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1. Introduction

In Thailand, a draft Act on Settlement of Disputes regarding Payment in Construction Contracts¹ (the “**Draft Act**”) which features a statutory adjudication process for construction disputes² has been prepared by the Thailand Arbitration Center (“**THAC**”) and has been submitted to the Ministry of Justice of Thailand (“**MOJ**”) for their deliberation.³ Statutory adjudication regimes exist in several other countries, notable of which are the United Kingdom, Australia, New Zealand, Malaysia, Singapore, and Ireland. If enacted, the Draft Act is likely to be the first statutory adjudication legislation in Civil Law jurisdictions.

This newsletter will analyse key aspects of the Draft Act.

2. Key aspects of the proposed Thai statutory adjudication regime

The proposed Thai statutory adjudication regime, similar to statutory adjudication regimes abroad, aims to ensure cash flow of contractors (including subcontractors). Some critical issues that the Draft Act addresses, are (i) the voiding of pay-when-paid and pay-if-paid clauses; (ii) the quick resolution of payment disputes between parties, and (iii) the giving of judicial effect to a determination rendered by an adjudicator.

(1) Voiding of pay-when-paid and pay-if-paid clauses

Generally, “pay-when-paid” clause refers to a mechanism which delays the timing for a main contractor to pay a subcontractor. “Pay-if-paid” clause refers to a mechanism which makes the main contractor’s obligation to pay a subcontractor dependent on the main contractor being paid by an employer.

¹ The version of the Draft Act analysed by authors not qualified in Thailand is not the official English translation.

² This Draft Act is intended to be applicable to the construction contract with written evidence, where all or part of the performance under such construction contract is done in Thailand, regardless of whether the law of Thailand is designated as a governing law of such construction contract, according to section 5 of the Draft Act.

³ Currently, the MOJ is thoroughly studying the Draft Act. In addition, the MOJ is to pass the Draft Act for further adjustment and revision by the Office of the Council of State of Thailand, a government authority providing legal advice to Thai state agencies.

Section 8 of the Draft Act has been drafted widely such that most (if not all) pay-when-paid clauses and pay-if-paid clauses will be voided. Pay-when-paid and pay-if-paid clauses, when included in construction contracts, serve to either delay the time for the subcontractor to receive payment for work done, or to make the subcontractor's right to receive payment for work done conditional upon an upstream contractor receiving payment for the relevant work done by a downstream subcontractor. Such clauses commonly result in cash-flow issues, as a downstream subcontractor would often not be aware of when the upstream contractor receives payment. The downstream subcontractor is likely to suffer cash flow problems if the payments from the employer to the upstream contractor is being delayed or withheld. The voiding of pay-when-paid and pay-if-paid clauses would better secure downstream subcontractors' right to payment for work done, and not leave downstream subcontractors to the mercy of their upstream contractors and the employer.

If section 8 of the Draft Act is enacted, it is likely that downstream subcontracts will have to be amended and/or revised to take into consideration the voiding of pay-when-paid and pay-if-paid clauses.

(2) Quick resolution of payment disputes between parties

Another fundamental feature of the Draft Act is that it allows a creditor to initiate adjudication processes at a registered institute (e.g. THAC) if a debtor fails to make payment in accordance with a demand notice. Upon receiving the claim for payment, the registrar of the institute must appoint an adjudicator and the adjudicator must issue a determination

Attention should be drawn to the short timelines in which parties are required to respond to claims, and the time frame in which the appointed adjudicator must issue the determination. Under section 23 of the Draft Act, the respondent to a claim must submit his statement of defence within 7 days from the date of receipt of the notice that a statement of claim has been filed against the respondent.

There are two alternative timelines for the adjudicator to submit a determination, the first timeline is pursuant to section 32(1) of the Draft Act, where the adjudicator shall submit a determination to the Registrar of the relevant institute within 7 days from the date of the commencement of the adjudication process (i.e. when the claimant has filed the statement of claim) if the respondent (i) has not made a written objection to the amount under the relevant construction contract, and has not made an objection within the specified period, or (ii) has not made payment under the construction contract accepted by the claimant within the specified period.

The second timeline is pursuant to section 32(2) of the Draft Act, where in any other case, the adjudicator shall submit a determination to the Registrar of the relevant institute, within 14 days from the date of the commencement of the adjudication process. The timelines pursuant to sections 32(1) and 32(2) may be extended if the disputing parties agree upon the request of the adjudicator before the expiration of the prescribed timelines.

The quick resolution of payment disputes between parties recognises the importance of cash flow in the construction industry, and is a fundamental feature to almost all statutory adjudication regimes. At the public hearing on the Draft Act held by THAC, some participants raised concerns regarding the short timeline for a respondent to prepare a statement of defence. While this may, at first glance, appear to be a concern, short timelines for respondents to respond with their objections are not uncommon, and exist in jurisdictions such as New South Wales, Malaysia, and Singapore.

(3) Judicial effect of a determination rendered by an adjudicator

One further critical aspect to the proposed Thai statutory adjudication regime is for the adjudicator's determination to be enforceable. In the event that payment is not made within the timeframe as specified in the determination, the claimant would, on application to the relevant institute pursuant to sections 40 and 41 of the Draft Act, be able to obtain the right to enforce the determination against the debtor's assets in a similar way as a writ of execution pursuant to section 42 of the Draft Act.

Here the Draft Act addresses an important issue, as even if the claimant obtains an adjudication determination, sometimes there may be no recourse for the claimant to obtain payment. Granting the claimant the right to enforce the adjudication determination in a similar fashion as a writ of execution provides the claimant an additional layer of protection, and may also act as a deterrent against upstream contractors who may wish to avoid making payment for legitimate claims by their downstream subcontractors.

3. Conclusion

With the implementation of a statutory adjudication regime for construction contracts, Thailand poises herself to be in a position where the interests of the stakeholders in the construction industry are safeguarded. A statutory adjudication regime would promote the rule of law and may prevent errant upstream contractors from taking advantage of downstream subcontractors.

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