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18 January 2010

International Swaps and Derivatives Association, Inc.24 Raffles Place
#22-00 Clifford Centre
Singapore 048621**Re: Enforceability and Admissibility into Evidence of Electronic Transactions**

Dear Sirs,

We refer to your letter dated 15 October 2009, requesting our opinion in connection with the enforceability of electronic transactions under Thai laws and the admissibility of electronic records into evidence in civil proceedings in Thailand.

We set out below our opinion on the captioned matter. This opinion addresses the enforceability and admissibility into evidence of the Transactions, in terms of their being electronic transactions only. It is not purported to provide an opinion on their enforceability and admissibility, from other perspectives, including but not limited to, the formality and/or required evidence for different types of transactions, other defects in the formation of contracts, and civil procedures in adducting and presenting evidence to the court, e.g., filing lists of evidence, submitting copy of evidence to the opposite party.

1. ASSUMPTIONS

For the purpose of this opinion, we have assumed the following:

- 1.1 electronic transactions considered hereunder are derivatives transactions under the ISDA Master Agreement which are entered into by means of electronic data interchange or other means of electronic communication. (the “**Transactions**”);
- 1.2 the due compliance by all parties with any applicable law (other than the laws of Thailand in relation to the enforceability and admissibility into evidence of the Transactions, from the aspect of their being electronic transactions as presented hereunder) in relation to the corporate authorization, execution, delivery, filing, registration, enforcement of rights and proper performance of obligations under, and the due authorization, execution and delivery of the Transactions by all parties under the laws of the place(s) of authorization, execution and delivery (other than the laws of Thailand in relation to the enforceability and admissibility into evidence of the Transactions, from the aspect of their being electronic transactions as presented hereunder);

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- 1.3 the legal, valid and binding nature of the obligations under the Transactions of all parties under any applicable law (subject that enforceability of such obligations may be affected by statutes of limitation, by estoppel and similar principles and by laws concerning insolvency, bankruptcy, liquidation, reorganisation, receivership, judicial management, fraudulent conveyance or similar laws generally affecting creditor's rights or duties generally) (other than the laws of Thailand in relation to the enforceability and admissibility into evidence of the Transactions, from the aspect of their being electronic transactions as presented hereunder);
- 1.4 that there are no other provisions of the laws of any jurisdiction outside Thailand which would have any implication on the opinions we express and, insofar as the laws of any jurisdiction outside Thailand may be relevant, such laws have been or will be complied with; and
- 1.5 the term “enforceable” as used in this opinion means that the obligations assumed by the relevant party under the relevant document are of the type which the Thai courts enforce. This opinion is not to be taken to imply that any obligation would necessarily be capable of enforcement in all circumstances in accordance with its terms, in particular, as:
 - (i) a Thai court will not necessarily grant any remedy of which the availability is subject to the discretion of the court. In particular, orders for specific performance and injunctions are, in general, discretionary remedies under Thai law and specific performance is only available where the nature of the obligation permits;
 - (ii) claims may become barred by a prescription period or may be or become subject to the defence of set-off or to counterclaim;
 - (iii) the enforcement of the obligations of the parties may be limited by the provisions of Thai law applicable to agreements held to have become impossible by events happening after their execution; and
 - (iv) enforcement of obligations may be invalidated by reason of fraud.

2. OPINIONS

Generally, the enforceability and admissibility into evidence of electronic transactions are recognized under Thai law, subject to certain conditions, requirements and procedures in presenting evidence to the court as set out below.

Based upon and subject to the assumptions and qualifications set out in this opinion, our opinion is as follows.

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2.1 Does Thailand have specific legislation giving legal recognition to transactions entered into “electronically” and/or specific legislation dealing with the admissibility into evidence of electronic records? If there are no specific statutes, is it possible to justify the enforceability of electronic transactions and the admission into evidence of electronic records through legal reasoning and how robust would such a position be?

Answer

The Electronic Transactions Act B.E. 2544 (A.D. 2001), as amended, (the “**E-Transactions Act**”) became effective on 3 April 2002. The E-Transactions Act incorporated electronic transactions law and electronic signatures law. Most of its provisions follow the same concept as that of the UNCITRAL Model Law on Electronic Commerce 1996 and Model Law on Electronic Signatures 2001. The E-Transactions Act was promulgated because it was necessary to provide legal recognition of electronic data, methods of dispatch and receipt of electronic data, use of electronic signatures, and the evidential admissibility of electronic data, aiming to promote the reliability of electronic transactions and to enable electronic transactions to have the same legal effect as that given to transactions made by traditional means.¹ The E-Transactions Act applies to civil and commercial transactions operated by using electronic data. Therefore, the Transactions, i.e., the transactions under the ISDA Master Agreement which are entered into by means of electronic data interchange or other means of electronic communication, fall within the ambit of the E-Transactions Act.

2.1.1 Legal Enforceability of Electronic Transactions

The E-Transactions Act recognizes transactions made electronically, e.g., by means of electronic data interchange or other means of electronic communication, subject to certain conditions and requirements as set out below.

(1) **General Concept**

Under the E-Transactions Act, the binding effect and legal enforcement of any message cannot be denied merely on the ground that such message is in the form of electronic data.² For this purpose, electronic data means messages made, transmitted, received, stored, or processed by electronic means, e.g., electronic data interchange procedures, e-mail, telegram, telex, and facsimile.³

¹ Concluded from the reasons for the promulgation of the E-Transactions Act as provided in the note appended to the E-Transactions Act

² Section 7 of the E-Transactions Act

³ Section 4 of the E-Transactions Act

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In short, the legal enforceability of electronic transactions is recognized; however, this is not an affirmation of the correctness and completeness of the message in the form of electronic data.

(2) Formality / Required Evidence

The E-Transactions Act does not mention the formality or required evidence for different types of contracts. However, it supplements the general laws governing the formation of contracts, e.g. the Civil and Commercial Code of Thailand, where the contract is made by electronic means. Under the Civil and Commercial Code of Thailand and other general laws, some types of contracts must be done in particular formalities or require certain types of evidence. Thus, some of the Transactions may also be required to comply with certain formality and/or required evidence in order to be valid, binding, and enforceable.

Where the law requires any transaction to be made in writing, to be evidenced in writing or supported by a document, if **the message has been made in or as electronic data that is accessible and can be recovered for use without change of meaning**, then such message will be deemed to have been made in writing, evidenced in writing or supported by a document. as the case may be.⁴

(3) Electronic Signatures

(3.1) *Deem Signed Signatures*

In the case where a person is to enter a signature, it will be deemed that the electronic data has been signed if,

- (i) the method used can **identify the owner of the signature and show that he has certified the message** in the electronic data as being his own; and
- (ii) such method is **trustworthy and suitable** for the objective in making or transmitting the electronic data with due regard to the prevailing circumstances or an agreement by the parties.

These conditions also apply *mutatis mutandis* to the affixing of the seal of juristic persons by electronic means.

In considering the trustworthiness of the method as mentioned in (ii) above, the following factors must be taken into account:

⁴ Section 8, Paragraph 1 of the E-Transactions Act

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- (a) the security and the circumspectness of the use of such method or equipment in the identification, the readiness of alternative means in the identification, the rules concerning the signature prescribed in the law, the level of security in the use of electronic signatures, the compliance with the process in the identification of the middleman, the level of acceptance or denial, the method used in identifying the person making the transactions, the method of identification at the time of making the transactions and communications;
- (b) the description, category or size of the transactions made, the number of times or the regularity of making the transactions, the trade customs or practices, the importance and the value of the transactions made, or
- (c) the circumspectness of the communication system.⁵

The E-Transactions Act does not specify a particular technology to be used but it recognizes all types of signatures as long as they comply with the conditions (i) and (ii) above.

(3.2) *Trustworthy Electronic Signatures*

An electronic signature means letter, character, number, sound or any other symbol created in electronic form and affixed to electronic data in order to establish the association between a person and the electronic data for the purpose of identifying the signature's owner who is involved with such electronic data and showing that the signature's owner approves the message contained in such electronic data.⁶

An electronic signature is deemed to be a trustworthy electronic signature if it meets the following requirements:

- (i) ***the signature creation data is***, within the context in which they are used, ***linked to the signature's owner*** and to no other person;
- (ii) ***the signature creation data was***, at the time of creating, ***under the control of the signature's owner*** and of no other person;

⁵ Section 9 of the E-Transactions Act

⁶ Section 4 of the E-Transactions Act

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- (iii) any alteration to the electronic signature, made after the time of creating, is detectable; and
- (iv) where the purpose of the legal requirement for a signature is to provide assurance as to the completeness and integrity of the message, any alteration made to that message after the time of signing is detectable.

However, this does not mean that there is no other way to prove the trustworthiness of an electronic signature or the adducing of the evidence of the untrustworthiness of an electronic signature.⁷

For example, the current technology which can be deemed as a trustworthy electronic signature, according to the E-Transactions Act, is a “digital signature”.

In considering the standards of electronic signature technology, not only recognized international standards developed by international organizations e.g. International Standards Organization, Internet Engineering Task Force, must be taken into account, but also industry practices and trade usage.

However, the parties to the Transaction can agree otherwise on the requirements for deemed trustworthy electronic signature.⁸ This is because while most of the provisions in the E-Transactions Act are mandatory rules, the parties are allowed to agree otherwise in certain provisions (e.g. deemed trustworthy electronic signature, offer, acceptance, intention and notice, the time and place of remitting and receiving electronic data as discussed below).

An electronic signature will be deemed to be legally effective without having to consider:

- (i) the geographic location where the electronic signature was created or used; or
- (ii) the geographic location of the place of business of the electronic signature’s owner.

An electronic signature created or used in a foreign country will have the same legal effect in Thailand as an electronic signature created or used in Thailand, provided that the level of reliability

⁷ Section 26 of the E-Transactions Act

⁸ Section 5 of the E-Transactions Act

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used in creating or using such electronic signature is not lower than as prescribed in the E-Transactions Act.⁹

However, the parties to the Transaction can agree otherwise on the matter mentioned in the two previous paragraph.¹⁰

(4) Offer, Acceptance, Intention, and Notice in the Form of Electronic Data

An offer and acceptance when executing a contract may be done as electronic data, and the legal effect of the contract will not be denied merely on the ground that the contract was executed with the offer and acceptance in the form of electronic data.¹¹ The E-Transactions Act also stipulates provisions regarding the time and place of remitting and receiving electronic data, which should be read together with other applicable laws, e.g. the Civil and Commercial Code of Thailand, to determine the time and place of creation of contracts.

Therefore, in the case where the Transaction is executed with the offer and/or acceptance being in the form of electronic data, its legal effect will not be denied only because it was done by means of electronic data.

Between the sender and the receiver, the declaration of intention or notices may also be done as electronic data.¹²

However, the parties to the Transaction can agree otherwise on the matter regarding offer, acceptance, intention and notice in the form of electronic data¹³. For example, the parties may agree that certain high-value transactions cannot be executed electronically or certain important notices cannot be sent electronically.

2.1.2 Admissibility of Electronic Records into Evidence

Pursuant to Section 11 of the E-Transactions Act, the admissibility of electronic data is recognized, subject to certain conditions as elaborated below.

It is prohibited to deny the admissibility of electronic data into evidence in judicial proceedings, whether it be civil cases, criminal cases or any other cases, only because it is electronic data.

⁹ Section 31 of the E-Transactions Act

¹⁰ Section 5 of the E-Transactions Act

¹¹ Section 13 of the E-Transactions Act

¹² Section 14 of the E-Transactions Act

¹³ Section 5 of the E-Transactions Act

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In weighing the evidence as to whether the electronic data is reliable to any extent, it shall be based on the reliability of the description or the method used to create, store, or communicate electronic data, the description or the method of storage, the completeness and integrity of the message, the description or the method used in specifying or identifying the data sender, including all circumstances involved.

As for the print-outs of electronic data, the same criteria as mentioned above also apply.¹⁴

The E-Transactions Act recognizes the admissibility of electronic data into evidence; nevertheless, it does not stipulate that electronic data will be admissible as what type of evidence and by what procedure.

The admissibility of electronic records, like any other types of evidence, is also subject to the Civil Procedure Code of Thailand. Generally, disputes arising from the Transactions, i.e., derivatives transactions under the ISDA Master Agreement may fall within the jurisdiction of the Civil Court (or other courts that have jurisdiction over civil cases), or the Intellectual Property and International Trade Court, or the Bankruptcy Court, as the case may be. Currently, in addition to being subject to the E-Transactions Act, certain types of cases must also comply with specific rules, the details of which are slightly different as set out below.

(1) Rules for Intellectual Property and International Trade Cases B.E. 2540 (A.D. 1997)

These rules are for the proceedings and hearings of evidence applicable in the intellectual property and international trade courts and other courts which are empowered to conduct proceedings on behalf of the intellectual property and international trade courts.¹⁵

¹⁴ Section 11 of the E-Transactions Act

¹⁵ The Intellectual Property and International Trade Courts have jurisdiction over certain matters, including ...

(5) civil cases regarding the international sale, exchange of goods or financial instruments, international services, international carriage, insurance and other related juristic acts;

(6) civil cases regarding letters of credit issued in connection with transactions under (5), inward and outward remittance of funds, trust receipts, and provision of guarantees in connection therewith; ...

(11) civil cases regarding arbitration to settle disputes under (3)-(10).

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(1.1) *Admission of Computer Records*

The court may admit data recorded in or processed by a computer as evidence in a case, if

- (i) The data recording or processing was done in the ordinary course of business of the user of the computer, and
- (ii) The data recording or processing resulted from the proper operation of the computer according to its due procedures and, even if the computer has experienced problems, the accuracy of the data contained therein is not affected.

The use of a computer in the ordinary course of business as stated in (i) and the accuracy of the data recording or processing as stated in (ii) must be certified by the person involved in the recording or processing, or the person recording or processing the data¹⁶

(1.2) *Admission of Records in Other Electronic Medium*

The same criteria and conditions as apply to the admission of computer records apply *mutatis mutandis* to the admissibility of any data recorded in or taken from microfilms, electronic medium or any other information technology medium.¹⁷

(2) Rules for Bankruptcy Cases B.E. 2549 (A.D. 2006)

These rules are for the proceedings and hearings of evidence applicable in the bankruptcy courts and other courts which are empowered to conduct proceedings on behalf of the bankruptcy courts.

¹⁶ Rule 33 of the Rules for Intellectual Property and International Trade Cases B.E. 2540

In our opinion, the use of the phrases “the person involved in the recording or processing” and “the person recording or processing the data” in the Rules, should be understood to mean that either the person who actually recorded or processed the computer records, or the person who was involved in the recording or processing, but did not record or process the computer records by themselves may certify (i) and (ii). However, there has not been any official interpretation or precedents set by the court yet, since the submission of computer records to the court is still rare in practice. Therefore, when preparing computer records for use as evidence, consultations should be held with the court.

¹⁷ Rule 36 of the Rules for Intellectual Property and International Trade Cases B.E. 2540

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(2.1) *Admission of Computer Records*

The court may admit data recorded in or processed by a computer as evidence in a case, if

- (i) The data recording or processing was done in the ordinary course of business of the user of the computer, and
- (ii) The data recording or processing resulted from the proper operation of the computer according to its due procedures and, even if the computer has experienced problems, the accuracy of the data contained therein is not affected.

The affirmation of the person involved in the recording or processing, or the person recording or processing the data may be used as proof of the use of a computer in the ordinary course of business as stated in (i) and the accuracy of the data recording or processing as stated in (ii).¹⁸

(2.2) *Admission of Records in Other Electronic Medium*

The same criteria and conditions as apply to the admission of computer records apply *mutatis mutandis* to the admissibility of any data recorded in or taken from microfilms, electronic medium or any other information technology medium.¹⁹

2.2 Would there be a presumption as to the authenticity and integrity of the electronic records?

Answer

There is no presumption as to the authenticity and integrity of the electronic records. However, there are other presumptions in relation to electronic transactions as elaborated in 2.1 above, and as summarized below.

2.2.1 Presumptions that message have been made in writing, evidenced in writing or supported by a document

Where the law requires any transaction to be made in writing, to be evidenced in writing or supported by a document, if the message has been made in or as electronic data that is accessible and can be recovered for use without change of meaning, then such message will

¹⁸ Rule 20 of the Rules for Bankruptcy Cases B.E. 2549

¹⁹ Rule 23 of the Rules for Bankruptcy Cases B.E. 2549

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be deemed to have been made in writing, evidenced in writing or supported by a document, as the case may be.²⁰

2.2.2 Presumptions that electronic data has been signed

In the case where a person is to enter a signature, it will be deemed that the electronic data has been signed if,

- (i) the method used can **identify the owner of the signature and show that he has certified the message** in the electronic data as being his own; and
- (ii) such method is **trustworthy and suitable** for the objective in making or transmitting the electronic data with due regard to the prevailing circumstances or an agreement by the parties.

These conditions also apply *mutatis mutandis* to the affixing of the seal of juristic persons by electronic means.²¹

2.2.3 Presumptions that an electronic signature is a trustworthy electronic signature

An electronic signature is deemed to be a trustworthy electronic signature if it meets the following requirements:

- (i) **the signature creation data is**, within the context in which they are used, **linked to the signature's owner** and to no other person;
- (ii) **the signature creation data was**, at the time of creating, **under the control of the signature's owner** and of no other person;
- (iii) **any alteration to the electronic signature**, made after the time of creating, **is detectable**; and
- (iv) where the purpose of the legal requirement for a signature is to provide assurance as to the completeness and integrity of the message, **any alteration made to that message after the time of signing is detectable**.

However, this does not mean that there is no other way to prove the trustworthiness of an electronic signature or the adducing of the evidence of the untrustworthiness of an electronic signature.²²

²⁰ Section 8, Paragraph 1 of the E-Transactions Act

²¹ Section 9, Paragraph 1 and 3 of the E-Transactions Act

²² Section 26 of the E-Transactions Act

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2.3 What are the conditions (if any) that would need to be satisfied with regard to:

(i) legal enforceability of electronic transactions;

Answer

Please see 2.1.1 (Legal Enforceability of Electronic Transactions) above.

(ii) admissibility into evidence of electronic records;

Answer

Please see 2.1.2 (Admissibility of Electronic Records into Evidence) above and the following.

The laws of Thailand require that documents in foreign languages be translated into the Thai language in order to be admissible as evidence in the Courts of Thailand. However, if the case is brought to the Bankruptcy Courts or the Intellectual Property and International Trade Courts, a document in English may be admitted by such Court should the parties agree not to translate it and such Court is of the opinion that such document is not evidence in a major issue of the case.

The laws of Thailand prescribe that contracts or documents that are subject to stamp duty cannot be admissible as evidence in Thai Courts unless the appropriate stamp duty is affixed. According to the stamp duty schedule in the revenue code of Thailand, transactions under ISDA Master Agreement are generally not subject to stamp duty, unless they can be recharacterized as certain types of contracts or documents that are subject to stamp duty, e.g., loan. The E-Transactions Act provides that where it is required by law to affix stamp duty, and if any payment or another arrangement has been made by electronic means in compliance with the rules, regulations and procedures prescribed by the relevant authorities, such documents shall be deemed as having been affixed with stamp duty, and such stamp duty will be deemed to have been crossed out as required by the law. Currently, there is no rule, regulation, and procedure regarding the aforementioned payment, or other arrangements. In practice, if it is required by law to affix stamp duty on any document, then that document can be printed out and affixed with a physical stamp duty, which is to be crossed out in the same way as the traditional method.

Please note that the admissibility of electronic records, like any other types of evidence, must also comply with the requirements under the Civil Procedure Code of Thailand and the rules of relevant courts, for example, requirements for adducting and presenting evidence to the

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court, e.g., filing lists of evidence, submitting copy of evidence to the opposite party.

(iii) presumption as to the authenticity and integrity of the electronic records?

Answer

Please see 2.2 (Presumptions) above.

3. QUALIFICATIONS

This opinion is subject to the following qualifications.

3.1 Laws of Thailand

Our opinion is confined to, given on the basis of, and is to be considered in accordance with the laws of Thailand as currently interpreted by the Supreme Court of Thailand and we have made no investigations of the laws of any country other than Thailand. The scope of our opinion is limited to the issues presented herein.

3.2 General Limitation

The rights and obligations of the parties to any agreement may be limited by applicable statutes of limitation, bankruptcy, insolvency, liquidation, business reorganization, moratorium, or other laws of general application relating to or affecting the rights of creditors and may be subject to a defence of set-off or counterclaim.

3.3 Good Faith

Provisions vesting a discretion in any party, or making opinions or determinations or accounts maintained by any party conclusive and/or binding, or imposing obligations in relation to payment of expenses, penalties, duties and taxes are subject to the requirements of good faith and/or reasonableness and/or proof of correctness.

3.4 Public Order or Good Morals

The enforceability of an agreement is subject to the public order or good morals of the people of Thailand. The court will not enforce any agreement which is considered to be contrary to the public order or good morals of the people of Thailand.

3.5 Application of Foreign Law in the Courts of Thailand

If any proceedings are taken in the Courts of Thailand for the enforcement of any agreement, the choice of the foreign law agreed by the parties as the

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governing law of the agreement will be recognized and applied, but only to the extent to which such law:

- (a) is proven to the satisfaction of the Courts of Thailand (which satisfaction is within the discretion of the Courts); and
- (b) is not considered contrary to public order or the good morals of the people of Thailand.

The scope of public order or the good morals of the people of Thailand has not been established in any Supreme Court judgment and is uncertain.

3.6 Judgment of Foreign Court

Any judgment or order obtained from a foreign court would not be enforced as such by Thai Courts, but such judgment or order may, at the discretion of Thai Courts, be admitted as evidence of an obligation in new proceedings instituted in Thai Courts, which would judge the issue on the evidence before it.

Furthermore, there is no basis under the laws of Thailand for submission to the jurisdiction of a court outside Thailand. In Supreme Court Decision No. 951/2539 (A.D. 1996), the court held that an agreement for the submission by any person to the non-exclusive jurisdiction of foreign courts does not prevent a Thai court from having jurisdiction over the case, by the virtue of the Civil Procedure Code of Thailand.

3.7 Court Proceedings

The taking of proceedings in one court in Thailand may preclude the taking of proceedings in any other court in Thailand on the same subject matter. No contractual agreement can prevent the court from accepting a case if the court has jurisdiction over the case under the law, nor can it prevent the legal execution of a court judgment against the debtor's assets.

3.8 The Unfair Contract Terms Act

Under the Unfair Contract Terms Act B.E. 2540 (A.D. 1997), any provisions in an agreement which give one party inappropriate advantage over the other party may be regarded by Thai Courts as unfair provisions and may result in such court ordering that only the provisions that are fair and appropriate are enforceable.

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This opinion is given as of the date hereof for the sole benefit of the International Swaps and Derivatives Association, Inc. and its members. This opinion is not to be disclosed to any other person nor is it to be relied upon by any other person without our prior written consent. The scope of this opinion is limited to the issues presented herein and this opinion does not purport to be a substitution for legal advice or opinion on any particular transaction.

Yours faithfully,

BAKER & MCKENZIE LTD.

A handwritten signature in black ink that reads "Baker & McKenzie". The signature is written in a cursive, flowing style. A single horizontal line is drawn under the word "McKenzie" at the end of the signature.