

# TERMINATION IN COMMERCIAL CONTRACTS

At the Conference on STRATEGIES FOR DRAFTING & NEGOTIATING SUMMIT 2017

#### **Contracts include**

- Sale and purchase agreement
- Service agreement
- Loan agreement
- Licensing agreement
- Mortgage agreement
- Guarantee agreement
- Assignment agreement



- International purchase agreement, domestic syndicated loan agreement, international syndicated loan agreement, subscription for domestic bonds, subscription for Euro bonds, local mortgage agreement, domestic guarantee agreement, international guarantee agreement, standby letter of credit and ISDA Master Agreement may be closely connected.
- Occurrence of any event of default may lead to termination of the contract if any dispute could not amicably settled.
- Termination clauses of a contract should be carefully, widely and clearly drafted.
- No doubt and ambiguous wording of termination clauses should exist.
- Consequences of a breach of provisions of an agreement must be certain.



- Consequences of a breach of provisions of an agreement must be certain.
- Cross cultural issues should also be taken into consideration at the time of preparation, revision and finalization of an agreement.
- Difference styles exist in dealing with settlement of disputes in an agreement.
- Enforcement of the contract may be problematic.
- An amount of damages to be claimed is a vexed issue.



#### **Events of default**

- non-payment
- non-monetary breach
- breach of representations and warranties
- breach of undertakings
- non-compliance of clauses
- cross default
- potential default

- change of ownership
- change of control
- material adverse change
- material adverse effect
- changes in circumstances
- insolvency and bankruptcy
- any analogous events



- What is a force majeure?
- Can a force majeure be raised as no event of default?
- Occurrence of an event of default
- Notice for rectification of a technical event of default
- Default under one agreement may trigger default in related agreements and have dominating consequences on each party.



- Indemnification and exceptions
- Are liquidated damages legal and enforceable?
- Are liquidated damages regarded as penalty?
- Liability cannot be excluded for fraud and gross negligence.
- Can limitation of liability be legal and enforceable?



#### **Termination**

- Termination by operation of law
- Termination by clauses of an agreement

#### Method of termination

- Notice of termination of an agreement must state facts and any breach of an agreement
- Notice of termination of an agreement must be signed by each party or an authorized person of each party.
- A counter notice may be provided by an opponent party.
- Omission for a certain period of time may be deemed to be termination of the agreement.
- Must termination of contract be made in writing, , verbally , any act or any omission ?
- Can termination of the agreement be withdrawn?



• Can termination of an agreement be made without any breach of the agreement?

• Exercise of call option or put option after breach of an agreement



#### **Termination**

- Governing law may be a foreign law but local law must be taken into consideration.
- Can laws of the third country be the governing law of an agreement?

### **Arbitration and litigation**

- Does arbitration involve commercial and technical experts than litigation?
- Is arbitration proceedings faster than litigation proceedings?
- Are costs and expenses of the arbitration cheaper than costs and expenses of the litigation ?
- Is enforcement of an international contract made by way of arbitration or litigation?
- Arbitration or litigation is to be chosen



#### **Arbitration**

- Process of negotiation for settlement of dispute
- Procedures under clauses of an agreement must be complied with.
- Negotiation at the level of a working team of the parties
- Negotiation at the level of a high ranking executive of the parties
- Negotiation at the level of a shareholder of the parties
- Mediation may be conducted



Litigation in Thailand

 Ordinary courts -consists of courts of the first instance, courts of appeal and the Supreme Court;

 Administrative court –Central Administrative Court and Supreme Administrative Court.



#### **COURT**

**Courts of the First Instance** 

Courts of appeal

Supreme court

- Ordinary First Courts of Instance
- Special courts such as Intellectual Property and International Trade Court, Central Tax Court, Central Labour Court, Central Bankruptcy Court

- Ordinary appeal courts for civil and criminal cases
- specialized appeal
   court for Intellectual
   Property and
   International Trade
   Cases, for Tax cases,
   Labour Cases,
   Bankruptcy Cases and
   family and juvenile
   cases.

#### **Plaint & Answer**

#### Plaint

## Answer

- Breach of the agreement
- No payment
- No deliver of goods or services
- Specific performance
- Claim of damages

- No breach of the agreement
- Change of the scope of works
- Change of payments
- Delay in delivery of goods or services
- Delay in delivery of site of the project
- Delay in implementation of phases of work

- technical default
- Incurrence of damage
- Amount of damages
- Remedy of damage
- Contributory damage
- Force majeure

## **Burden of proof**

- A plaintiff generally has the burden of proof.
- But the burden of proof may be shifted to a defendant.

Presumption of law is different from assumption of law.



## Enforcement of a foreign judgment or a foreign award

- Can a foreign judgment be automatically enforced in Thailand
- To which court in Thailand must a new lawsuit be brought?
- Within which time must the new lawsuit be brought?
- For what reasons cannot the foreign judgment or the foreign award be enforced in a court in Thailand?



## **Damages**

- actual damages
- consequential damages
- liquidated damages
- Can a breach party demand for contributory damage or for no remedy for damages from the other party?
- Do damages cover costs and expenses incurred by each party?
- Are lawyers fees paid by a losing party?



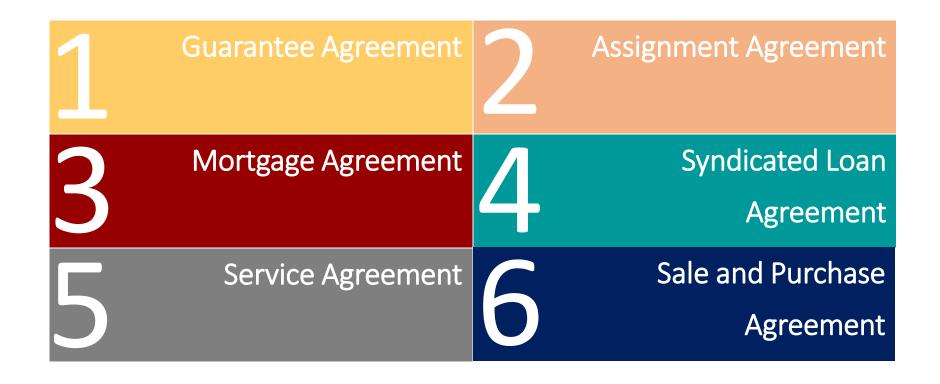
## Diagram on Arbitration and Litigation

Arbitration in a foreign country

Litigation in the first Court of Instance of a home country

Litigation in the Appeal Court of the home country Litigation in the Supreme Court of the home country

## **Diagram on Agreements**



## Thank you very much for your kind attention



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