovereign immunities and the law on privileges of States will still be applicable to the choice of court clause made between the Thai government and the other party in international civil and commercial contracts. Nonetheless, if Thailand considers that there are certain matters under the scope of application of the Convention that should not be allowed for parties to choose other jurisdictions rather than a Thai court to hear their disputes, Thailand is permitted to make declarations for exemption from applying the Convention to such matters,³¹ and in relation to all other Contracting States, Thailand will be considered as a non-Contracting State with regard to that matter.³²

3.2 Exclusive choice of Court Agreement

The exclusive choice of court clause is a core issue to determine whether the parties' choice merely allows a chosen court to exercise its jurisdiction over other competent courts. With regard to the formation of choice of court agreement in international commercial contracts, in general, designating a court to adjudicate disputes arising from the contracts can be classified into two types of jurisdiction clauses including an exclusive jurisdiction clause and a non-exclusive jurisdiction clause.³³ In regard to the Convention, it was founded on the concept of an exclusive choice of court agreement,³⁴ which lays out that the court of a Contracting State chosen by the parties' choice must hear the case,³⁵ whereas the courts of other

³⁰ *ibid.*, art 2 (6)

³¹ The Hague Convention on Choice of Court Agreements, art 21 (1)

³² *ibid.*, art 21 (2) (a) (b)

³³ Stephen G. A. Pitel and Jonathan de Vries, 'The Standard of Proof for Jurisdiction Clauses' (2008) 46 Canadian Business Law Journal 66 (2) < <https://ssrn.com/abstract=2378308> > accessed 28 October 2018

³⁴ The Hague Convention on Choice of Court Agreements, art 1 (1)

³⁵ *ibid.*, art 5 (1)

Contracting States must refuse to exercise their jurisdiction provided that they are not designated as the chosen forums.³⁶

However, under Thailand's current legal regime, although the existing law of Thailand does not explicitly address this issue, it can be considered that both exclusive choice clause and non-exclusive choice clause are upheld by its judicial practice, which can be observed from the decision of the Thai Supreme Court no. 3537/2546 (2003 A.D.). The Court in this case ruled that since the parties' jurisdiction clause did not expressly specify the court of Singapore as an exclusive court, it should be deemed that such a jurisdiction clause did not prevent either party from filing their petition to the Thai court as another competent court. What can be implied from the Court's ruling in this case is that if the parties had expressly specified that a court of Singapore was chosen as the exclusive court in their agreement, such an exclusive choice would have been upheld by the Thai Supreme Court. Nonetheless, since the parties failed to expressly state their choice, the Thai Supreme Court in this case decided that the concept of a non-exclusive court choice should be applied. Thus, it can be deemed that the parties' agreement did not exclude a Thai court as another competent court to assert its jurisdiction over their dispute.

With regard to the aforesaid analysis, providing that Thailand accedes to the Convention, the author views that Thailand's judicial practice on the affirmation of an exclusive choice of court issue will not create any conflict with the Convention since the Thai Supreme Court's holding in the aforesaid case clearly stipulated that the parties' exclusive choice of court would have upheld by the Court if such a choice had been clearly stated in the agreement. Nevertheless, although the main concept of the Convention is to promote an exclusive choice of court agreement, in the situation where the parties' choice of court agreement simultaneously designates both exclusive jurisdiction and non-exclusive jurisdiction to hear their disputes, article 22 of the Convention permits Contracting States to make a

³⁶ ibid., art 6

reciprocity declaration in order to recognise and enforce the judgment rendered pursuant to such a non-exclusive clause. Hence, in the event that Thailand accedes to the Convention, such a reciprocity declaration shall be made accordingly in order that a judgment rendered by a Thai court based on a non-exclusive choice of court agreement will be recognised by other courts of other Contracting States that have also made the same declaration.

3.3 Obligations of the Chosen Court

As the exclusive choice of court clause is a core concept under the Convention, the effectiveness of the Convention depends on whether the chosen court can exercise its jurisdiction as designated in the choice of court agreement. In this light, the Convention imposes certain obligations for the chosen court of a Contracting State to apply including i) the chosen court shall hear the dispute unless such a jurisdiction clause is null and void under the law of that Contracting State;³⁷ ii) the chosen court must not reject its jurisdiction on the ground that another court is more suitable to hear the disputes according to the *forum non conveniens* principle.³⁸ In contrast, this issue is silent under Thailand's current legal regime; however, it can be observed from several rulings of the Thai Supreme Court as discussed previously that a Thai court could exercise its jurisdiction to hear the disputes between the parties on the ground of a competent court regardless whether it was designated as a chosen court or not.³⁹

Thus, in consideration of the holdings of the Thai Supreme Court in the aforementioned cases, it can be inferred that if a Thai court is chosen by parties' choice to hear their dispute, such a court can exercise its jurisdiction so long as it is a competent court as set forth under Thai CPC. According to Thai CPC section 4 (1), it sets forth the scope of a Thai court's

³⁷ The Hague Convention on Choice of Court Agreements, art 5 (1)

³⁸ *ibid.*, art 5 (2)

³⁹ The Decisions of the Thai Supreme Court (n 12), (n 14), and (n 20)

jurisdiction to hear a case based on two primary concepts including the place where the defendant has domicile and the place where the cause of action arises.⁴⁰ Additionally, aside from these two basic jurisdictional rules, Thai CPC also sets forth several conditions as the extension of the Thai court's jurisdiction.⁴¹ In this light, if a Thai court is chosen as an exclusive jurisdiction, and it appears to be a competent court under the provisions of Thai CPC, the author views that there will not be an issue for Thai court to deny the validity of jurisdiction clause.

However, an interesting question to be raised here is whether a Thai court as a chosen court will refuse to hear parties' claim if it is not a competent court according to the jurisdictional rules under Thai CPC. Although the current Thai law and practice are silent on this issue, the author views that if Thailand accedes to the Convention and decides not to adjudicate parties' claim due to the lack of authority pursuant to the provisions of Thai CPC, it will be contrary to the obligation of the chosen court under article 5 of the Convention. In order to avoid this contradiction, it is suggested that Thailand may make a declaration according to article 19 of the Convention, which grants a Contracting State to exempt from exercising its jurisdiction as a chosen court pursuant to parties' exclusive choice clause provided that its court does not have any connection with the dispute or the parties. In this light, the author views that upon making such a declaration, a Thai court, as a chosen court, will not only be able to limitedly exercise its jurisdiction within the scope of jurisdictional rules under its Thai CPC, but it will also avoid creating any conflict with the Convention.

3.4 Obligations of the Non-Chosen Court

In addition to the obligations of the chosen court, the Convention also imposes certain obligations to the court of other Contracting States that

⁴⁰ Civil Procedure Code B.E. 2477 (1934), s 4 (1)

⁴¹ *ibid.*, s 3, s 4 bis, and s 4 ter

is not designated by the choice of court agreement, which is deemed to be a non-chosen court under the Convention. The main obligation of the non-chosen court under the Convention is not to perform litigation proceedings if the parties have agreed to designate the other court to hear their disputes.⁴² Although the Convention does not permit a non-chosen court to assert its jurisdiction over the dispute between the parties, several exceptions are set forth under the Convention, which allows the non-chosen court to exercise its jurisdiction in lieu of the chosen-court under the certain circumstances including i) the jurisdiction clause is null and void under the law of the chosen court,⁴³ and in this light a non-chosen court is entitled to decide the validity of a choice of court agreement by applying the law of the state of the chosen court.⁴⁴

Additionally, a non-chosen court is allowed to apply its own law to determine whether the parties are capable to conclude the choice of court agreement⁴⁵ and whether giving effect to a jurisdiction clause would provide manifest injustice or may be contrary to public policy of its country.⁴⁶ The Convention further grants the non-chosen court to apply its own rules in the event that an exclusive choice of court agreement cannot be reasonably performed,⁴⁷ and as for the last exception, a non-chosen court is entitled to hear the case provided that the chosen court has decided not to hear such a dispute.⁴⁸

In comparison to the Convention, Thailand's judicial practice has principally recognised parties' choice on designating a foreign court to hear their dispute;⁴⁹ however, it is further required that the chosen court had to

⁴² The Hague Convention on Choice of Court Agreements, art 6 para 1

⁴³ ibid., art 6 (a)

⁴⁴ ibid., art 6 (a)

⁴⁵ ibid., art 6 (b)

⁴⁶ ibid., art 6 (c)

⁴⁷ The Hague Convention on Choice of Court Agreements, art 6 (d)

⁴⁸ ibid., art 6 (e)

⁴⁹ The Decision of the Thai Supreme Court no. 951/2539 (1996 A.D.) (n 12)

have some connections with the parties or disputes.⁵⁰ In this light, the author views that such a requirement enables a Thai court acting as a non-chosen court's role to decide whether to uphold or deny parties' jurisdiction clause, which is considered to conflict with the obligation of the non-chosen court as imposed by article 6 of the Convention. Nevertheless, although the Thai Supreme Court in this case does not expressly state the reasons for requesting a connection between the chosen court and the parties or disputes, it can be assumed that there are two possible reasons behind for such a requirement. First, a Thai court as a competent court would be more suitable to hear the case than the chosen court under the circumstances that the parties or evidence related to the case are located in Thailand. Secondly, when a Thai court exercises its jurisdiction in lieu of the chosen court, it could assure that such a dispute would be decided in accordance with its domestic law and its public policy.

In consideration of the above concerns, the author views that these issues can be properly settled under article 6 of the Convention, which provides several exceptional rules enabling a non - chosen court to fully examine the validity of choice of court agreement. In this light, a Thai court as a non-chosen court is permitted to inspect the validity of jurisdiction clause by applying not only a chosen court's law but also Thai law to decide whether a jurisdiction clause designating a foreign court to hear the dispute will give rise to manifest injustice or will be contrary to Thailand's public policy.⁵¹ Furthermore, the Convention also allows a Thai court to assert its jurisdiction over the dispute in the event that the jurisdiction clause is null and void.⁵² Thus, the author views that the Convention provides more room for the Thai court to be able to censor the validity of the choice of court agreement and assert its jurisdiction although its role is deemed as the non-chosen court under the Convention.

⁵⁰ ibid

⁵¹ The Hague Convention on Choice of Court Agreements, art 6 (c)

⁵² ibid., art 6 (a)

Considering the above analysis, it is suggested that when Thailand is acting as a non-chosen court, it should not apply the requirement of the connection between the chosen court and parties or the dispute to determine the validity of the choice of court clause. This will not only correspond with the obligation of the non-chosen court as imposed by article 6 of the Convention, but it will also enhance the party autonomy doctrine under the private international law to be fully recognised by the Thai court, and this could mean that pursuing an international commercial lawsuit in Thailand will be more predictable and less complicated to some extent. More importantly, it will also boost the confidence of foreign investors in doing their businesses in Thailand as they are able to access to more efficient and more transparent legal framework upon dealing with their disputes in the Thai court.

3.5 Recognition and Enforcement of the Judgments of the Chosen Court

One of the fundamental concepts of the Convention is to ensure that the ultimate judgment rendered by the chosen court pursuant to the choice of court agreement is recognised and enforced by the court of other Contracting States. Hence, the Convention imposes general obligations on the non-chosen court that when it is requested to recognise and enforce a judgment rendered by the chosen court, it shall recognise and enforce such a judgment and may not review the merits of the judgment unless the decision of the chosen court was given by default.⁵³ However, the Convention sets out several exceptional grounds allowing a requested court to exempt from such obligations under the following circumstances including i) the choice of court agreement was null and void under the law of the chosen court;⁵⁴ ii) the parties are incapacity under the law of the

⁵³ The Hague Convention on Choice of Court Agreements, art 8

⁵⁴ *ibid.*, art 9 (a)

requested court;⁵⁵ iii) the judgment was involved the defective service of process,⁵⁶ fraud,⁵⁷ or incompatible with public policy of the requested court;⁵⁸ iv) the judgment is inconsistent with a judgment given in the requested court to the same parties;⁵⁹ and v) the judgment rendered by the chosen court involving the same parties and the same cause of action decided by the earlier judgment of another foreign court is inconsistent, which the earlier judgment has fulfilled the specified conditions of recognition in the requested state.⁶⁰

Nevertheless, in regard to Thailand's current legal regime, there are no specific rules for a Thai court to apply when dealing with the recognition and enforcement of foreign judgments. However, in reference to the decision of the Thai Supreme Court no. 585/2461 (1918 A.D.), the recognition and enforcement of foreign judgments in Thailand can be based on the two principles. First, the judgment must be given by the court of competent jurisdiction. Secondly, the judgment must also be final and conclusive on the merits of the case.

In comparison to Thailand's current legal regime on the recognition and enforcement of foreign judgments, article 9 of the Convention not only covers the two principles in accordance with the decision of the Thai Supreme Court no. 585/2461 (1918 A.D.) but also provides several exceptional rules for a requested court to apply prior to giving effect to a judgment rendered by a chosen court. As a result, the author views that in the event that Thailand accedes to the Convention, the provision of the Convention is compatible with Thai court's practice. More importantly, article 9 of the Convention also provides several exceptions enabling the Thai court to deny the recognition and enforcement of the judgment of the

⁵⁵ ibid., art 9 (b)

⁵⁶ ibid., art 9 (c)

⁵⁷ ibid., art 9 (d)

⁵⁸ ibid., art 9 (e)

⁵⁹ ibid., art 9 (f)

⁶⁰ ibid., art 9 (g)

chosen court. Consequently, the author views that the accession of Thailand to the Convention will not only enhance Thailand's current legal regime to be more predictable and consistent, but it will also promote the reliability role of the Thai court when it comes to making a decision on the recognition and enforcement of the foreign judgments in relation to the international commercial matters.

4. Conclusions and Recommendations

In consideration of the aforesaid analysis, even though the current legal regime of Thailand principally upholds the choice of court agreement, the rules governing the validity of the jurisdiction clause still remain uncertain and unpredictable. In addition, as for the recognition and enforcement of the foreign judgments, Thailand neither has specific rules nor has concluded any international treaty pertaining to this matter. Thus, at present, the practice of the Thai court in dealing with the recognition and enforcement of foreign judgments is also unpredictable. Conversely, the provisions of the Convention concerning the choice of court agreement and the recognition and enforcement of a judgment rendered by the chosen court in relation to disputes arising from the international commercial matters are more definite and more uniform.

In reference to the analysis conducted by this article, it finds that the three fundamental rules imposed by the Convention somewhat contradict to the current legal regime of Thailand; however, these three basic rules are not absolute but rather provide several exceptions that will enable Thailand to make relevant declarations for exemption from applying certain provisions under the Convention in order to complement its current law and practice. As a result, in consideration of the disuniformity and uncertainty of Thailand's current legal regime in dealing with the issues involving the validity of jurisdiction clauses and recognition and enforcement of foreign judgments, the author views that it is high time for Thailand to become a Contracting State to the Hague Convention on the

Choice of Court Agreements by proposing necessary declarations as permitted by the Convention in order that a Thai court will be able to apply a uniform rule that will be compatible with Thai law and practice.

More importantly, the accession of Thailand to the Convention is one of significant steps to promote Thailand's legal regime governing the international commercial transactions to become more internationalized and standardized; particularly such an accession will significantly promote Thailand 4.0 scheme and the EEC project since the application of the Convention in Thailand will boost foreign investors' confidence that their international commercial litigations involving the determination of validity of jurisdiction clause will be governed by the same standard rules as applied in other Contracting States. Significantly, a judgment rendered by a chosen court will primarily recognised and enforceable in Thailand, and by the same token, the judgment rendered by a Thai court will also be recognised and enforceable in other Contracting States to the Convention.

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