ARBITRABILITY OF CONSUMER DISPUTES IN THAILAND

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I. INTRODUCTION
This article presents the indefinite restriction or prohibition of arbitrability of consumer disputes in Thailand. Arbitrability of disputes relates to the concept of party autonomy in arbitration, where contractual parties decide what kinds of disputes that have arisen or will arise in the future are to be submitted to arbitration. Nonetheless, such autonomy may be restricted or prohibited by states.

The general principle of private autonomy, which can be found in various legal jurisdictions, means a private person’s self-determination in creating his or her legal relations, within the legal order, without external interference from anyone including the State. This autonomy gives rise to another principle in private law, which is the freedom of contract. This freedom is conferred on individuals in deciding who is the counterparty to an agreement, what is the content governing the parties’ rights and obligations and what is a method of dispute settlement. This principle of freedom of contract also applies to an arbitration agreement whereby parties agree on which disputes arising between them will be settled through arbitration. This party autonomy lies at the heart of arbitration. Arbitrability defines the boundaries of the right of the parties to go to arbitration. Non-arbitrability of disputes can invalidate an arbitration agreement. As a result, the jurisdiction of the arbitral tribunal cannot be established. Moreover, non-arbitrability of disputes can affect recognition of an arbitration agreement and enforcement of an arbitral award. According to Article 2 (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention), arbitration agreements shall be recognized unless it is incapable of settlement by arbitration. Furthermore, Article 5(2)(a) of the New York Convention lays down two grounds for the competent court of a country where recognition and enforcement of an arbitral award is sought to refuse such recognition and enforcement, one of which is when the subject matter of the dispute is not capable of settlement by arbitration under the law of that country.

It shall be noted that the autonomy of parties in deciding what kind of disputes to be arbitrated is not beyond limitation. States, with the aim to protect the legitimate interests of the public, limit such freedom by passing laws to intervene the issue of arbitrability. Such laws include that relating to consumer protection. The relationship between a goods or service provider and a consumer is usually subject to special legal supervision. Special law comes into play in the relationship since the beginning of a contract drafting. The rationale behind special legal supervision is that the consumer, a natural person who acts for purposes

2 Steingruber AM, Consent in International Arbitration (Oxford University Press 2012), 12.
3 ibid 40.
outside of trade, business or profession, is perceived to be at a disadvantaged position vis-à-vis the goods or service provider due to the less bargaining power. As a result, special laws seek to protect the vulnerable consumer. An example of special legal provisions protecting the legitimate interests of the consumer is one which concerns fair contract terms concluded by both parties.

An example of how arbitrability of consumer disputes is limited by State’s policy can be observed from the EU Unfair Terms in Consumer Contracts Directive. According to the EU Directive, Article 3(1) states that:

“a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.” Article 3(2) states that “a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”

Furthermore, Article 3(3) refers to the Annex which indicates contractual terms that may be regarded as unfair. One of the unfair terms is a term having the object or effect to:

exclud[e] or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

It follows that pre-dispute arbitration clauses that are drafted as standard forms and thus not individually negotiated are regarded as unfair and the disputes arising therefrom are non-arbitrable.

II. ARBITRABILITY OF CONSUMER DISPUTES IN THAILAND

In this section, the indefinite Thai legal provisions to the question of arbitrability of consumer disputes and its restriction or prohibition in Thailand will be examined. It shall be noted that the relevant legislations with regard to this topic are the Arbitration Act, B.E. 2545 (2002), the Civil Procedure Code, B.E. 2477 (1934), the Consumer Protection Act, B.E. 2522 (1979) and the Unfair Contract Terms Act, B.E. 2540 (1997). According to Section 14 of the Arbitration Act, when one party under an arbitration agreement files a lawsuit, the competent court shall strike out the case so that the parties can refer to arbitration, provided that an arbitration agreement is not void, inoperative or incapable of being performed. This legislation does not explicitly prohibit any specific disputes from being arbitrated, although a ground to render an arbitration agreement to be void includes non-arbitrability of disputes. Also, in Section 210 of the Civil Procedure Code, it is stated only that in a case pending before the Court of First Instance the parties may submit the dispute, in reference to all or some issues, to arbitrators, if the agreement is not contrary to law. Still, the Code does not expressly restrict the parties from submitting certain disputes to arbitration. For that, one

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5 Civil Procedure Code, B.E. 2477 (1934) (Thailand).
shall examine specific laws on this matter. The Consumer Protection Act is divided into several parts, one of which concerns “Consumer Protection in Contracts”. Under this part, the Act stipulates that in the operation of a contract-controlled business, contracts which business operators make with consumers must not contain contract terms unfair to consumers. More specifically, a contract-controlled business shall have contractual terms as provided by the Committee on Contracts. The terms shall expressly inform the consumers of their rights and obligations and information relating to the products, shall not restrict or exclude substantial liability of the business operator unreasonably and shall compensate the consumers appropriately when there is a breach. A business that is considered as a contract-controlled business includes one which uses standard forms and where the operators have more bargaining power than the consumers. An issue arises whether the phrase “to restrict or exclude substantial liability of the business operator unreasonably” encompasses mandatory arbitration clause in a standard form contract whereby the consumers are left with two choices; to take it or leave it. If so, consumer disputes may not be arbitrable. Furthermore, according to Section 4 of the Unfair Contract Terms Act⁶, a contractual term in a standard form contract which gives an unreasonably excessive advantage over the other party is an unfair contract term and shall be enforceable only insofar as it is fair and reasonable. The Act lays down some guidelines to determine whether there is an unreasonable advantage over the other party. The guidelines include terms relating to restriction or exclusion of liability and unjustifiable termination of contracts. Furthermore, the Act also lays down factors that the courts shall take into account when determining enforceability of contractual terms to the extent that they are fair and reasonable. Those factors are, among others, bargaining power, good faith, expertise, time and place of conclusion and performance of a contract and onerous burden on a party compared with the other party. The same question arises with regard to the term “restriction or exclusion of liability” whether it includes mandatory arbitration clause. In one Thai Supreme Court decision No. 1958/2548⁷, the Court ruled that a contractual term in a standard form contract which obligated the parties to refer their disputes to arbitration before resorting to courts is enforceable and not contrary to Thai laws. In this case, the claimant had argued before another court that the employment contract between the claimant, who is an individual, and the respondent, who is a juristic person, was a standard form contract which contained onerous burden on the claimant. The claimant argued that contractual terms in the contract should be void and unenforceable under the Unfair Contract Terms Act. However, the Supreme Court ruled that the arbitration clause in the employment contract, which states that the parties shall refer their disputes to arbitration, is applicable. The Supreme Court did not, however, render an explanation to the nature of a standard form contract that obligates the parties to dissolve their disputes to arbitration whether such contractual clause is unfair or fair under the Unfair Contract Terms Act. The Supreme Court did not make a judgment on arbitrability of disputes when one of the parties, due to his bargaining power, has no choice but to agree to the mandatory arbitration clause. From various legislations and the Supreme Court decision, it is observed that there is no express restriction or prohibition of arbitrability of consumer disputes which arise from a standard form contract, where bargaining power plays a considerable role in negotiating the contractual terms, in Thailand. To analyze whether this trend in Thailand should or should not be upheld, one shall consider other approaches adopted in other jurisdictions.

III. COMPARATIVE APPROACHES IN OTHER JURISDICTIONS

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⁷ Supreme Court decision No. 1958/2548 (Thailand).
i. Bulgaria
Since January of 2017, Bulgaria had amendments and supplements to its Code of Civil Procedure, International Commercial Arbitration Act and the Consumer Protection Act.8

The new amendments provide additional consumer protection from mandatory arbitration, as it proposes that consumer disputes are non-arbitrable.9 In addition, arbitration clauses for consumer contracts would be void, unless they are in accordance with the Consumer Protection Act.10 The new amendments also go as far as to fine arbitrators who render an award, which is ex lege deemed void, in a non-arbitrable dispute.11

The amendments were aimed to increase protection for consumers, which guarantees consumer protection from arbitration clauses not subjected to negotiation in standard contracts and general terms.12

ii. United States of America
Though the current consumer protection regime in the United States still allows for pre-dispute mandatory arbitration for consumer contracts, there has been an ongoing trend to increase protection for consumers against it.

In the executive branch, the Consumer Financial Protection Bureau has shown indications that it would propose rules which would take away the ability of consumer financial companies from drafting arbitration clauses that prevent class action lawsuits.13 They noted the unfairness of such clauses, in light of companies using them to ‘sidestep courts and avoid accountability and wrong doing.’14

On the other hand, in the legislative branch, there exist both current legislation prohibiting pre-dispute mandatory consumer dispute arbitration and efforts by the House and Senate to further increase protection for consumers.

Currently, Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) explicitly rejects pre-dispute mandatory arbitration in residential mortgage loan contracts15 and allows the Securities and Exchange Commission to establish rules that restrict mandatory arbitration clause usage for the benefit of the public interest or for protecting investors.16

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9 ibid.
10 ibid.
11 ibid.
12 ibid.
14 ibid.
15 Title 15 of United States Code § 1639c(e)(1) (United States of America).
Efforts of the House and Senate to further increase the protection for consumers have been seen through the introduction of bills, such as the companion House and Senate versions of the Arbitration Fairness Act introduced by Representative Henry Johnson and Senator Al Franken, which has the basic idea to prevent the use of pre-dispute arbitration agreements for all employment, consumer, antitrust, or civil rights disputes.

iii. Underlying implications of mandatory arbitration clauses

Often in consumer contracts, consumers are met with terms and contracts on a ‘take it or leave it’ basis. This also includes clauses for settlement of disputes. If such clauses were to be an arbitration clause, there could be problems. As in contrast to normal arbitration proceedings, where parties are on a level playing field and the disputes deal with a substantial amount, consumer disputes normally deal with parties that are not equal and the amount at stake individually are small. In addition, there is no real need for flexibility in consumer disputes and confidentiality is not an advantage.

In practice, mandatory arbitration clauses in consumer contracts are used by companies for immunity against laws protecting consumers. Due to various advantages in arbitration, it is likely that companies would receive more favorable results, as compared to court proceedings. Mandatory arbitration clauses would usually bar consumers from fundamental protections such as the public awareness generated by an open trial, which is taken away due to confidentiality in arbitration. In addition, even if, in the event, it is deemed that a company engaged in unlawful conducts, as the arbitration proceeding has no precedential weight and the public not knowing, the company would escape both public perception and pressures to change its behaviors.

Another protection that would be forgone is the assurance of a lack of bias afforded to litigants by a judge in the judicial system. Such protection protects against the possibility of repeat-player bias that could be

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19 ibid.
21 ibid.
22 ibid.
23 Italian Colors, 133 S. Ct. at 2313 (Kagan, J., dissenting).
27 N (n 22) 64.
28 ibid.
exhibited by arbitrators, who are part of mandatory arbitration proceedings.\(^{29}\) It is reasonable to assume that companies would appoint arbitrators who would issue favorable awards and decisions for them.\(^{30}\) The repetitive use of arbitrators in practice by companies could also create a quid pro quo future financial relationship between the companies and arbitrators.\(^{31}\) In addition, many companies further abuse consumer dispute arbitration with an establishment of ‘*pocket arbitrations*’ that renders awards predominantly in their favors.\(^{32}\)

In addition, mandatory arbitration clauses could be used to prevent class action, especially as could be seen in the United States.\(^{33}\) These mandatory arbitration clauses are coupled with class waiver provisions that are used as a powerful tool to circumvent class action lawsuits.\(^{34}\) As a result, the high cost of resolving disputes through arbitration individually, coupled with the relatively low recovery that would be granted if the consumer claims were to be a success, would discourage consumers from seeking remedies altogether.\(^{35}\)

Furthermore, statistics show few that though many consumers are covered by mandatory arbitration clauses, only a few choose to pursue their individual claims through arbitration which implies that mandatory arbitration could be used to deny consumers a forum to resolve their disputes or an effective mechanism to assert their rights.\(^{36}\)

**IV. CONCLUSION**

As could be seen from the analysis, mandatory arbitration clauses could impose various problems to Thailand with regards to consumer protection. To address such concerns, Thailand may impose special regulations to provide more appropriate protection to the consumers in Thailand. However, it would be necessary to balance between the value of party autonomy in arbitration and the protection of consumers.

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\(^{29}\) ibid.
\(^{30}\) ibid.
\(^{32}\) M (n 26).