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Maritime Arbitration: Thai Laws and Foreign Awards

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Introduction

When it comes to maritime disputes, Thai laws provide special protection to Thai nationals and corporate entities in form of mandatory governing laws, or by restricting Thai courts from making certain rulings. Nevertheless, the Kingdom of Thailand has joined the global trend in ensuring consistency of its arbitration laws with international standards. Disputing parties, including those in maritime disputes, are free to resolve their differences with an arbitral tribunal of their choice.

This article examines the key issues in Thai maritime law and arbitration law, as these two regimes are intertwined when it comes to arbitration of a maritime claim. Arbitral tribunals and legal representatives of disputants should carefully consider key issues in this article in order to ensure enforceability of arbitration awards.

Overview of Thailand's Arbitration Act

Thailand is a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ("**New York Convention**"). Thailand joined the New York Convention in 1959.

The current legislation regulating the enforcement of arbitral awards in Thailand is the Arbitration Act BE 2545 (2002) ("**Arbitration Act**"). By virtue of the Arbitration Act, Thai law only recognizes and enforces foreign arbitral awards rendered in the contracting states of international treaties which the Kingdom is bound.[1] This piece of legislation is based on the UNCITRAL Model Law on International Commercial Arbitration 1985.[2] It should be pointed out that Thailand did not further adopt amendments to the Arbitration Act based on the UNCITRAL Model Law International Commercial Arbitration 1985 with amendments as adopted in 2006.

Therefore, under the Arbitration Act, arbitral tribunals do not have the power to grant interim injunctions. This is in contrast with countries whose arbitration laws have been amended to include the 2006 amendments to the UNCITRAL Model Law which give arbitral tribunals the power to grant interim measures. Section 16 of the Arbitration Act provides that an interim measure may only be imposed only if a party files a motion requesting the competent court to issue an order imposing an interim measure. Therefore, parties arbitrating in Thailand should be aware that even if a tribunal purports to impose an interim measure in Thailand, such an order will not have any legal significance pursuant to the Arbitration Act.

The Arbitration Act has undergone only minor amendments since 2002. For instance, in 2019 the Arbitration Act was amended to permit disputing parties to appoint a foreign arbitrator to conduct the arbitration proceedings in the Kingdom[3] and allows foreign arbitrators to apply for a permit to work in the Kingdom under the applicable law on immigration.[4] Prior to these amendments, foreigners could not be appointed as an arbitrator in Thai arbitral proceedings.

In addition to the above observations, the Arbitration Act also covers general principles in line with international practice standards, for example, parties to an arbitration agreement may agree on the seat of arbitration, the number of arbitrators, the law applicable to the underlying agreement and the arbitration agreement, the arbitration institution, and so forth.

Overview of Maritime Law in Thailand

During the 1990s, Thailand passed several significant maritime laws. This included the Arrest of Ships Act BE 2534 (1991) ("**Arrest of Ships Act**") , the Carriage of Goods by Sea Act BE 2534 (1991) ("**Carrige of Goods by Sea Act**") and the Vessel Mortgage and Maritime Liens Act BE 2537 (1994) ("**Vessel Mortgage and Maritime Liens Act**").

Arrest of Ships Act

The Arrest of Ships Act applies to any seagoing vessel that is used for the international carriage of goods or passengers to Thailand. The Act permits creditors to apply to the Central Intellectual Property and International Trade Court (**"IPIT Court"**). The Act permits the court to order an arrest of a debtor's vessel as security for the debt if the owner or operator of the vessel incurs a civil liability in Thailand.

To exercise this right, one must be a creditor of the owner or possessor of the vessel. The creditor must also be domiciled within Thailand. The law does not have any requirements as to nationality of the creditor.

Among those who may ask the court to order an arrest of a vessel are creditors of salvages, creditors under vessel leases, hire-purchases or loans or similar service agreements, and creditors of claims for the loss of or damage to cargo on board the vessel. Creditors of claims for the loss of or damage to cargo on board the vessel may also be interpreted as creditors.

Nevertheless, the Act does not allow an arbitral tribunal to play a role in the arrest of a debtor's vessel. This is because the Act vests the power to order an arrest of a vessel exclusively with the Court. In practice, an application for an order to arrest a vessel is the matter for the court and the litigating parties, rather than parties to an arbitration. As such, an arbitrators' role is limited by this Act.

Carriage of Goods by Sea Act

The Carriage of Goods by Sea Act defines the rights, duties and liabilities of carriers and shippers in the inbound or outbound carriage of goods by sea. Contract parties may state the governing laws of their choice in the bill of lading. The Act, however, provides a special condition to the effect that, if one of the contract parties is a Thai individual or a corporate entity under Thai law, the Act will always be the governing law.[5] This affords special treatment to Thai parties.

The contract must be construed, and the rights and duties of the parties must be defined, in line with the provisions of Thailand's substantive laws. Consequently, if a dispute over an international carriage of goods by sea is referred to arbitration, the arbitral tribunal may be required to apply Thai substantive law to the dispute. The Act also limits the carrier's liability, in the absence of agreement with the shipper as to such limit, by the operation of law.[6]

In the event of total or partial loss of or damage to cargo, the Act limits the carrier's liability to the higher of THB 10,000 per shipment or THB 30 per kilogram of cargo. The parties cannot contract out of the applicability of the limit. Any agreement to circumvent the limit is void. The parties may, however, provide in a bill of lading a higher limit than that assumed by the law, in which case the limit of liability provision will not apply.

Additionally, the carrier cannot cite the legal limit of liability if the cargo damage is caused by an act of dishonesty perpetrated by themselves or any of their employees or agents.[7]

In a dispute over the carriage of goods by sea that involves one or more Thai individuals or entities, the arbitral tribunal needs to ensure that the substantive law applied to the matter is Thai law and to consider the carrier's rights and limit of liability under Thai law, so as to avoid recognition and enforcement issues of the arbitral award in Thailand.

Vessel Mortgage and Maritime Liens Act

The Vessel Mortgage and Maritime Liens Act was introduced following the Thai government's decision to issue a special law to deal with maritime liens and mortgages in place of the provisions governing vessel mortgages because Thailand's Civil and Commercial Code were deemed to be unsuitable for maritime issues. This Act applies to vessels of 60 gross tons or more which qualify as a seagoing vessel under the laws governing navigation in Thai waters.

According to the Act, for a vessel to be registered for a mortgage in Thailand, it must have Thai nationality.[8] A foreign vessel cannot be mortgaged under Thai law. However, the Act recognizes the mortgage of a foreign vessel that may have been registered elsewhere by the foreign vessel owner as security for a debt in favor of a third party, and, in the event of enforcement or claim of any of the mortgagee's rights under the Act, the mortgagee will enjoy that right under Thai law.[9]

Recognition and Enforcement of Foreign Arbitral Awards in Thailand

Under the Arbitration Act, the parties to an arbitration agreement may refer a dispute to an arbitral tribunal and pursue arbitration proceedings, whether the seat of arbitration is determined to be Thailand or abroad. That is, the Thai Arbitration Act treats all arbitral awards, whether foreign or Thai, the same. Recognition and enforcement of arbitral awards are based on the same standards under sections 43 and 44 of the Arbitration Act.

In brief, the Arbitration Act provides that the court may not enforce the arbitral award if any disputing party can prove that:

1. Either party is legally incompetent;
2. The arbitration agreement is invalid under the law of the arbitration agreement and seat;
3. The disputing parties cannot proceed with arbitration because no notice of arbitrator appointment or the proceedings were given;
4. The award contains decisions beyond the scope of the issues submitted to arbitration;
5. The composition of the arbitral tribunal falls beyond the scope previously agreed by the parties; or
6. The arbitral award is annulled by the competent court of the seat of arbitration.

Additionally, if in the court's opinion, (1) the dispute is not arbitrable; or (2) the award contradicts the public policy of Thailand, the court may refuse to recognize the arbitral award. The issue of public policy is a key argument that is often raised by a party objecting to the enforcement of the award. As such, relevant precedent Supreme Court judgments should be considered when determining whether an award is in fact contrary to public policy.

One example of a Supreme Court Judgment in respect of public policy is Supreme Court Judgment No 6292/2561. In this case, the arbitral tribunal ruled that the losing party had to pay interest at a rate higher than that stipulated by Thai law. This award was considered contrary to the public policy of Thailand. The Supreme Court ruled that an interest rate higher than the statutory rate under Thai law is not applicable. However, other sections of the award that were not contrary to the Thai public policy remained enforceable.

In the same in 2018, the Supreme Court ruled in Judgment No 4750-4751/2561 that an arbitral tribunal's exercise of its discretion when determining the weight of evidence in relation to the interpretation of penalty and compensation clauses in a construction contract, was not contrary to the basis of the law on arbitration, and was not contrary to public policy. On this basis, the Supreme Court refused to overturn the award and thus found that the award remained enforceable.

Institutional vs Ad Hoc Arbitration

Thailand's Arbitration Act does not restrict the form that an arbitration should take. The parties may choose to have their dispute resolved either by arbitration at an arbitration institute (institutional arbitration) or by one or more arbitrators who are nominated by themselves, provided the nominated arbitrators decide on the dispute impartially, independently and in compliance with the applicable legal requirements (ad hoc arbitration).

Thai courts generally will not intervene in any institutional or ad hoc arbitration.

Despite the fact that Thai courts will not intervene in institutional or ad hoc arbitrations, choosing an institutional arbitration will reduce the possible conflicts over legality of proceedings (for example issues concerning equal treatmen and the full opportunity to present evidence under section 25 of the Arbitration Act).

Institutional arbitration can also prove more convenient, as institutes have their own rules of arbitration that provide clear procedural guidelines to be followed by the parties and the arbitrators. This will help ensure a fair hearing and inspire the parties' confidence that their procedural rights will be fully protected. Moreover, the use of institutional arbitration can reduce the chance that a party will request the court to set aside or refuse to enforce the award.

Status in Thailand of an SCMA award

The Thai court will decide whether to recognize and enforce an award rendered under SCMA's auspices by consulting sections 43 and 44 of Thailand's Arbitration Act.

As Thailand's substantive laws on maritime affairs (such as the Carriage of Goods by Sea Act) are *jus cogens* (that is, mandatory laws), the tribunal will always need to apply such laws when rendering an award, so that the rights, duties and liabilities of the parties are determined in accordance with the substantive laws of Thailand.

The upshot of this means that arbitral proceedings must be conducted with the above mentioned *jus cogens* in mind to ensure a streamlined enforcement of an SCMA award in Thailand.

[1] Section 41 of the Arbitration Act.
[2] Arbitration: theory and practice, Chaiwat Bunnag, page 2.
[3] Section 23/1 of the Arbitration Act.
[4] Section 23/2 of the Arbitration Act.
[5] Section 4 of the Carriage of Goods by Sea Act.
[6] Section 58 of the Carriage of Goods by Sea Act.
[7] Section 60(1) of the Carriage of Goods by Sea Act.
[8] Section 11 of the Vessel Mortgage and Maritime Liens Act.
[9] Section 21 of the Vessel Mortgage and Maritime Liens Act.

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