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Emergency Interim Measures in Thai Arbitration

Interim measures are necessary to protect the interests of a claimant in arbitral proceedings when speed is required in obtaining emergency interim relief. In many cases, urgent situations occur even before the filing of a notice of arbitration and the appointment of arbitrators. The institutional rules of the International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), and Hong Kong International Arbitration Centre include provisions for the appointment of an emergency arbitrator (EA) to handle such emergency situations, and the EA is able to grant interim measures in situations where the arbitrator or the parties have not yet appointed an arbitral tribunal.

Emergency Arbitrator under Thai Arbitration Law

The concept of an EA has not been incorporated into the rules of the Thai arbitral institutions, the Thailand Arbitration Institute (TAI) and the Thailand Arbitration Center (THAC). However, Thailand's Arbitration Act B.E. 2545 (2002), which governs both domestic and international arbitration, does provide an interim mechanism under section 16, which allows arbitral applicants who have not yet filed a notice of arbitration to petition the court for interim measures, under the condition that, if the court orders accordingly, the applicant has to proceed with the arbitration within 30 days of the date of the order. Failure to initiate the arbitration causes the interim measures to be automatically revoked. Section 16 also allows an arbitral party that requires protection of their interests during pending proceedings to obtain interim measures. Thai courts will apply the Civil Procedure Code in respect of interim measures or emergency injunctions when considering whether to issue interim measures for the requesting party in the arbitration case, and if the court does grant interim measures, the requesting party will likely be ordered to put up a security fund accordingly.

Issuing Interim Measures in Thailand

Section 16 of the Thai Arbitration Act clearly states that the competent Thai court can issue interim measures, but the law is silent on whether an arbitral tribunal can do the same. To our knowledge, arbitrators have never granted an order or provisional award for interim measures in Thailand, regardless of the institutional rules being used in the arbitration. There could be two reasons. One is that the parties may have gone straight to the court to make such a request, as stipulated in section 16 of the Thai Arbitration Act; or the arbitrator could have recommended that the requesting party seek assistance from the court, which has the power to enforce interim measures as well, whereas the Supreme Court has apparently never ruled on the enforcement of an arbitral tribunal's order on interim measures.

In the international context, the UNCITRAL Model Law on International Commercial Arbitration confirms that "an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the compe-

tent court, irrespective of the country in which it was issued." It is very common for an arbitral tribunal to issue interim measures, which the local court can enforce accordingly. This seems to be contrary to Thailand's situation, where the court holds the power to issue interim measures in the arbitral proceedings and enforce them.

In 2017, the TAI issued a new version of its arbitration rules. Article 39 of the 2017 TAI Arbitration Rules stipulates clearly that an arbitral tribunal may grant interim measures upon a party's request. Article 39 also provides that a request to the arbitral tribunal for interim measures does not affect the right of the party to petition a court for interim measures as well. This is the first official indication that section 16 of the Thai Arbitration Act does not prevent the arbitral tribunal from issuing interim measures—in other words, that an arbitral tribunal in Thailand can issue interim measures. A local practitioner, though, would still recommend petitioning the court for interim measures. This would save time, since the court can enforce its order for interim measures at the same time. Although the arbitral tribunal's order would be recognizable and enforceable, it could be challenged by the opposing party and revoked by the court.

Unlike in Thailand, SIAC stipulates the authority of an EA in clause 12 of schedule 1. This clause also precludes the possibility of challenging the EA's interim order in the local courts. This prevents a party from employing the tactic of using a local court to intervene in the arbitral tribunal's discretion to issue an interim order.

On the issue of whether Thailand should use an EA in cases involving the need for urgent interim measures before the appointment of the arbitral tribunal, one could argue that an EA is not necessary, because a court could grant an interim order, even before any party submits an application to initiate arbitration proceedings, under section 16 of the Thai Arbitration Act. However, the court would have to apply sections 253–270 of the Civil Procedure Code to issue emergency interim measures, and unlike the interim order of a SIAC EA, the interim order of a Thai court of first instance can be appealed by the opposing party and revoked or changed under section 45 of the Thai Arbitration Act. Thus, obtaining an interim order through a Thai court will use the same domestic litigation procedure. This could create complications and delays, and would not be confidential. Thus, having an EA would protect the interests of the requesting party in a timely and confidential manner, because the EA's interim order could not be appealed.

Concluding Thoughts

EAs do not yet exist in Thailand. Under section 16 of the Thai Arbitration Act, any party under an arbitration agreement may seek interim measures through the courts even before initiating a notice of arbitration. An interesting question to consider is whether an EA could be appointed and grant an interim order if an ICC or SIAC arbitration is conducted in Thailand, and whether that order would be considered enforceable by a Thai court.

Section 16 of the Thai Arbitration Act does not address the authority of an arbitral tribunal to issue interim measures. Article 39 of the recent TAI Arbitration Rules seems to indicate that an arbitral party can request an interim measure from either or both the arbitral tribunal and the court. Nevertheless, the Thai Arbitration Act and TAI rules do not provide for the appointment of an EA if emergency interim measures are needed before the arbitral tribunal is appointed. The amendment of section 16 of the Thai Arbitration Act to allow an EA to be appointed and issue interim orders would be a substantive change in Thailand's arbitration law, but it would help boost the efficiency of arbitration proceedings. 🏡