

# Litigation & Dispute Resolution 2024

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# Thailand

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## **Efficiency of process**

The Thai judicial system is primarily adversarial. However, certain courts, like the Administrative Court, Labor Court, Constitutional Court, and Criminal Court for cases involving corruption and misconduct, operate under an inquisitorial system.

Recently, Thai courts have increasingly recognised the importance of mediation as an efficient way to resolve a dispute without the need for a lengthy trial. Court procedures in Thailand typically begin with the plaintiff filing a complaint. Depending on the case, the court may require parties to participate in mandatory mediation at the first hearing, such as in labour disputes. Further, in general civil cases, courts may require parties to participate in mediation, even without a mandatory mediation requirement by law. If no resolution can be found through mediation, the court schedules proceedings to determine the issues for trial. Subsequently, dates are set for witness hearings where both plaintiff and defendant present their evidence. Once witness hearings are concluded, a judgment hearing date is scheduled. If necessary, parties have the option to appeal the decision.

Thailand is actively enhancing the efficiency of its legal systems through the use of technology and digital initiatives. For example, the judiciary has implemented online platforms for filing claims, submitting pleadings, submitting petitions or other documents, and delivering the documents. These platforms improve the litigation process by enabling electronic submissions and facilitating easier access to case information.

Recently, Thailand has implemented an e-Hearing system for witness examinations, which are examinations of witnesses via video and audio recording systems. The judge does not have to record the testimony using a recording device, as is traditionally done in in-person proceedings; instead, testimony is captured using CCTV cameras and microphones installed in the courtroom. The recorded video and audio can be reviewed by the judge and involved parties to facilitate the judicial process.

It has become increasingly common for the Thai courts to allow witnesses who are outside the courtroom or abroad to testify via video conference. This method allows witness testimony, cross-examination and re-direct examination to be conducted remotely. While Thai law permits this practice, its use is subject to exercise of the courts' discretion. This

approach supports judicial efficiency by being beneficial for cases involving international or distant witnesses.

## **Integrity of process**

The principle of judicial impartiality and independence is enshrined in the Constitution. Judges have the duty to operate independently in the trial and adjudication of cases, adhering to the Constitution and laws, and ensuring swift and fair proceedings without any bias. Thailand's laws include numerous provisions mandating that judges must maintain impartiality in their adjudications. Importantly, judges can be challenged if they have a vested interest in a case or a relationship with any of the parties, such as being a relative of a party or if they have other serious conflicts that could compromise the fairness of the trial or judgment. Additionally, there is a code of ethics for judges, providing guidelines on maintaining impartiality and independence, with disciplinary consequences for violations. Thailand ensures a balance of power in the judiciary. Internally, if a party disagrees with a court's order or judgment, they can appeal the decision to the Court of Appeal or the Supreme Court, allowing for a thorough review. Externally, an independent organisation can investigate judges suspected of dishonest conduct, similar to the officials in other branches of government. This system maintains checks and balances within and outside the judiciary.

## **Privilege and disclosure**

Attorney-client privilege in Thailand is an obligation of lawyers not to disclose confidential information shared during communications between a lawyer and their client, except where the client's consent has been obtained or where it is made under court order. This rule is mentioned in the code of ethics of the Lawyers Council of Thailand and in several provisions of the Penal Code and other relevant laws.

There is no mandatory discovery procedure under the Civil Procedure Code of Thailand. The Thai legal system only requires the disclosure of some basic information before trial, which includes information from the submission of lists of evidence and witnesses to be presented to the court, and submission of copies of documents that will be used during the trial. Otherwise, parties must petition for a court subpoena for witnesses or evidence from the opposing party or from third parties.

## **Evidence**

The Thai judicial system is largely an adversarial system. Each party has the right to present evidence and to rebut the other party's evidence. The courts play an active role in case management and make all procedural decisions throughout the trial. The courts have the discretion to ensure that all issues are properly addressed by the parties and may directly question witnesses during trial hearings to gather essential facts for resolving the dispute.

Witnesses can be subpoenaed to the court for witness hearings. Either party may request the court to issue a subpoena for any witness to attend the court. The court will issue an order to subpoena witnesses at the discretion of the court. Documents that are in the possession of the opposing party or a third party can also be subpoenaed to the court. However, in courts that use the inquisitorial system, the court can issue a subpoena on its own for any witness or evidence to appear in court. Petitions for a subpoena must clearly identify the person or evidence sought and relevance to the claim in dispute. Thai courts

are generally conservative and only clear and relevant requests are likely to result in issuance of a subpoena.

Each party must submit a list of witnesses to the court prior to the hearing. The parties may use written witness statements (similar to an affidavit) instead of direct examination in the court by agreeing to do so at least seven days before the hearing at which the testimony of that witness will be presented. During the hearing, the witness will be required to verify the contents of their statement. Subsequently, the parties will proceed with the cross-examination and re-direct examination of the witness.

## Costs and attorney fees

Thai courts generally order the losing party to pay costs to the prevailing party. However, courts have the discretion to determine that the prevailing party be liable for all costs or that each party be liable for their own costs. Where a court claim is successful, some advanced court costs are usually recoverable.

Substantial legal fee awards are rare in Thailand, and typically only a small portion of actual legal fees can be recovered. The court calculates the amount of costs to be awarded based on a statutory schedule, which sets minimum and maximum guidelines for lawyer remuneration in cases of need. In the calculation of legal fee awards, the court will consider the complexity or simplicity of the case, the time spent, and the work done by the lawyer. However, the amount awarded is typically low, and parties involved in litigation should not expect to recover a significant portion of their legal expenses.

The defendant may request any time before judgment for the court to issue an order for the plaintiff to pay a deposit for costs and expenses if either:

- the plaintiff is not domiciled or does not have a business office situated in Thailand and does not have assets in Thailand; or
- there is a strong reason to believe that the plaintiff will evade payment of costs and expenses if the plaintiff loses the case.

The court examines such requests by determining whether there is reasonable cause to believe that either of the above situations is true. Thai courts routinely grant orders for a security when foreign plaintiffs are involved. If the plaintiff fails to comply with the court order, the court will issue an order disposing of the case unless the defendant requests that the trial proceed or an appeal is made against the order by the plaintiff.

No court fees are required to file a criminal complaint or to initiate an investigation. However, if there is a request for the defendant to make payments related to a civil claim connected with the offence, court fees will be calculated for the civil claim based on the claim amount. These are the same calculations as in civil cases.

## Litigation funding

Litigation funding is not common in Thailand. There are no laws or regulations that directly prohibit litigation funding. However, the Supreme Court has consistently ruled that litigation funding is not recognised and is not legally enforceable under Thai law. These Supreme Court precedents have established that agreements to receive benefits in return for pursuing litigation in which the funding party is not involved in the dispute would be an act of seeking benefit from the litigation of others. Thai courts have viewed that seeking benefits from the litigation of others is contrary to public order and good morals, which results in the agreement being void and unenforceable.

Nonetheless, if the funding party has an interest or involvement in the dispute, the Supreme Court considers the litigation funding not to qualify as seeking benefits from pursuing litigation of others. Instead, such actions are typically taken to protect their own interest. Consequently, these actions are legally enforceable and not contrary to public order and good morals.

Although there are no specific laws or regulations prohibiting contingency fee agreements in Thailand, the Supreme Court has consistently ruled that a contingency fee arrangement without any interest or involvement in the dispute is contrary to public order and good morals. While there are also a handful of rulings that suggest that contingency fees are permissible, the preponderance of rulings discourage such fee arrangements. As such, there is substantial risk that contingency fee agreements may be unenforceable under Thai law.

However, a recent development in the laws regarding contingency fees allows the plaintiff's lawyer to receive a contingency fee in class action cases. The law stipulates that the lawyer has a right to a portion of the award in a successful case, and the court will determine the amount of the award. The award is not a result of a contingency fee arrangement *per se*, but is determined by law.

## Class actions

Class actions are permissible in Thailand. The plaintiff must submit a request for a class action proceeding to the court. In consideration of whether to certify the class, the court will consider whether there is a class of persons who have suffered damages due to the same sets of facts and legal principles as the plaintiff, whether conducting the cases individually would be difficult and inconvenient, and whether conducting the case as a class action is more impartial and efficient than hearing the cases individually.

Class action proceedings apply the inquisitorial system, in which the court has discretion in conducting a search for further facts. In this regard, the court may hear any witness, documentary evidence, or any other evidence, but the parties will not be precluded from rebutting such evidence. The court's decision in class action lawsuits binds both the plaintiff and all other class members who did not opt out of the class.

## Interim relief

Interim relief can be applied for either party in Thailand. The plaintiff and defendant have different conditions and criteria for requesting interim relief.

The plaintiff may request in the complaint, or at any time before judgment, an order to provide the following protective measures:

- To seize or attach the disputed property or the defendant's assets, including money or property of third parties due for payment to the defendant.
- A provisional injunction refraining the defendant from repeating or continuing any act, or any other order to redress grievances or damages that may continue to be suffered as a result of the defendant's act, or a provisional injunction refraining the defendant from any legal acts or damages concerning disputed property or the defendant's assets.
- An order for a competent authority to suspend, amend, and revoke registration in relation to the disputed property or the defendant's assets.
- To arrest and detain the defendant on a temporary basis.

When considering the request, the court must be satisfied that the complaint has a reasonable basis and that there are sufficient grounds for the requested protective measure to be applied.

Furthermore, either party is entitled to request the court to issue any interim relief order for the protection of the interest of the requesting party during the trial or for the enforcement of a judgment, such as depositing disputed property or money with a court or a third party, refraining from public auctions, or any other protective measures.

## Enforcement of judgments/awards

If the losing party or judgment debtor fails to comply with the execution order issued under the judgment or order of the court, the prevailing party or judgment creditor is entitled to apply for an *ex parte* request for execution with the court to issue a writ of execution to enforce its judgments by means of seizure of properties, attachment of claims or other measures of execution within 10 years from the date of the judgment or order. A Court of First Instance generally has the power to issue writs of execution to enforce its judgments and address related issues. Upon receiving the writ, an executing officer normally accompanies the judgment creditor or their agent to the place of the judgment debtor, and the officer will then attach the property. The attached property is generally either moved to a secure warehouse or left in place under seal. Notice of attachment is then sent to the judgment debtor and a subsequent public auction is advertised.

Foreign judgments are not enforceable in Thailand. Thailand is not a party to any treaty or convention on the recognition and enforcement of foreign judgments. Consequently, creditors must file a new lawsuit with the Thai court to obtain satisfaction. This requires the foreign judgment creditor to initiate a case against the Thai debtor in Thailand, presenting the foreign court's judgment as evidence. The Supreme Court has ruled that for a foreign judgment to be admitted as evidence, it must be a final and conclusive order.

Foreign arbitral awards are recognised and enforced in Thailand if they fall within the recognition of the treaties, conventions, and international agreements to which Thailand is a party and only to the extent that Thailand is committed to be bound by them. Thailand is a party to both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. The Arbitration Act B.E. 2545 dictates the enforcement mechanism for a foreign arbitral award in Thai courts. If the losing party refuses to comply with an arbitral award, whether the award is rendered in Thailand or in a foreign country, such an award may be enforced only after a Thai court judgment is obtained ordering enforcement. A petition for enforcement of an award must be filed with the court within three years from the date when the award could first be enforced. In addition, enforcement of the court judgment ordering enforcement does require the filing of an enforcement claim with the Thai court of jurisdiction for execution against a debtor's assets.

## Cross-border litigation

Thailand is not a signatory to the Hague Convention on the Taking of Evidence Abroad. However, Thailand currently has entered into an Agreement on Judicial Cooperation in civil cases with six countries: Australia; China; Indonesia; Korea; Spain; and Vietnam. Thai courts can request civil cooperation from foreign courts about serving judicial documents and obtaining evidence in civil and commercial matters. The cooperation



will be carried out in accordance with these agreements. If there is no civil cooperation agreement between Thailand and the other country, the proceedings must be conducted through diplomatic channels.

Thailand has entered into several bilateral agreements on mutual assistance in criminal matters. These agreements provide for cooperation in taking evidence and obtaining statements. Thailand has also provided a framework for criminal cooperation between Thailand and foreign countries in the Act on Mutual Assistance in Criminal Matters.

Countries that have a bilateral agreement on mutual assistance in criminal matters with Thailand that wish to request assistance from Thailand must submit a request to the Central Authority, which is the Attorney General of Thailand. However, countries that do not have such bilateral agreements with Thailand must submit their request through diplomatic channels. For countries without a bilateral agreement with Thailand, testimony can be taken for a foreign court through the use of letters rogatory.

Types of criminal cooperation that can be carried out within the Act on Mutual Assistance in Criminal Matters include:

- A request for questioning witnesses or providing documents or items of evidence, which is an out-of-court action, delivery of documents, searching and locating of people, and freezing or seizure of documents or articles for the purpose of gathering evidence.
- A request for questioning witnesses, documentary evidence, or physical evidence, which is an in-court action.
- A request for freezing or seizure of property for the purpose of forfeiture, or demand for payment *in lieu* of forfeiture, against any person, and a request for freezing, seizure, or forfeiture of property, or demand for payment *in lieu* of forfeiture, as per judgments or orders of courts in a foreign state.
- A request for transfer or receipt of a transfer of a person under custody for testimonial purposes.
- A request for initiating criminal proceedings.

Thailand may refuse to accept a request for assistance if it affects sovereignty, national security, or any other significant public interest of Thailand, or if the request is in connection with any political crimes. If the Central Authority considers that an execution of such a request may interfere with an ongoing investigation, inquiry, prosecution, or other action in connection with criminal cases in Thailand, the Central Authority may postpone the execution of such request or may execute such request under necessary conditions and shall notify the requesting state accordingly.

## International arbitration

Thailand is a signatory to both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Geneva Protocol on Arbitration Clauses 1923 (Geneva Protocol). International arbitration in Thailand is governed by the Arbitration Act, which generally follows the United Nations Commission on International Trade Law (UNCITRAL) Model Act.

There are three main domestic arbitration institutes in Thailand:

- the Thai Arbitration Institute of the Alternative Dispute Resolution Office, Office of the Judiciary;

- the Thai Commercial Arbitration Institute of the Board of Trade; and
- the Thailand Arbitration Centre, under the Ministry of Justice.

These institutes are well managed, have standard arbitration rules, and maintain a list of qualified available arbitrators. Additionally, in commercial contracts that designate international arbitration institutes, the most commonly used in Thailand are the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre, and London institutes.

The arbitral tribunal has powers to rule on matters under its jurisdiction, including the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal, and issues of dispute falling within the scope of its authority. If a party to the arbitration agreement commences legal proceedings in court against the other party, the party against whom the legal proceedings are filed may request the court to issue an order to dispose of the case and to proceed with the arbitral proceedings instead.

Furthermore, either party of an arbitration agreement may request for interim relief by submitting a request to the competent court to issue an order of interim measures to protect his or her interest before or during the arbitral proceedings. However, there are no provisions in Thailand that address the enforcement of interim measures issued by arbitral tribunals. There is only a provision that gives the court the power to issue an interim relief order. Parties cannot enforce interim measures from arbitral tribunals through Thai courts; they can only request the Thai court to issue such interim measures.

An arbitral award, regardless of the country where it was made, will be binding on the parties. In the case where an arbitral award was made in a foreign country, the award will be enforced by the competent court only if it is subject to an international convention, treaty, or agreement to which Thailand is a party.

However, even if all statutory conditions for recognition are met, the court may still refuse to recognise and enforce the award if it appears to the court that:

- the party was under some incapacity under the law applicable to that party;
- the arbitration agreement is not binding under the law of the country agreed to by the parties;
- the award has been annulled in the country in which it was rendered;
- the party against whom the award was sought was not given notice of the arbitral proceedings in sufficient time to enable the party to present their case or was not properly represented in the proceedings;
- the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties; or
- the award does not deal with all the differences submitted to arbitration by the parties or contains a decision on matters that are beyond the scope of the arbitration agreement.

In addition, the court may refuse to enforce an award if it finds that the award involves a dispute that cannot be resolved by arbitration under Thai law or if the enforcement would be contrary to public policy or good morals.

## Mediation and ADR

Most civil cases in Thailand generally have no mandatory requirement for mediation. However, in certain Courts of First Instance, such as the Labor Court and the Family and Juvenile Court, mediation is compulsory before witness hearings commence. Recently, courts have increasingly required mediation in general civil cases before witness hearings, even when it is not legally mandated. The high volume of cases in each court often exceeds the capacity of judges and court officials, leading to significant delays in case resolutions. As a result, it can take several years for cases to reach their conclusions, posing a serious obstacle to the administration of justice. Recognising the importance and efficiency of mediation, the Thai judicial system has adopted mediation as a method for resolving disputes, aiming to expedite case resolution and improve access to justice for the people.

In Thailand, mediation can be initiated before filing a case, at any point before judgment, or even before and after the execution of judgment. Additionally, Thai courts have permitted online mediation for various types of disputes, including consumer protection cases, labour cases, and criminal disputes involving compoundable offences.

Before filing a case, any party to a dispute may request the court to appoint a conciliator to facilitate mediation. If the parties reach an in-court settlement agreement, the court will review the agreement to ensure that it reflects the parties' intentions, adheres to principles of good faith and fair dealing, and does not violate the law. Either party can then request the court to issue a consent judgment based on the settlement agreement. This consent judgment, although rendered without a formal hearing or prior case filing, carries the same legal weight as a regular judgment. If any party fails to comply with the consent judgment, the other party can immediately enforce it without the need for a witness hearing.

Furthermore, parties can engage in mediation even after a judgment has been rendered, either before or after the execution of the judgment. Mediation can occur before the seizure or attachment of the judgment debtor's assets to prevent execution or after execution to withdraw the seizure or attachment of the judgment creditor's assets. If the parties reach an agreement, it will result in the suspension of the execution based on their settlement. This settlement agreement is binding, and neither party can terminate or alter it without the consent of the other party.

## Regulatory investigations

Thailand has a variety of laws and regulations regarding regulatory controls of consumer and business affairs, which have enhanced consumer protection and ensured fair business practices. These developments primarily focus on shielding consumers from unfair practices, defective or unsafe products, or violations of consumer rights. Additionally, businesses are required to strictly comply with regulatory standards and guidelines. Failure to comply can lead to regulatory investigations. There are several regulatory authorities in Thailand that focus on consumer and business affairs, such as:

- The Office of the Attorney General, which is responsible for the investigation and prosecution of criminal offences.
- The Office of the Securities and Exchange Commission, which is an independent state agency responsible for supervising the capital market, such as fund mobilisation, products and services, related business operators, and unfair securities trading activities in the capital market.

- The Office of the Consumer Protection Board, which is responsible for considering complaints from consumers who have suffered hardships or injuries from the acts of a business operator, and prosecuting cases regarding violations of consumer rights.
- The Office of Trade Competition Commission, which is responsible for considering the complaints and investigating violations of the law regarding trade competition, proceeding with criminal lawsuits, and imposing administrative fines as well as filing lawsuits in administrative court.

Thai courts oversee regulatory authorities through judicial review, ensuring that investigatory agencies and government bodies exercise their regulatory powers in accordance with the law and principles of fairness. This oversight includes assessing the legality and adherence to due process.

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Michael Ramirez is a senior counsel in Tilleke & Gibbins' dispute resolution group. Widely regarded as one of the most experienced foreign disputes attorneys in the region, he is a leading expert in regional trade and customs disputes and leads the firm's trade and customs disputes practice.

Michael regularly assists major international clients in a range of domestic and international disputes, including high-value commercial and construction claims, complex labour disputes, and transportation and logistics matters. In addition, he serves as a client advisor on the strategic aspects of claims management for cross-jurisdictional disputes, white-collar criminal disputes, and compliance with regional and foreign anticorruption laws.

Supplementing Michael's practice is his representation of clients in arbitration and mediation. This experience includes representing clients in regional enforcement proceedings, acting as an international arbitrator, and leading teams of litigators in domestic and international claim resolution.

Michael has authored and coauthored numerous published articles on topics including customs practice, anticorruption, foreign investment, and civil and criminal liability. He is a regular presenter on dispute resolution and commercial practice topics and has received the American Bar Association's Rule of Law Award on attorney ethics.

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Chayathorn Kruatao is an associate in Tilleke & Gibbins' dispute resolution group in Bangkok, where he provides a comprehensive range of litigation and advisory services for both civil and criminal matters in Thailand.

His expertise encompasses contractual disputes, torts, criminal offences, labour and employment disputes, customs and trade disputes, and bankruptcy and insolvency cases. In collaboration with Tilleke & Gibbins' litigation teams, Chayathorn helps clients develop and implement litigation strategies that further their business goals and allow them to deal smoothly with the unexpected commercial disputes that can arise in the course of doing business in the region.

Chayathorn holds an LL.B. from Chulalongkorn University.

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