

# Kluwer Arbitration Blog

## Thai Administrative Court Overturns an Arbitration Award against the Government

Vanina Sucharitkul (University of Paris Descartes) · Thursday, October 9th, 2014 · Herbert Smith Freehills

### Introduction

On 13 March 2014, Thailand's Central Administrative Court annulled an arbitration award in the case between Hong Kong-based Hopewell Holding and the Thai Ministry of Transport ("MoT") and State Railway of Thailand ("SRT"). The dispute arose out of a 30-year concession dating back to 1990 to build a 60-km elevated highway and rail line from central Bangkok to Don Mueang International Airport (the "Hopewell Project").

From its inception, the project was riddled with difficulties and criticisms on design changes, approvals and access to site, delays, financing, and allegations of impropriety. In 1992, construction was suspended and after the collapse of the Thai property market and currency devaluation during the 1997 Asian economic crisis, the project was terminated in 1998. With less than 20% of the work completed, the 500 concrete-pillar remains of the abandoned Hopewell Project are often described as Bangkok's version of "Stonehenge".

### Arbitration Award and Proceedings to Set Aside

On 30 September 2008, an arbitration tribunal under the auspices of the Thai Arbitration Institute ruled in favour of Hopewell and ordered the MoT and SRT to pay Thai Baht 12 billion, being USD 351,131,815 plus 7.5% annual interest as compensation for wrongful termination of the concession.

The state agencies challenged the award on multiple grounds including allegations that the tribunal exceeded its scope of authority and that the ruling on contract termination was ultra vires. The Administrative Court eventually decided to annul the award on the basis that the claim was barred by prescription (time limitation).

Hopewell had commenced arbitration on 24 November 2004, over six years after the contract termination on 30 January 1998. At the time the dispute arose, no specific statute of limitations existed for breach of contracts with government entities. The default prescription period of 10 years thus applied and Hopewell would have had until January 2008 to bring claims under the concession agreement. The arbitration had started well within that time limit.

However, the court ruled that the five-year prescription period introduced for certain state contracts

by the Act on the Establishment of Administrative Courts and Administrative Court Procedure in 1999 (i.e. after the contract termination) applied to the matter. This determination effectively reduced Hopewell's timeframe within which to bring suit by half. Under the Administrative Act, the claimant should have instituted arbitration by 30 January 2003. As Hopewell commenced arbitration on 24 November 2004, its claim was time-barred. The Court confirmed that prescription periods were a matter of public policy and on this basis, annulled the award.

Hopewell appealed the decision on 9 April 2014 to the Supreme Administrative Court.

### **The Thai Court's Attitude toward Arbitration involving State Parties?**

The Hopewell case follows a series of cases in the past decade where the Thai courts have broadly interpreted public policy in order to set aside awards against state entities.

In 2006, the Supreme Administrative Court annulled an arbitration award in a high-profile case brought by television station ITV against the Office of the Prime Minister for breach of an amended concession provision prohibiting other concessionaires from advertising on its television station. The Court found that the amended concession provision was not legally binding as the process for amendment did not comply with certain government regulations. The Supreme Administrative Court ruled that the concession provision contravened public order and thus, the enforcement of the award would violate public policy.

In 2007, the Supreme Court overturned the Civil Court's enforcement of the USD 202 million-award against the Expressway and Rapid Transit Authority ("ETA") upon finding evidence of bribery and numerous conflicts of interest. The Supreme Court concluded that the underlying agreement was contrary to public order and good morals, and therefore the award was against public policy.

The picture is not entirely bleak; indeed, the Central Administrative Court has enforced a THB 9-billion arbitration award against the Pollution Control Department for breach of contract for the construction of a wastewater treatment system on 9 November 2012. The court enforced the award despite allegations of corruption, criminal charges and convictions of a high-ranked official. The matter is pending appeal.

Despite some reassuring decisions, the occasionally broad and unexpected interpretation of public policy by the Thai courts has led to some surprising and unpredictable results. This mixed outcome might lead investors to question the viability of using arbitration to resolve cases involving state parties. This concern is exacerbated by government measures to restrict recourse to arbitration in state contracts.

On 27 January 2004, following the award in the ETA case, the Thai Cabinet passed a resolution restraining state agencies in any administrative contracts, including concession agreements, from agreeing to settle disputes by arbitration without prior authorization or approval from the Cabinet. The 2004 resolution was later extended in 2009 after the award in the *Walter Bau v. the Kingdom of Thailand* case to forbid in principle, any contract concluded by the government and a private party, (Thai or foreign) from containing an arbitration clause, unless approved by the Cabinet on a case-by-case basis. While cabinet resolutions do not have the effect of binding law, they reflect government policy and are invariably observed by the public sector. In practice, the Thai government has permitted the inclusion of arbitration clauses in some public sector contracts, at least in cases where the counter party has sufficient bargaining power.

Until the Thai government's attitude toward arbitration as a dispute resolution mechanism changes, uncertainties in enforcement proceedings will continue. It remains to be seen in the pending Hopewell appeal how the Supreme Administrative Court will rule. Will there be a trend toward annulment of awards against the public sector entities in Thailand?

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