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The Kingdom of Thailand And International Arbitration – Ending The Journey On A Winding Tollway?

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The approach of the Kingdom of Thailand to international arbitration has undergone significantly different phases over time. These phases have ranged from support to scepticism. Recent developments, however, may signal a bright future for international arbitration in the Kingdom of Thailand and possibly the end of the journey on a winding tollway.

The Kingdom of Thailand is by no means new to the international arbitration arena. It is a difficult endeavor to trace back the first use of arbitration in the country to a specific time. Nevertheless, there is broad consensus among scholars that the Code of the Three Great Seals of 1805 constitutes the first formal legal text incorporating arbitration under the reign of King Rama I. The Kingdom of Thailand is also a contracting state to the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and the succeeding New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Furthermore, it has signed – but not yet ratified – the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the "**ICSID-Convention**") on 6 December 1985. In both, international commercial and investment arbitration, the Kingdom of Thailand has thus for almost a century been an active player.

In 1987, the initial Thai Arbitration Act B.E. 2530 (the "**First Arbitration Act**") was passed, paving the road for modern international arbitration's winding journey in the Kingdom of Thailand. Scholars and practitioners largely criticized the First Arbitration Act. It did not fully reflect the principles and practices of modern international arbitration contained in the UNCITRAL Model Law of 1985 and was thus accordingly reviewed and updated. The result of the subsequent amendment process was the 2002 Thai Arbitration Act B.E. 2545 (the "**Second Arbitration Act**"). Interestingly, the Second Arbitration Act was already motivated by governmental policies of inviting foreign as well as domestic investments. It rested on the observation that international arbitration had developed and would further develop as the primary means of dispute settlement between commercial parties, particularly those engaged in cross-border activities. The era of modern international arbitration with governmental support in the Kingdom of Thailand, it appeared, had begun.

In 2004, however, the Thai Cabinet issued a resolution that banned the use of arbitration in concession agreements after the Rapid Transit Authority of Thailand was ordered to pay compensation amounting to 6.2 billion Thai baht in the context of an international arbitration. The development of international arbitration then encountered another major setback with the issuance of an award in 2009, amounting to €29.21 million rendered against the Kingdom of Thailand in the well-known investment arbitration brought by the German Walter Bau AG (*Werner Schneider (liquidator of Walter Bau) v. Kingdom of Thailand*). At the core of the dispute laid the construction and operation of the Don Muang tollway, connecting Bangkok and the Don Muang airport. The Thai Cabinet subsequently issued a resolution that completely banned the use of arbitration in government contracts, if the Cabinet would not approve otherwise. The step was a bold attempt in preventing future successful compensation claims arising out of arbitrations brought against the Kingdom of Thailand. Nevertheless, foreign investors were watching the actions of the Thai government closely and were likely to have done so in discomfort.

The policy responses given by the Thai Cabinet were, especially in the realm of international investment arbitration, not uncommon. The initiation of arbitral proceedings by the Swedish energy company Vattenfall against Germany in 2009, for example, has sparked broad public attention. The dispute continues to shape the current debate and European policies on the design of an investor-state-dispute-settlement mechanism in the Transatlantic Trade and Investment Partnership (TTIP). It appears that the steps taken by the Thai Cabinet have not only adversely affected the perception of foreign investors of the country's attitude towards international investment arbitration. Rather, they have harmed the more general perception of the Kingdom of Thailand as an arbitration-friendly jurisdiction.

Recently, however, the Kingdom of Thailand has taken a number of steps that may over time change investors' perception of international arbitration in the country to the positive. Firstly, on 29 March 2012, the ASEAN Comprehensive Investment Agreement (the "**ACIA**"), to which the Kingdom of Thailand is a party, entered into force. Its goal is to improve the investment environment within the ASEAN community and thereby support its dynamic future development. For that purpose, Art. 24 of the ACIA particularly sets out a number of measures explicitly to strengthen foreign investments into ASEAN as well as intra-ASEAN investments. At the same time, Art. 33 of the ACIA provides, apart from court litigation, for international arbitration as a means to resolve investment disputes under the ICSID-Convention, the UNCITRAL Arbitration Rules, at the Regional Centre for Arbitration in Kuala Lumpur or any other arbitration institution. Given that the Kingdom of Thailand has not yet ratified the ICSID-Convention, however, it is still excluded from respective arbitration pursuant to Art. 33 (1)(b) of the ACIA. Nevertheless, the ACIA has clearly helped to re-position the Kingdom of Thailand as an arbitration-friendly jurisdiction.

Secondly, Thai courts have shown an increasing willingness in enforcing arbitral awards, similarly demonstrating a more arbitration-friendly attitude (see e.g. the Thai Supreme Administrative

Court's decision to enforce an award rendered against the Pollution Control Department – Case No. Or. 487/2557). Thirdly, the establishment of the Thailand Arbitration Center (the "**THAC**") marks yet another move towards greater arbitration friendliness. Its goal is to become the centre of arbitration within ASEAN. Lastly, as was recently highlighted by Gavin Margetson and Vanina Sucharitkul, the Thai Cabinet has chosen to ease the restrictions placed upon the use of arbitration clauses in government contracts on 14 July 2015. Only public-private-partnership agreements, concession agreements and contracts requiring Cabinet approval under the Royal Decree of 2005 continue to be subject to the restrictions.

It is conceivable that the latest steps of the Kingdom of Thailand in supporting the use of international arbitration are motivated by an impressive increase of foreign direct investments into the country. Pursuant to the United Nations – Economic and Social Commission for Asia and the Pacific ("**UNESCAP**"), foreign direct investments have increased by 135% between 2012 and 2014 compared to the years 2009 and 2011. The report particularly points not only to the apparent positive effect of ASEAN generally, but most interestingly to the ACIA, which "*has been instrumental in attracting increased FDI inflows*" (UNESCAP Asia pacific Trade and Investment Report 2015, pp. 41 et seq.). While a possible causal link between foreign direct investment and investment protection through the use of international arbitration remains at the heart of a heated debate, the example of the Kingdom of Thailand at least indicates that the use of international arbitration as a means to resolve investment disputes is a successful part of modern investment protection.

From the perspective of international investors, these developments will be greatly appreciated. They provide assurance that the Kingdom of Thailand is committed to offering an investment environment in which the well-known advantages of international arbitration may be fully taken advantage of. By adjusting the practices of international arbitration to the existing international benchmark, the Kingdom of Thailand will allow investors to focus on the tremendous resources and potential of the country rather than legal pitfalls when carrying out business.

The Kingdom of Thailand does therefore appear to have found its direction on the road to a competitive international arbitration standard. In this context, it must be borne in mind that an arbitration-friendly attitude of local courts, modern arbitration laws or a ratification of the ICSID-Convention do not provide a comparative advantage towards other economies. Rather, such attributes constitute the existing international arbitration benchmark in most of the countries that the Kingdom of Thailand is directly competing with. A negative deviation from these standards may thus rather be described as a comparative disadvantage. For the Kingdom of Thailand, it is all about levelling the international arbitration playing field. With its most recent approach, however, the country is on a positive track that has quite rightly been termed "*a new dawn for arbitration in Thailand*" (Gavin Margeston/Vanina Sucharitkul, 25 November 2015).

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