

Complex Commercial Litigation 2021

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Complex Commercial Litigation 2021

Contributing editor**Simon Bushell**

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Complex Commercial Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Bermuda, China, Mexico, Portugal and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Simon Bushell of Seladore Legal, for his continued assistance with this volume.

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Thailand

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BACKGROUND

Frequency of use

- 1 | How common is commercial litigation as a method of resolving high-value, complex disputes?

High-value, complex disputes are commonly litigated in Thailand in the domestic context. However, arbitration is becoming increasingly popular in resolving domestic issues and is mainly used for high-value and complex cross-border disputes.

Litigation market

- 2 | Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

Thailand is a top-tier inbound investment jurisdiction and the number of foreign investor parties, transactions involving them, and quantity of foreign investment capital has generally increased on annual basis for several decades now. Consequently, the number of cases brought by or against foreign parties have been increasing as well. However, international parties prefer the mechanisms of arbitration to settle their cross-border disputes, whereas domestic parties commonly insist on domestic litigation.

Legal framework

- 3 | What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Although there are some statutory provisions that have their origin in common law systems both the substantive and procedural law of Thailand is modelled on the civil law system. In the context of litigation this means that contentious legal disputes are generally resolved in the courts by the direct application of statutory law and not, as is often the case in common law jurisdictions, by application of 'case law'. Accordingly, although Thai appellate court decisions do have significant persuasive effect on lower courts, they do not have any precedential value.

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

- 4 | What key issues should a party consider before bringing a claim?

Litigation in Thai courts can be lengthy and costly. For a foreign investor this is largely due to the fact that generally all documents and testimony must be translated into Thai, and even though the hearing dates are

scheduled to be successive, they are often not completed within the time scheduled and postponed for weeks or months. Civil trials rarely take less than two years to complete from filing to judgment, often longer. Completing the appellate process often takes five to 10 years. Arbitration is an advisable alternative for foreign investors in Thailand. Thailand is a signatory to the New York Convention and its Arbitration Act is based on the 1985 version of the UNCITRAL Model Law.

Establishing jurisdiction

- 5 | How is jurisdiction established?

Any general civil action may be filed in Civil Court as long as it is submitted to the court where the cause of action arose or where the plaintiff is domiciled. However, where the case concerns immovable property, the plaintiff must bring the case to the court where such property is situated or where the defendant is domiciled. But if the case concerns certain subject matters (ie, tax, bankruptcy or labour) it must be submitted to the relevant specialised court with exclusive jurisdiction over that subject matter (eg, the Tax Court for a tax matter).

Preclusion

- 6 | Res judicata: is preclusion applicable, and if so how?

Res judicata is available under Thai law. It prevents a claim from being relitigated when a court of competent jurisdiction has entered a final judgment on the merits on the same claim in a prior action between the same parties. Exceptions to this are when:

- proceedings are filed for the execution of a prior judgment or order;
- a judgment or order has prescribed provisional measures that are subject to alteration or repeal; or
- a complaint or order is dismissed 'without prejudice' debarring the plaintiff's right to refile.

Applicability of foreign laws

- 7 | In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Thai courts will apply foreign law if the parties' choice of law provisions state so.

Where the substantive law has not been established by the parties in cross border situations, the application of foreign law is regulated in the Conflict of Laws Act, which outlines what law applies to a dispute in such cases. Nevertheless, Thai courts only apply foreign law when they consider that doing so would not be contrary to the public order or good morals of Thailand.

Initial steps

8 | What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

The initial steps the claimant can take are as follows:

- file a request to the court to request for protective measures, eg:
 - to seize all or some of the property in dispute or the defendant's other property, including any money or property payable to the defendant by a third party;
 - for a temporary injunction restraining the defendant from damaging, transferring, encumbering any property or right that might inhibit the plaintiff's recovery;
 - an order directing any relevant authority to cancel or modify any registration appertaining to the defendant's property; or
 - provisional arrest and detention of the defendant.
- Inspect the defendant's assets before filing the case. An inspection of assets of a juristic person can be done by a review of its yearly financial statement which is a public document and easy to obtain, however, an inspection of assets of a natural person is rather difficult as third parties such as banks or government offices often deny such request absent a court order or judgment.

It is a criminal offence if a defendant unfaithfully takes steps to make themselves 'judgment proof' (eg, by removing, concealing or transferring his or her assets to other parties by knowing that the claimant has filed a case to the court or is going to file a case to the court).

Freezing assets

9 | When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

An order freezing a defendant's assets can be obtained by filing an ex parte application to the court together with the complaint or at any time before judgment. For the court to grant such order, the claimant must satisfy the court that:

- there are sufficient reasons to believe that the defendant has intention to transfer, sell, or remove the assets in order to delay or obstruct future execution; and
- the case has a reasonable chance of success.

Pre-action conduct requirements

10 | Are there requirements for pre-action conduct and what are the consequences of non-compliance?

For most cases, there are no pre-action requirements. However, there are some cases that require a person to take certain actions, which generally involve various notification formalities, before commencing civil proceedings (eg, a rescission of contract; suretyship enforcement; mortgage enforcement; and pledge enforcement) failing which will result in different consequences. In practice, a notice is usually sent to the opposing party to demand a performance under the contract or to request alternative dispute resolution mechanisms before bringing the case to the court.

Other interim relief

11 | What other forms of interim relief can be sought?

Apart from the protective measures over the defendant's assets explained in questions 8 and 9, the parties can also seek an interim of relief by applying to the court for an order prescribing measures to protect the applicant's interest during the trial or to secure the execution

of judgment, such as depositing property or money in dispute with the court or the third party or appointing an administrator of the business in dispute. The defendant can also seek an interim relief in a form of security for costs.

Alternative dispute resolution

12 | Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

Thai courts encourages ADR at the pre-action stage and throughout the case before the judgment, but the parties are not obliged to join. There are no consequences of failing or refusing to engage in ADR.

Claims against natural persons versus corporations

13 | Are there different considerations for claims against natural persons as opposed to corporations?

The difficulties between assessing natural persons' assets and corporations' assets are significantly different and should be considered before bringing a claim. Assessing a corporation's assets is easier since these are subject to public records whereas assessing a natural person's assets can be more complicated.

Class actions

14 | Are any of the considerations different for class actions, multiparty or group litigations?

Multiparty litigation is common in Thailand and can be established by initial joinder of parties or, subsequently, brought by or against any natural or juristic person who is not already a party to the proceedings. Class actions are relatively new to Thailand and came into effect on 4 December 2015. As with the class actions in other jurisdictions, particularly in the United States on which Thailand's version is modelled, a plaintiff party may seek certification of a class by the court. If the court finds, among other things, that there is indeed an identifiable and definable plaintiff class, that the plaintiff seeking certification is an adequate representative of such class, and that the potential class representative's legal counsel can effectively and fairly represent the class, it will certify the class. An important distinction between multiparty or group litigation and class actions in Thailand is with regard to case funding, specifically with regard to payment of legal fees and expenses. Actual, legal fees and expenses are not awarded in normal, including multiparty or group, civil actions. However, in the event that a class is successful, the court will determine the amount of the class' actual legal fees and expenses, which may be up to an amount equal to 30 per cent of the monetary judgment awarded to the class, to be paid by the defendant.

Third-party funding

15 | What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

Third-party funding or agreeing to pay adverse costs is not disallowed by law. However, it is unclear whether or not Thai courts would find a third-party funding arrangement from a disinterested third party associated with litigation of another person in exchange for certain benefits from the litigation, as contrary to public policy or not.

Contingency fee arrangements

16 | Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

In the past, the Lawyer Act explicitly prohibited lawyers from acting on a contingency fee basis. Although the current Lawyer Act no longer prohibits such, to prevent lawyers from having direct interest with the result of the case many court judgments have voided the contingency fee based on the reason that it was unethical and contrary to public order and good morals.

THE CLAIM

Launching claims

17 | How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

A claimant initiates a claim by filing a complaint to the Court of First Instance. Generally, the complaint must contain all the facts which would be sufficient to support a legally cognizable claim against the defendant under Thai law and the relief applied for. However, there is no need for the claimant to quote the applicable law nor to provide evidentiary support for these factual allegations in the complaint. There is no limit of minimum or maximum length of claims submitted to Thai court, so it could range from a few pages to hundreds of pages. The claimant can attach documents supporting the claim as exhibits together with the complaint or submit them to the court and serve to other parties at any time not less than seven days before the trial.

Serving claims on foreign parties

18 | How are claims served on foreign parties?

Nationality of a defendant has no effect on a service of a summons and a complaint in Thai court proceedings. The key factor is the defendant's domicile or place of business. If the defendant is domiciled or has a place of business in Thailand, the summons and the complaint can be served on him by: a court officer; a registered mail with a mailing receipt; or a domestic express mail at such address. If the personal service by the court officer or mail is not successful, alternative services can be made by the court posting them in a conspicuous place at the domicile or place of business of the defendant; depositing them with the local administrative or the police office and then posting the notice of such deposit as previously stated; advertising them; or by any other methods as the court deems fit. If the defendant is not domiciled in Thailand, does not have any place of business in Thailand, and does not have any agent or lawyer in Thailand, the plaintiff must submit a motion to the court within seven days from the date of filing of the complaint in order for the court to forward the summons and the complaint to the defendant. However, if the defendant's domicile or place of business outside of Thailand cannot be located, or if the process mentioned above has been carried out but the result of the service is unknown, the plaintiff may request and the court may then allow the service of the same by posting them at the court.

Together with the posting the court may also have them published in the newspaper or sent by any other means.

Key causes of action

19 | What are the key causes of action that typically arise in commercial litigation?

The key causes of action for commercial litigation in Thailand are breach of contract, tort and infringement of intellectual property rights.

Claim amendments

20 | Under what circumstances can amendments to claims be made?

Thai courts may allow the amendment of a claim in the following limited circumstances:

- 1 increase or decrease of claimed amount or value of the disputed assets;
- 2 waiving of claim, or submission of supplementary complaint to make the original complaint more complete; or
- 3 correction of insignificant error or mistake or amendment involving public order.

The claimant can do so by submitting the request to the court before the settlement of issues hearing, or if there is no settlement of issues, at least seven days before the commencement of the trial. However, in the case of (3) above or when there is reasonable cause, the said time limit would not apply.

The opposing party has the right to examine and rebut the claim amendment.

Remedies

21 | What remedies are available to a claimant in your jurisdiction?

Remedies in Thailand are various and depend on the claims and legal obligations between parties that can be categorised into monetary remedy, specific performance and other non-monetary remedies.

Recoverable damages

22 | What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

As a general rule civil courts in Thailand limit recovery for contractual breaches and wrongful conduct to actual monetary damage caused. The aim is to put the harmed party in the same financial position they would have been in had the wrongful act not occurred. There is no provision for the recovery of 'general' or 'additional' damages in Thailand such as emotional distress or punitive damages. However, there are some exceptions with regard to the latter case under, for example, the 2009 Product Liability Act, which does permit the court to award limited punitive damages based on and in addition to the actual damages. Contractual parties may provide for an exception to this general rule of 'actual damages only' by including contractual penalty provisions in their contract. But it should be noted that Thai courts have discretion to reduce such contractual penalty if they are of the opinion that such penalty is too high compared to the actual damages caused. Courts may also refuse to enforce such a provision if they are of the opinion that it is contrary to public policy or contravenes any other relevant applicable laws such as the Unfair Contract Terms Act. Because Thailand is a 'free contract jurisdiction' – where parties can agree to any lawful contractual terms – they may also limit their respective liabilities. However, such limitations of liability will almost certainly receive a greater degree of scrutiny by the courts as to their enforceability. For example, contractual terms pre-exonerating a party from fraud or gross negligence are highly unlikely to be enforceable under the Unfair Contract Terms Act.

RESPONDING TO THE CLAIM

Early steps available

23 | What steps are open to a defendant in the early part of a case?

At the early stage, the defendant may raise a question of law, such as, plaintiff's legal power to file the case, the court jurisdiction, the limitation period to bring a claim, and disjunctive allegations. Before proceeding further with the case, the court will examine the question and render a decision on it. If such is decided in favour of the defendant, the issues to be tried and potential liability of the defendant may be reduced or eliminated if the case is dismissed as a result. A defendant may also file any counterclaim against the plaintiff that is directly related to the original complaint, together with their answer to the complaint. If the defendant believes that a third party is liable for the claim, the defendant can summon a third party to join the case.

Defence structure

24 | How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

Once the defendant receives the summons and complaint, the defendant can begin the defence process by filing an answer. The answer must clearly state whether the defendant admits or denies the allegations in whole or part. In case of denial, reasons for such denial must be given. Generally, the defendant must submit the answer to the court within 15 days of the date the defendant was served. However, for specific cases such as consumer cases, the defendant can submit the answer at any time up to and including the hearing date. A defendant can attach documents supporting the answer together with the answer as exhibits or submit them to the court and to the opposing party not less than seven days before the hearing date.

Changing defence

25 | Under what circumstances may a defendant change a defence at a later stage in the proceedings?

A defendant can amend his defence by raising any new defence against the first or subsequent claims or amending the allegations or contentions to support his claims or to contradict those of the opposing party by filing a request to the court not less than seven days before the settlement of issues hearing, or if there is no settlement of issues, at least seven days before the commencement of the trial. However, the defendant is also entitled to file the request later than the time prescribed with 'reasonable cause' for not being able to file it within such time. Amendments that involve public order, or the amendments that correct insignificant errors or mistakes can be done at any time.

Sharing liability

26 | How can a defendant establish the passing on or sharing of liability?

A defendant can file a request to the court to summon a third party against whom he believes he has a right of recourse or compensation in the event judgement is rendered against the defendant. A defendant can also summon a third party to join the case when it is required by law or if it is in the interest of justice. A defendant may formally request when answering the complaint or, upon the court's permission, at any time before the judgment.

Avoiding trial

27 | How can a defendant avoid trial?

The defendant may avoid a trial by entering into a settlement agreement with a plaintiff. The parties may also request that the court endorse the settlement agreement and if so such endorsement then has the force of a judgment.

Case of no defence

28 | What happens in the case of a no-show or if no defence is offered?

If the summons and complaint have been legally served but the defendant fails to file the answer within the time prescribed by law, he is deemed to be in default. However, the claimant must still file a request for a default judgment, failing which the case will be dismissed. Having received the plaintiff's request, and having examined the complaint (which may require the plaintiff to provide evidence and response to examination by the court) and determined that it is well-grounded and not contrary to the law, the court will render judgment or order dismissal of the case.

Claiming security

29 | Can a defendant claim security for costs? If so, what form of security can be provided?

A defendant can request for a security for costs when a claimant's domicile or business is not situated in Thailand and has no assets to be executed against in Thailand, or when there is a reason to believe that the claimant will evade payment of court ordered fees and expenses, if he loses the case. When the court finds that the request is reasonable, the court may issue an order directing the claimant to deposit money or other security as the court deems appropriate.

PROGRESSING THE CASE

Typical procedural steps

30 | What is the typical sequence of procedural steps in commercial litigation in this country?

The typical sequence of procedural steps in commercial litigation cases in Thailand is as follows:

- the plaintiff files a complaint;
- the court accepts the case and serves the complaint and summons to the defendant;
- the defendant files the answer to the complaint;
- a settlement conference is held;
- assuming the settlement conference does not succeed in terminating the case, the parties then proceed to a pretrial conference during which they specify the issues they believe need to be resolved;
- the court then sets the trial date;
- after the trial the parties may, if permitted by the court, submit closing statements;
- the court reads the judgment; and
- if the judgment has not been complied, the judgment creditor applies for an execution of the judgment against the judgment debtor.

Bringing in additional parties

31 | Can additional parties be brought into a case after commencement?

Any third party can be brought into a case under several circumstances by way of interpleading as follows, by:

- applying to join the case by motion to enforce or protect a right if that would be affected by the outcome of the case;
- being summoned by the claimant or defendant to appear in the case where such party has a legal claim against the third party with regard to the case; or
- being summoned to join a case by a claimant, a defendant, or the court when it is required by law, or it is deemed necessary in the interest of justice.

Consolidating proceedings

32 | Can proceedings be consolidated or split?

Proceedings can be consolidated on the condition that the court is satisfied that there is sufficient connection between the cases, at least some of the parties in the cases to be consolidated are the same and that consolidated trial of these cases is manageable. Proceedings can also be split provided that a case involves several claims and the court is of the opinion that these claims will be better facilitated if all or any of the claims are tried separately.

Court decision making

33 | How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

Once the complaint and the answer are filed, the court will fix a day for a pretrial conference. On this date, the court will determine disputed issues and assign the burden of proof. Generally, the burden of proof of a fact lies on a party who alleges such fact. An exception to this basic rule is a presumption in law or reasonable presumption from the usual state of events in favour of a party. Such party must prove that it has fulfilled the conditions required to be entitled to such a presumption. The court has full authority to decide if the evidence is sufficient to be conclusive by balancing the degree of probability of the evidence produced by the parties.

34 | How does a court decide what judgments, remedies and orders it will issue?

Judgments, remedies, and orders depend on the nature of the case and are circumscribed by the relief requested in the complaint. With very limited exceptions the court cannot render any relief that exceeds what is requested in the complaint.

Evidence

35 | How is witness, documentary and expert evidence dealt with?

Typically, the party that alleges a fact has a burden to prove such fact. However, evidence in the form of facts generally known, indisputable or admitted or deemed admitted by the opposing party do not need to be weighed by the court and is deemed proven by its nature. The parties are free to submit whatever evidence that will support their claims. Any party intending to rely on such evidence must provide a list of evidence to the court and to the opposing party within the time as prescribed by law. If the court is of the opinion that such evidence is necessary, the court will admit the evidence. However, if the evidence has been provided contrary to the law, or if the court is of the opinion

that the evidence is superfluous, dilatory or irrelevant, it can refuse to allow such evidence. Where the court is of the opinion that it is necessary in the interest of justice to hear further evidence, it can also order that such be provided without the application of a party. The court can upon the application of any party or when the court thinks fit, order the appointment of an expert.

36 | How does the court deal with large volumes of commercial or technical evidence?

There is no specific rule that deals with large volumes of evidence. However, there are specialist courts in Thailand for certain legal matters in order to ensure that complex cases or technical evidence can be appropriately dealt with eg a quorum of the Central Intellectual Property and International Trade Court judges combines career judges and layman judges who have in-depth knowledge or experience. Moreover, a party is allowed to cite any person who has expert knowledge whose opinion can help settling disputed issues. The court can, upon the application of any party or when the court thinks fit, order the appointment of an expert.

37 | Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Thailand applied to be, but is not yet a member of The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Accordingly, there is not currently a legally defined mechanism to specifically compel a foreign witness to give evidence in Thailand for a foreign proceeding.

38 | How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

A list of documentary evidence and a copy of the same must be provided to the opposing party within the time prescribed, in order to give the opposing party time to review such evidence before trial. When documentary evidence is required by law, no witness testimony is admissible. A party may request the court to summon a witness to appear in court. Fact witnesses can only provide testimony with regard to fact of which they have direct knowledge. A witness gives his or her testimony orally. Exceptions are applicable if the court and all parties agree to the procedure of having the witness providing a written statement. An opposing party can cross-examine another party's witness after the party proffering such witness completes its examination in chief. An opposing party may also object to any testimony given by a fact witness and if the court believes the objection is well founded the court may disregard the testimony. Furthermore, the court has the power to ask the witness any question it deems necessary at any time while the witness is giving testimony.

Time frame

39 | How long do the proceedings typically last, and in what circumstances can they be expedited?

The length of court proceeding depends on the complexity of the case and the relevant court's docket. In the general civil court of first instance, it usually takes one or one and a half year from the filing date to the date the court gives judgment. An exception to this are consumer cases, which are governed by a separate procedural Act that emphasises expediency and thus such cases tend to be completed on a shorter time frame.

Gaining an advantage

40 | What other steps can a party take during proceedings to achieve tactical advantage in a case?

Tools that some litigants may use during the proceedings to achieve tactical advantage in a case are for example: filing of a motion to transfer venue to a more favourable forum; burying the other party with large volumes of evidence; filing a parallel criminal case to pressure the same defendant in a civil case; and especially by the defendants, applying for an extension of time and adjournment of hearings, which Thai courts very often accommodate.

Impact of third-party funding

41 | If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

Third-party funding or agreeing to pay adverse costs is not disallowed by law. However, based on rulings regarding attorney contingency fees, there is a non-negligible risk that the court could interpret a third-party funding arrangement as contrary to public policy, and as such, void.

Impact of technology

42 | What impact is technology having on complex commercial litigation in your jurisdiction?

Technology has been and is increasingly playing more of a role in commercial litigation proceedings in Thailand. For example, approximately 20 years ago certain specialised courts began allowing electronic witness testimony; about 10 years thereafter, the same became accepted in general civil courts and is now generally accepted under certain circumstances. Similarly, in 2015 the Civil Procedure Code was amended to allow for electronic document submission. However, it was not until 2017 that the regulations to implement such were issued and such submission option remains a work in process.

Parallel proceedings

43 | How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Although private parties generally cannot bring a criminal action, they can report suspected or known regulatory violations to the appropriate authority. The ability to prosecute criminal cases is not limited to a public prosecutor, a private party may file a criminal case. When the court deems appropriate or upon an application of any party concerned, a civil case can be suspended pending the result in a parallel proceeding if the adjudication of the pending civil case depends wholly or partly on the prior adjudication of certain points in the parallel civil or criminal proceeding. Filing of a civil claim in connection with a criminal offence may be of strategic value because:

- it may be more convenient for the plaintiff to have the civil and criminal cases tried in one court than to have them separately tried and face a possibility of the civil case being put on hold by the civil court as explained in the first paragraph;
- the plaintiff does not have to pay the court fee. While filing the civil claim in the civil court, the plaintiff would generally have to pay the court fee at the rate equal to 2 per cent of the claim (up to a maximum of 200,000 baht). If the claim is above 50 million baht, the court fee will be 200,000 baht plus an amount equal to 0.1 per cent of the claimed amount that exceeds 50 million baht; and
- it may encourage the defendant to be more amenable to settlement.

TRIAL

Trial conduct

44 | How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

After both parties have made their first filings, the court sets a date for a pretrial conference, however, the court may and does regularly order a settlement conference prior to such. Assuming the settlement conference does not succeed in terminating the case, the parties then proceed to the pretrial conference during in which matters such as the issues to be determined at trial, whose burden it will be to prove each issue, and the trial date is set. Unfortunately, a Thai civil court trial usually consists of several evidence or witness hearings. Each party presents its evidence consecutively; however, the hearing of the parties' evidence may often be separated by several days, weeks, or even months depending on the case and the court's schedule. After the hearing of evidence is concluded the parties may, if permitted by the court, submit closing statements. The court then also fixes a date to pronounce its judgment. This day can vary depending on the procedural law under which the case is brought and how busy particular court is but it's usually within 30 to 90 days after the conclusion of the trial. The total duration of a case in the court of first instance can vary significantly but is most often 18 to 24 months from the initial filing to judgment.

Use of juries

45 | Are jury trials the norm, and can they be denied?

There are no juries in Thailand. Decisions are made by judges – generally either a panel of one, two, or three depending on the remedy sought and on which court the case appears before.

Confidentiality

46 | How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

Where a witness is called to give testimony or present evidence and such witness asserts that such evidence is confidential and must not be admitted because:

- it involves the state and by its nature it has to be kept confidential;
- it is communication between a client and his lawyer; or
- it would breach the secrecy of any invention, design, or other works or matters protected by law, the witness can refuse to give such testimony or present such evidence. The court may then summon any relevant witness or evidence to determine if there is reasonable ground for the non-disclosure. The trial is normally open to the public except in the case where the court finds appropriate to prevent the disclosure of any information in the parties' pleadings or evidences, the court may forbid the public from attending the proceeding. However, first hand access of the case evidence is normally available to the parties.

Media interest

47 | How is media interest dealt with? Is the media ever ordered not to report on certain information?

Generally, proceedings are open to the public including the media. However, where the court finds appropriate it may prohibit the disclosure of any information in the parties' pleadings or evidence by prohibiting the public, including the media, from attending the hearing, or from publishing such information, or both. However, whether or not the public is disallowed access to any of the proceedings or to report such, the

reading of the judgment must be in open court and the publication of the judgment or the accurate summary of such cannot be deemed unlawful.

Proving claims

48 | How are monetary claims valued and proved?

Monetary claims can consist of either contractual enforcement ('specific enforcement') claims or monetary damages. Interest on any monetary award is applicable per any legal acceptable contractual arrangement, absent which it will be included and tolled at the statutory rate of 7.5 per cent per year.

POST-TRIAL

Costs

49 | How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

The plaintiff is legally responsible for depositing the trial court fee on entry of a complaint, generally payable at the rate equal to 2 per cent of the claim (up to a maximum of 200,000 baht). If the claim is above 50 million baht, the court fee will be 200,000 baht plus an amount equal to 0.1 per cent of the claimed amount that exceeds 50 million baht. The same applies to the filing of an appeal to the Court of Appeal and the Supreme Court. In specific cases such as consumer cases, court fees may be exempted. In addition, the court has the power to waive court fee for a party that cannot afford it by reason of poverty, if so requested. The ultimate liability for costs of the parties to a case is to be borne by the party losing the case. However, the court has the power, irrespective of the total or partial success of a party, to decide at its own discretion, taking into account the reasonableness and good faith of the parties' contentions or the conduct of the case by the parties. Awardable costs include the court fee, witnesses' fees, lawyers' fees, fees for service of documents, and execution and all other costs or fees payable by law. With regard to the lawyer's fees, the court is authorised to order up to a maximum amount equal to 5 per cent of the amount in dispute (and the Appellate and Supreme Court, can do so up to a maximum of 3 per cent) but practically the courts usually award only a very small fraction of the actual lawyers' fees. Thus, the parties to court litigation in Thailand should bear in mind that they will be responsible for almost all of their attorney's fees and an exposure to the opposing party's attorney's fees is limited. A typical judgment is made in written form and states:

- name of the court giving judgment;
- names or all parties, and of their legal representative(s) (if any);
- the particulars of the case;
- the ground for all decisions; and
- the court's decision on the issues of the case and the decision for the costs.

The length of a judgment depends on complexity of the case. Hard-copy judgments can generally be obtained by the parties only, but reading of judgments and viewing the published copy of a judgment are open to the public.

Appeals

50 | When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

There are two stages of appeal in Thailand, which are appeal to the Court of Appeal and appeal to the Supreme Court. Most of judgments and orders of the trial court can be appealed to the appellate court. Appeals may be made on question of 'fact' or 'law' but the appeal on the question

of fact can be proceeded only when value of property or the disputed amount in the appellate court exceeds 50,000 baht, except where:

- the judge who tries the case in the trial court gives a dissenting opinion or certifies that the appeal should be allowed due to reasonable excuse; or
- in the case of no such dissenting opinion or certification written permission from the Chief Judge of the trial court or of the regional court is obtained.

Unless otherwise allowed by the trial court, an appeal must be filed at the trial court within one month from the date of reading of the judgment. Typically, the parties cannot submit new evidence in the appeal stage. The issues raised in the appeal stage must already have been raised in the trial court and must be significant. However, in some cases the law provides for appeal directly to the relevant supreme court, thus bypassing any intermediate appellate court. Notable examples of this would be cases involving:

- the recognition and enforcement of arbitration agreements and awards;
- employment law disputes; and
- consumer cases.

Appealing to the Supreme Court is a permission-based system and will only be granted where the case involve matters where the court determines that the appeal involves a significant question of law or public order: on which the appellate court ruled absent, or contrary to, Supreme Court precedent or other court orders on the issue; the Supreme Court determines that ruling on the case will contribute to the development of law in Thailand; or other significant matters according to the Regulation of the President of the Supreme Court, which are:

- when there is a dissenting opinion in the Court of Appeal's decision on any material point of the case; and
- when the Court of Appeal's decision on any significant question of law is contrary to any international agreement that Thailand is a party to. An appeal generally takes up to three to five years at each appellate stage.

Enforceability

51 | How enforceable internationally are judgments from the courts in your jurisdiction?

Thailand has not yet concluded any treaty and is not party to any convention governing the enforcement or recognition of foreign judgments.

52 | How do the courts in your jurisdiction support the process of enforcing foreign judgments?

Thailand is not bound to enforce foreign judgments as it is not a party to any treaty or convention governing the enforcement or recognition of foreign judgments; however, a party intending to enforce a foreign judgment in Thailand may initiate a new case and submit such foreign judgment as an evidence.

OTHER CONSIDERATIONS

Interesting features

53 | Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

A defending party can often count on delaying the proceedings for a significant time as the court will almost always grant extensions of time based on any reason, cognisable or not, and sometimes even when the

law does not provide the court with the power to do so. Also, the current quality of practice by party representatives in court proceedings will generally afford significant advantage to a party whose representative is well prepared and that has mastered the relevant facts, law and the connections between them.

Jurisdictional disadvantages

54 | Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

Some common disadvantages of litigating in Thai courts are follows:

- Costs: all court proceedings must be conducted in Thai language. Thus, all foreign language documents must generally be translated into Thai language before submitting to Thai courts. Any foreign witness giving a testimony in any language other than Thai language would generally require a translator, all of which greatly increase a party's costs;
- Delay: there is a significant backlog of cases before Thai courts. It often requires several months, even a year or more, to obtain an initial trial date. Completing the initial trial level can take significantly longer. There is no fixed timeframe to achieve the judgment at any stage. A typical civil case, if appealed, can take several years to be fully and finally resolved; five to 10 years is common, but some cases have taken well over a decade to complete; and
- Competence: Thai judges sometimes lack the requisite specialist knowledge to understand the nature of the dispute and competently administer and rule on the case.

Special considerations

55 | Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

A defending party should be aware that an unfavourable Thai court judgement can only be enforced against his assets in Thailand. A defending party should also be aware that the defamation law in Thailand is quite broad and can include criminal sanction, even where the statement is true; accordingly, a defending party would do well to refrain from any disparaging commentary regarding the counterparty.

UPDATES AND TRENDS

Key developments of the past year

56 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

No court or legislative developments in the past year are sufficiently significant to include here.

Coronavirus

57 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic was one of the key factors that accelerated judicial authorities in Thailand to implement technology in the judicial process to reduce court visits and speed up the process. The key developments are as follows:

- Effective from 27 March 2020, a case information service system, or Case Information Online Service, has been made available, which



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provides parties with the opportunity to online track a progress of the case, file documents, as well as request for copy of documents from case files without having to visit the courts;

• E-filing rules that were issued by the Office of Court of Justice originally supported only the filings of claims and summons by the plaintiffs and limited to cases that are under a jurisdiction of general civil courts. However:

- effective from 30 April 2020, the e-filing rules were amended to enable submissions of answers by the defendants and submissions of any other case-related documents by the parties; and
- effective from 10 July 2020, the e-filing rules were amended to include cases that are under a jurisdiction of specialist courts, which are: the Central Intellectual Property and International Trade Court; the Central Tax Court; the Central Bankruptcy Court; and the Labour Courts.

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