

VOYAGEUR



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Selected Thoughts about the Governing Law Issue in Thailand

Using a law other than Thai law as the governing law of a contract performed in Thailand is an issue often asked about by clients and potential investors. This article demonstrates that the issue is in practice complex, and expert legal advice should be sought having regard to the particular circumstances of the matter at hand.

What the Law Says

In practice a judgment obtained in a foreign court cannot be enforced directly in Thailand. A matter litigated in a foreign court will need to be re-litigated on the merits in a Thai court, with the foreign judgment having merely evidentiary value. Thus choosing, for example, Singapore law as the governing law of a contract, with disputes to be resolved by the Singapore courts, may not be appropriate if in fact the contract is to be performed in Thailand and/or a related judgment would need to be enforced against a party (or their assets) in Thailand.

The basic provisions pertaining to the adoption of a foreign governing law in Thailand are established by the Conflict of Laws Act (1938) which states that the applicable law of a contract is determined by the intention of the parties. If the intention is not explicit, the governing law should be either the law of the parties' nationality or, in case parties

are of different nationality, the law of the place where the contract is deemed to have been made. If it is not possible to identify the place where the contract was made, the contract should be ultimately governed by the laws where the contract is to be performed.

However, the general principle that applies is that a foreign law may be the governing law in a Thai-related contract only if it is not in conflict with the "public order and good morals" of Thailand. Furthermore, the content of the foreign law must be proved to the satisfaction of the Thai court, through the use of experts. This means that the adoption of a foreign governing law may not be practicable.

Ensuring that laws from another jurisdiction do not conflict with "public order" and "good morals" is a challenging task, because the terms "public order" and "good morals" remain largely undefined by law or judicial reasoning, but have in practice been interpreted broadly by Thai courts.

Practicalities

There are thus risks in adopting a foreign governing law in a Thai related contract. If the contract is to be enforced in Thailand, the Thai courts will:

- need to be provided with evidence of the meaning of the foreign law, failing which they may apply Thai law, (with potentially unintended consequences); and
- determine that there is no conflict with "the public order and good morals" (failing which the relevant portion of the contract may be unenforceable).

For this reason, foreign parties wanting to have their contract governed by a law other than Thai law often choose dispute resolution by arbitration in a foreign country. As Thailand is a party to the NY Convention on the Recognition of Foreign Arbitral Awards, the enforcement of foreign arbitral awards in Thailand does not give the Thai courts the same level of latitude to look into the merits of the case as they can with foreign court judgments, though they will refuse to enforce the award if to do so would be against public policy.

Irrespective of the selected governing law, Thai law will in any event apply to matters requiring compliance with certain regulatory requirements such as in relation to local registration requirements for the purpose of completion of the contract's performance. This would be the case with any transaction involving immovable assets or with corporate formalities in respect of a company incorporated in Thailand.

Considering all the risks mentioned in this article, innovative drafting of the governing law clause may be necessary if a foreign law is adopted as the governing law of a contract related to Thailand.

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