

**NOTE**

**Re : the draft-agreement between the government of Thailand  
and the Export –Import-Bank of Washington (said Eximbank)**

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From the letter of the Secretary-General of the Council of Ministers No. 10896 dated 27th. September 2494, I understand that that the consideration of, and the opinion concerning, the draft-agreement which is requested from me “as required by the Bank” is in execution of Article VI (b) of the said draft-agreement, which reads as follows :

“LEGAL OPINION. An opinion of the Minister of Justice of Thailand or other counsel satisfactory to Eximbank that this agreement as signed on behalf of the Kingdom of Thailand is legally binding upon Thailand in accordance with its terms, and that the notes and mortgage when and as issued pursuant hereto, will constitute the valid obligation of Thailand”.

(N.B. It seems an usual practice of the banks in U.S. America to require a legal opinion of that kind in case of agreement passed with the Government of foreign countries).

After reading the documents communicated to me, I consider that the position of the question is as follows.

FIRSTLY. I am ready to give opinion that the contract, when signed by a qualified authority on behalf of the Government of Thailand (the designation of that qualified authority belonging entirely to the Government) shall be legally binding for the Government.

See also on this point Article VI (a) which does not fail to mention that “evidence of the authority of the person or persons who will sign the Promissory Note and Mortgage” shall be given to the Bank. My opinion can only corroborate the evidence so given.

SECONDLY. Even if a contract is binding because it is signed by a qualified authority, it might however not constitute a valid obligation because its provisions should be contrary to law.

On this point there is no doubt that the law to be considered is the law of Thailand. See Article I Section I of the draft-contract which says that “the mortgagor is the Government of Thailand and it has taken all action required by Thai law for the execution and delivery of the mortgage”. See also Article I section 12 : “Thailand will comply with and satisfy all the applicable provisions of the law of Thailand in order to establish and maintain this instrument as a good and valid mortgage .....

This makes easier the consideration of the documents. It is reminded that the Thai law concerning Promissory Notes is in the Civil and Commercial Code sections 982 to 990. As to the Mortgage, since there is no Maritime Law in Thailand we have no special rules for the mortgage of vessels (said Maritime Mortgage in some other countries); the matter is governed by section 703 which permits to mortgage the ships and vessels of six tons and over “provided they are registered according to law”. Consequently the Title of Mortgage (sect. 702 to 746) shall apply.

As to the validity of the obligation, it may mean two different things :

A) It means that the conditions of form for the validity of the Promissory Notes and Mortgage have been complied with by the Government in accordance with the Thai law.

The examination of the draft-Promissory-Note shows that its mentions are conform to those required by section 983 of the Code. It is a matter of course that the Promissory-Notes shall have to be signed by a person empowered to engage the liability of the Government for pecuniary liability.

The examination of the draft-Mortgage shall mean especially that the registration of the Mortgage (sect. 714) has been provided in the usual conditions of the law. But of course I can only give the opinion that if and when such registration is duly made, as is undoubtedly the intention of the Government, everything shall be complet and valid.

B) Validity means besides that the clauses of the Mortgage are not contrary to the Thai law. The conditions of the mortgage are very drastic for the mortgagor since everything in that clever document is made in favour of the mortgagee. But drastic conditions do not mean necessarily illegal conditions. However attention must be called immediately upon the necessity for the Government to avoid as far as possible the occurrence of those numrsous "events of default" specified in Article II of the draft-mortgage, defaults entailing many undesirable consequence for the mortgagor.

The examination suggests a few minor observations as follows :

a) according to the Thai law (C.C. Code sect. 708) "no property can be mortgaged except by the ownet for the time being" This means that the mortgage to be signed by the Government cannot be made befoe the transfer of wownership of the vessels by the Republic of China is completed. Moreover Article I section 2 of the draft mentiions that "Thailand lawfully owns and is lawfully possessed of the vessels";

b) the expressions "the Kingdom of Thailand or "Thailand" which are used at the beginning of the draft, in the preamble and other places, should never be used. They are more geographic expressions. The party to the contract is the Government of Thailand (as is shown by the signature to be made at the end);

c) the Thai law uses only the word "mortgage" and never the word "hypothec" (which in fact belongs to the legla language of Scotland). The words "mortgage, mortgaged" should replace the words "hypothec, hypothecated". This would introduce without doubt the legal Thai provisions and procedures for mortgage in the contract.

But a very important observation concerns the cases of Enforcement of a mortgage provided by the Code (sect. 728, 729, etc.). Those cases are strictly limited. In the contract, numerous "events of default" are specified in Article II : and if they occur, the Eximbank claims the right to enforce the mortgage at its own will and declaration, making the principal and interests due and payable immediately. It claims also the right to detain the vessel without legal process wherever the vessel may be so that the vessel shall be hold, leased, oparated, used, etc. By the Bank as they like. The Bank may even sell and dispose of the vessel (free from any claim of or by Thailand) in she way they prefer "for their best advantage". Thailand irrevocably appoints the Bank to make all transfers, etc. There is no doubt that the drastic provisions of Article II either as to the "events of default" or as to the rights granted to the Bank for the enforcement of the mortgage, its foreclosure and the consequent disposal of the vessel, do not grant to the mortgagor the guarantees which are given by sections 728 to 735 of the C.C. Code. Those guarantees are so jeopardized or even

suppressed that nobody can say safely that Courts should complacently admit that the parts of a contract which would have accepted such burdens upon the mortgagor are valid obligations within the meaning of the Thai law on mortgage.

In consideration of the above observations, a lawyer cannot give the opinion that such a contract of mortgage shall contingently be recognized by the Courts as valid obligation, in the case where a dispute (especially concerning Article II) should have to come to court upon action being brought by some interested party. One cannot assure that the Courts would accept as possible even for the Government (contractor) to give up guarantees which exist in the law of Thailand and after all are for the benefit of the taxpayer in that case of purchase of vessels.

In any case I would have myself to mention the above reservation in any certification concerning the validity of the agreement.

But in fact it belongs to the Government to consider if the Eximbank should not be warned that the provisions under Article II are to be modified in order to create valid obligations and avoid later on unexpected surprises. This would necessitate a much careful and minute study.

The provisions of the mortgage upon which I call attention seem to be a legacy of the contract made with the Republic of China, which of course, on account of the precarious conditions of its finances, had to be imposed drastic conditions and could not refuse them. But when Thailand now makes that contract of mortgage, it should be proper to claim a reconsideration of the matter of mortgage by the Eximbank.

30th. September 2494.