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NO&T Asia Legal Review 創刊のご案内

長島・大野・常松法律事務所（NO&T）は、日々目まぐるしく移り変わるアジア各国の法実務に関する最新の情報をお届けするべく、今般 NO&T Asia Legal Review（月刊英文ニュースレター）を創刊いたしました。NO&T Asia Legal Review は当事務所の各国アジアオフィスに所属するアジアの弁護士が執筆しており、日本人の皆様だけではなく、貴社内でご勤務されている日本人以外の方にもお読みいただけるよう英文で作成しております。ご関心のある方には是非ご転送いただき、今後直接ご送付できるようこちらからご登録いただければ幸いです。

Issue of "NO&T Asia Legal Review"

We, Nagashima Ohno & Tsunematsu ("NO&T"), are pleased to inform that we have launched a monthly English newsletter, "NO&T Asia Legal Review", to share updates on the rapidly changing laws and legal practices in Asian countries. The articles in the NO&T Asia Legal Review are written in English by Asian qualified lawyers, who are working in our Asian offices, not only for the Japanese expatriates but also for non-Japanese speakers who are interested in this kind of legal information. Please kindly forward this NO&T Asia Legal Review to your colleagues and ask them to register here if they are interested to receive this newsletter so that we can directly send it to them hereafter.

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Malaysia

KEY CHANGES TO THE ARBITRATION ACT 2005

2018 年 5 月 8 日、マレーシアにおいて改正仲裁法が施行された。マレーシアは、2005 年時点において既に UNCITRAL モデル法に準拠する仲裁法を制定していたが、今般、最新の UNCITRAL モデル法（2006 年版）に準拠する形での改正が行われた。本稿では、暫定措置に関する手続の変更等、改正仲裁法における重要な改正点を取り上げる。

Key Changes to the Arbitration Act 2005

The Arbitration Act 2005 ("**2005 Act**") is the primary legislation regulating arbitration proceedings in Malaysia. The 2005 Act is based on the United Nations Commission on International Trade Law Model on International Commercial Arbitration ("**UNCITRAL Law Model**").

The Arbitration (Amendment) (No. 2) Act 2018 ("**Amendment Act**") came into force on 8 May 2018 with the objective to enhance Malaysia's profile on international and regional arena as a safe-seat and arbitration-friendly jurisdiction.

The Amendment Act essentially introduces revisions to the 2005 Act which reflects the 2006 amendments to the UNCITRAL Law Model and it enhances interim protection measures and confidentiality while minimizing recourse against arbitral awards.

Set out below are key changes introduced under the Amendment Act:

1. **Freedom for domestic and international parties to choose representation:**

   The introduction of Section 3A allows both domestic and international parties freedom to choose their own representation during arbitral proceedings, unless the parties had agreed otherwise.

2. **Removal of writing requirement and recognition of electronic forms of arbitration agreements:**

   This amendment removes the positive and evidentiary writing requirement and seeks to address advances in communication technology to conform to international contract practice. An agreement to arbitrate may now be entered into in any form as long as the contents of the agreement are recorded.

3. **Interim measures:**

   The Amendment Act introduced a slew of supplementary provisions relating to the granting of interim measures by both the arbitral tribunal the and High Court. The newly introduced sections 19A to 19J, mirrors the provisions of the 2006 amendments to the UNCITRAL Model Law. These additional provisions establish a regime in respect of requests for interim measures, and provide useful guidance on the operation, recognition and enforcement of interim orders.

   Examples of such additional provisions are as follows:

Section	Remarks
19E	Permits the arbitral tribunal to require security from the party requesting an interim measure
19F	requires a party to promptly disclose any material change in the circumstances on the basis of which the interim measure was requested or granted
19H	Provides for the recognition and enforcement of an interim measures issued by an arbitral tribunal
19J	Provides that the High Court has the power to issue interim measures in relation to arbitration proceedings, irrespective of whether the seat of arbitration is in Malaysia

4. **Pre-award interest:**

   There had been issues raised about the extent of an arbitral tribunal's jurisdiction to order non-contractual pre-award interests. The amended Section 33 now expressly grants arbitral tribunals the power to award simple or compound interest for both pre- and post-award.

5. **Confidentiality:**

   Confidentiality is one of the pivotal elements of arbitration, especially where the dispute involves business trade or intellectual property. In order to enhance Malaysia's status as a safe seat, the addition of an express clause on confidentiality aims to protect the confidentiality of arbitration proceedings.

   Section 41A now prohibits the disclosure of arbitral proceeding or award, barring certain circumstances provided by the said section. Section 41B allows for the hearing of the arbitral tribunal not to be heard in an open court

unless one party applies or the Court is of the opinion that it should be heard in open court.

6. **Deletion of section 42 and 43 in order to promote arbitration as an alternative form of dispute:**

The purpose of the deletion of these sections is to promote arbitration as an alternative form of dispute resolution which enhances the finality of arbitral awards. In other words, the High Court may no longer review awards on questions of law arising out of an arbitration award.

The amendment was prompted by the decision in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang [2018] 1 MLJ 1 (FC)*, which expanded the scope for judicial supervision on domestic arbitral awards through challenges on questions of law. The Federal Court held that an arbitral award may be challenged in court on any question of law pursuant to Section 42 of the 2005 Act, including those that have been specifically referred to an arbitrator. As such, parties tend to rely on Section 42 as an alternative method to setting aside or vary the award.

With the said deletions under the 2005 Act, this option is no longer available.

Conclusion

The amendments introduced by the Amendment Act are in line with international practice and as such will likely further enhance Malaysia's position as a major center for dispute resolution in Asia. The summary above is not intended to be exhaustive. Should you require further information, please contact the author of this article.

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Vietnam

NEW CYBER SECURITY LAW

ベトナムでは、2018 年 6 月 12 日制定されたサイバー・セキュリティ法が 2019 年 1 月 1 日より施行される。ベトナムには未だ包括的な個人情報保護規制が導入されていないが、同法ではオンライン上の情報の取り扱いについて、一定の規制を事業者に課すものである。そこで本稿では、かかる規制の具体的内容について概観する。

Background

The Cyber Security Law ("**CSL**"), one of the most controversial laws of Vietnam, was adopted by the National Assembly on June 12, 2018. The CSL will come into force beginning January 1, 2019 and the Vietnam government is drafting decrees and circulars to implement it.

In general, the CSL incorporates the security rules stipulated in existing laws like the Law on Cyber-Information Safety, Law on Telecommunications, and Law on Information Technology. At the same time, it introduces new and severe rules to ensure that the activities conducted in cyberspace will not affect the national security, social order and safety of Vietnam.

Main contents

1. Scope of application:

The CSL applies to all individuals or organizations having activities in cyberspace regardless of whether they are local or foreign individuals/organizations operating in the public or private sector. In particular, the CSL aims at regulating enterprises that provide services on telecom networks or the internet, or provide other value added services in cyberspace (collectively, "**Cyber Services Providers**").

2. Critical information vs. non-critical information:

For state management purposes, the CSL categorizes information systems into (i) information systems that are critical to the national security, and (ii) information systems that are not critical to the national security.

A critical information system is one in which the occurrence of any incident, intrusion, hijacking, falsification, interruption, stasis, paralysis, attack or sabotage would seriously affect the national cybersecurity. Critical information systems are present in various sectors (e.g., military, foreign affairs, finance, banking, telecommunications, transportation, environment, and health) and the Vietnam government will further issue a detailed list of such systems.

Because of its importance to the national information network, a critical information system will be subject to the evaluation, assessment, inspection, and supervision of the Cyber Security Task Forces ("**CSTF**") - a special state agency to be established under the Ministry of Police for the purpose of enforcing the CSL.

For information systems that are not critical to national security, the inspection by CSTF will be carried out only if illegal conduct is involved which violates national security or seriously affects social order and safety, or subject to the network operator's request.

3. Prohibited activities:

The CSL enumerates numerous activities which will be prohibited, including, *inter alia*, using cyberspace, information technologies, and electronic measures to (i) illegally post, disseminate, or appropriate national secrets, business secrets, personal secrets, family secrets, and private information; (ii) sell prohibited goods; (iii) organize anti-state activities; and (iv) provide false information that may harm the social order and economy, or challenge the operation of state authorities or of other individuals or organizations.

There are concerns that the vague description of prohibited activities by the CSL may allow the CSTF to freely interfere with the operation of Cyber Services Providers. To alleviate such concerns, the officers of the Ministry of Police have verbally emphasized that the CSL's purpose is not to burden or restrict legal business and activities in cyberspace. Rather, the CSL aims at preventing and dealing with illegal activities that, in general, are already prohibited and covered by other relevant laws (e.g., cybercrimes under the Crimes Code).

4. **Important obligations of Cyber Services Providers:**

The CSL imposes various obligations on Cyber Services Providers. In particular, a Cyber Services Provider must:

(i) verify the user's information, keep confidential the user's information, and provide the user's information at the request of competent authority;

(ii) prevent the exchange of information having illegal contents within 24 hours after being requested by competent authorities; and

(iii) refuse or cease providing services to any user who launched illegal contents on its network if it is so requested by competent authorities.

Burden of information storage: A Cyber Services Provider, regardless of whether it is an onshore or offshore service provider, must store information in Vietnam if it carries out activities of collection, exploitation (use), analysis and processing of personal information, data of the user's relationship or data created by users. As indicated in the draft of the decree implementing the CSL dated October 31, 2018, the following information and storage periods are required:

- Information which must be stored in Vietnam during the life of the Cyber Services Provider or until it ceases to provide services: Personal information of service users in Vietnam including their name, date of birth, place of birth, nationality, occupation, job title, place of residence, physical address, email address, telephone number, person identity number, personal identification number, citizen card number, passport number, social security card number, credit card number, health status, medical records and biometrics.

- Information which must be stored in Vietnam for at least 36 months: (i) data created by users in Vietnam including information uploaded, synthetized, or imported from their devices; and (ii) data on relationship of users in Vietnam including the friends and groups connected and interacted by such users.

- Information which must be stored in Vietnam for at least 12 months: System logs.

The foregoing requirements trigger serious concerns that it would not be feasible to store all required information in Vietnam due to issues of storage space and protection. Although the CSL does not explicitly require an offshore Cyber Services Provider to locate its server in Vietnam, the requirement of data localization may imply or, at least, induce an offshore Cyber Services Provider to engage a local data center. In practice though, this data localization requirement is certainly burdensome and it does not seem likely that offshore giants such as Google or Facebook can be compelled to place their servers in Vietnam, at the risk of driving them away from operating in Vietnam.

Branch or representative office requirement: In addition to the foregoing obligations, an offshore Cyber Services Provider that collects, exploits, analyzes, or processes information from users in Vietnam must set up a branch or representative office in Vietnam. The idea behind this requirement is not new as it was also present in the draft of the Decree on Information Technology Services, and its main purposes are for state management and collection of taxes.

Conclusion

The CSL will have a material impact on the individuals and organizations operating in cyberspace. It will, at least, create additional obligations for Cyber Services Providers with respect to data collection, remittance, storage, and management. Although the CSL and the draft of the implementing decrees have been challenged by endless and noisy criticism, it may be too early to provide any judgement until its enforcement has been tested and its real impact has been examined.

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Thailand

THAILAND'S NEW MERGER CONTROL REGULATIONS

タイでは 2017 年に取引競争法が全面的に改正され、それに基づき 2018 年 10 月 4 日付けで企業結合に関する施行規則が制定された。これまで施行規則が無いことから事実上適用されていなかった企業結合規制の適用がいよいよ開始されることになる。そこで本稿では、かかる企業結合規制の要件及び手続等について概説する。

Thailand's New Merger Control Regulations

On 4 October 2018, the following Merger Control Regulations have been ratified by the Trade Competition Commission ("**TCC**") and are awaiting the government gazette publication in order to be legally effective:

1. Notification on criteria of assets or shares acquisition to control the business administration policy, facilitation or management which results in a merger;

2. Notification on criteria, method and condition of notifying the merger; and

3. Notification on criteria, method and condition of application for approval of the merger.

While the Merger Control Regulations may still be subject to further amendments, we summarize the substantive and procedural requirements and provide our insights below.

Background

Prior to the enactment of the 2017 Trade Competition Act ("**TCA**"), the previous 1999 TCA was widely criticized for its lack of enforcement and infamously referred to as a "tiger without teeth". Such reference stemmed from the fact that the Office of Trade Competition Commission ("**OTCC**") failed to enact any merger control regulations for the 1999 TCA. To avoid such issue and ensure that relevant laws are enacted in a timely manner, the 2017 TCA imposed a deadline and required the government authority to issue regulations by 5 October 2018.

Substantive Requirements

The Merger Control Regulations introduces the following changes to the legal requirements:

Definition of merger: This includes transactions such as share acquisition, asset purchase, any merger which retains or ends the status of one of the businesses, or creates new business, excluding business restructuring of a group companies related through common control. The trigger points for a merger are, as follows:

Acquisition of assets: Acquiring assets that relate to the normal course of business operations of other business operators which exceeds 50% of the value of such assets, either as a partial or entire business acquisition to obtain control.
The consideration of the value of the assets to be acquired will be based on the accounting value at the date of the acquisition agreement or actual acquisition, as the case may be.

Acquisition of shares:

a. **Within securities laws regulatory scope**: Purchasing or acquiring shares, warrant to purchase shares, or any securities which may be converted into shares, as at the close of business day time, which results in at least 25% of the total voting rights of the other business operators governed by the laws of securities and stock exchange, e.g., listed public limited companies; and

b. **Outside securities laws regulatory scope**: Purchasing or acquiring shares, as at the close of business day time, which results in over 50% of the total voting rights of the other business operators which are not governed by the laws of securities and stock exchange, e.g., private limited companies.

   In case the share purchaser or acquirer is a natural person, the calculation shall include the

acquisitions made by such person's spouse, and in case the share purchaser or acquirer is a juristic person ("Acquiring Juristic Person"), there shall be calculation based on the (i) shareholders with over 30% of the voting shares in the Acquiring Juristic Person and (ii) other business operators which are related through common control and business administration policy of the Acquiring Juristic Person.

Who needs to file a merger notice or application? The duty falls on *the acquiring entity or the surviving entity*, and we can categorize the business operators based on their duty to file, as follows:

1) **Those *without* any duty to file**: A merger by any business operator which, before or after the merger, has the annual revenue in a particular market of less than 1 billion Baht. The calculation of the annual revenue in a particular market of the business operator is based on the preceding year's financial statements and shall include the annual revenue of all business operators under common control.

2) **Those *with* the duty to file a *post-merger* notice:** A merger which may cause any business operator to, before or after the merger, have an annual revenue in a particular market of at least 1 billion Baht but which does not result in the monopoly or market dominance in any particular market.

   2.1) "**Monopoly**" means any business operator who is a sole operator in a particular market *or* any business operator who has the power to freely determine the price and volume of the goods or services with the revenue of at least 1 billion Baht.

   2.2) "Market Dominance Operators" means either of the following:

   1. Any business operator with 50% market share and annual revenue of at least Baht 1 billion business operator in a particular market; or

   2. Any business operator with 75% market share, collectively in top three, and each having annual revenue of at least 1 billion Baht, but excluding a business operator with less than 10% market share or annual revenue of less than 1 billion Baht;

3) **Those *with* the duty to file a *pre-merger* application:** A merger which may cause any business operator to, before or after the merger, have an annual revenue in a particular market of at least 1 billion Baht which results in the monopoly or market dominance in any particular market.

Exemptions: Subject to the transitional period exemption below, only (a) government and state enterprise for activities in accordance with Thai law or Cabinet resolutions which are necessary for the stability, public interests, common interests, or arrangement of public utilities only, and (b) internal restructuring of group companies are exempt from the requirements of the Merger Control Regulations.

Offshore mergers involving overseas parent companies or holding companies of Thai subsidiaries are not exempted, even if there is no direct acquisition of the Thai subsidiaries' shares and/or assets. As long as the offshore merger has an effect on the Thai market, the TCC still has jurisdiction over the matter and the Merger Control Regulations will apply. Multinational companies under common control will be treated as a single economic entity connected to the Thai subsidiaries subject of the merger filing.

Transitional period exemption: During the transitional period, any merger instrument, such as shareholders' meeting approvals or resolutions and merger agreements, which have been executed before the date of publication of the Merger Control Regulations in the government gazette shall be exempted. However, the transitional period exemption is applicable only to the requirement of submitting ***pre-merger*** applications. The exemption does not apply to those with a duty to observe the post-merger notice requirements.

Procedural Requirements

A business operator has the option to apply for pre-consultation regarding a merger filing, subject to an applicable fee of 50,000 Baht.

Once a business operator determines whether it has a duty to file an application or notice under the Merger Control Regulations, it must submit the following application or notice, as may be applicable:

(a) **Pre-merger application:** The OTCC's prior approval shall be obtained for any merger that may result in a monopoly or market dominance.

The prescribed timeframe for OTCC's consideration is 90 calendar days (and an additional extension of 15 calendar days) from the date of submission of the pre-merger application to the date of issuance of a decision. The OTCC is legally empowered to set terms and conditions regarding its approval. The applicable fee is Baht 250,000 per application.

A business operator has the option to appeal the OTCC's decision of a pre-merger application to the Central Administrative Court within 60 days from the date the OTCC's decision was received.

(b) **Post-merger notice:** The OTCC shall be notified of any merger that may result in substantive reduction of competition in a particular market within seven days from the "**Merger Date**", which means the either the date in which (i) one business exists and the other business ceased to exist or has become a new business, (ii) the transfer of asset ownership has been registered, or (iii) there is a transfer of shares.

Other requirements

Follow-up report requirements: This primarily depends on the conditions attached to the OTCC decision. However, based on the law, there are currently no specific follow-up report requirements applicable for pre-merger application.

Penalty

Penalty: There is no criminal penalty for the failure to file merger application or notice. Only administrative sanctions are imposed. For the failure to obtain a pre-merger approval, the maximum fine is 0.5% of the value of merger, without a cap as to the monetary amount. For the failure to file a post-merger notice, the maximum fine is Baht 200,000, plus Baht 10,000 per day for continuing violations.
In addition to the administrative sanctions, the merger may also be deemed as "void" and subject to annulment for violation of applicable laws.

Conclusion

The soon-to-be enacted Merger Control Regulations represents a big step forward for Thailand's competition regulations. However, considering the history of the competition law's lack of enforcement in Thailand, we will have to wait and see when these Merger Control Regulations will be effective and whether they will be successfully enforced.

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