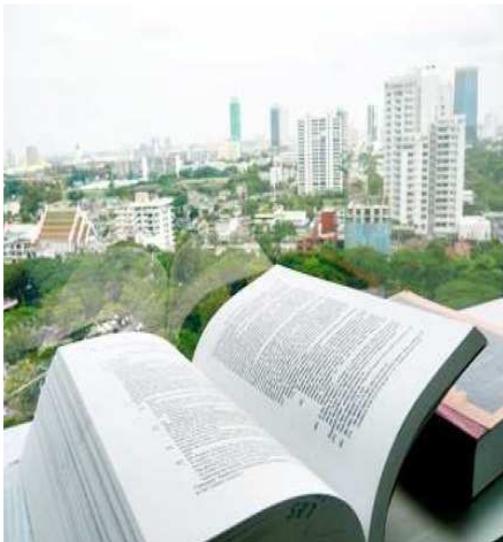


## FINANCIAL INSTITUTIONS AND ARBITRATION: NOW AN UNRESTRICTED CHOICE FOR SPECIFIC LOAN TRANSACTIONS

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The Thai Cabinet passed a resolution on November 15, 2011, approving in principle the right for financial institutions which are Thai state enterprises to choose arbitration in respect of syndicated loans in cross border transactions without having to first obtain Thai Cabinet approval (the “**New Cabinet Resolution**”). The New Cabinet Resolution creates an exemption to the previous Cabinet Resolution which requires Thai Cabinet pre-approval for every Thai state organization seeking to use arbitration as a means of dispute resolution.

### *The Previous Cabinet Resolution*



The previous Thai Cabinet Resolution passed on July 28, 2009 (“**Previous Cabinet Resolution**”), specified that arbitration is not available as a means of dispute resolution in agreements between any Thai state organization and any third party, regardless of whether such third party is a Thai or foreign national or whether such agreement is an administrative contract. However, when an arbitration provision is a requirement to effecting the agreement, especially a cross-border one, the parties may propose the use of arbitration to the Thai Cabinet for the necessary approval on a case-by-case basis. Thus, under the 2009 resolution, financial institutions which are Thai state enterprises are required to obtain approval from the Thai Cabinet for every transaction in which they seek to use arbitration as a means of dispute resolution. Understandably, this causes inconvenience not only for the financial institutions themselves, but also for the counterparty to the transaction. The fact that Cabinet Meetings are held just once a week only compounds this inconvenience.

Given the already lengthy internal processes associated with syndicated loans, wherein a group of commercial lending banks usually cast votes among themselves regarding the provisions in the agreements, including the dispute resolution clause, the lengthy and uncertain bureaucratic process required by the Previous Cabinet Resolution impedes arbitration between Thai state organizations and third parties.

The main reason behind this Previous Cabinet Resolution is widely known among lawyers and the general public to lie in the Thai Government wanting Thai state enterprises to avoid the arbitration process, a process that Thai state enterprises tend to lose. So the arbitration process has long been seen as taboo in the eyes of the Thai Government.

## Why Arbitration?



Arbitration is widely used in international transactions because arbitral awards are easier to enforce in a foreign country than a court judgment. Particularly, arbitral awards issued in the countries which are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”) can be enforced in the courts of any other contracting countries. Furthermore, arbitral awards are not subject to appeal and can only be challenged in limited circumstances. More importantly, arbitral proceedings take substantially less time than court proceedings.

## Does the Resolution really solve the problem?



Although the Resolution allows financial institutions which are state enterprises to use arbitration without first acquiring Thai Cabinet approval, the Resolution is very limited in scope: it applies only to syndicated loans (loans with more than one lender) in cross-border transactions. Consequently, financial institutions which are state enterprises that seek to use arbitration as a means of dispute resolution in other transactions must still obtain the requisite approval from the Thai Cabinet under the Previous Cabinet Resolution which is still in force.

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### **Important Note and Disclaimer**

The content of this Newsletter is prepared as of 21 December 2011.

This Newsletter is informational in nature and is not to be considered as legal advice. It does not exhaustively cover the subjects which it treats, and is only intended to address some of the key issues. When specific questions arise in practice, it is necessary to obtain appropriate legal advice.