

Thailand

Herbert Smith (Thailand) Limited

Litigation

1 What is the structure of the legal profession?

Under the Lawyers Act B.E. 2528 (1985), the term “lawyer” is defined as “a person who is registered and licensed to act as a lawyer by the Law Society of Thailand”. Applicants for registration as lawyers must be at least 20 years old and have passed the lawyer’s licence examination. Thai nationals with a law degree from an institution recognised by the Lawyer’s Council are eligible to take the examination only if they are members of the Thai Bar Association and have had six months training at a law firm, as well as practice and ethics training.

The Law Society’s registration and licensing requirements apply only to individuals who wish to represent clients in Court. There are no registration or training requirements applicable to any other legal consultants.

Candidates for positions as judges and public prosecutors must be at least 25 years old and must hold a bachelor of law degree from a recognised institution. To become qualified, a candidate must first pass an examination organised by the Thai Bar Association and then practice for at least two years as an assistant to a judge or a public prosecutor.

Judges are appointed by the King on the recommendation of an independent commission, and only the King can remove them on certain limited grounds. There are safeguards designed to protect judges from political interference.

2 What is the structure of the Court system?

There are three levels of Courts: Courts of First Instance, Courts of Appeal and the Supreme Court.

The Courts of First Instance comprise district Courts, provincial Courts (whose jurisdiction is geographically limited) and specialised Courts such as the Central Taxation Court, Central Juvenile & Family Court, Central Labour Court, Central Intellectual Property & International Trade Court (the IP-IT Court), Administrative Court and the Bankruptcy Court. In civil cases, district Courts deal with small claims of not more than Baht 300,000, while provincial Courts have general jurisdiction. In Bangkok, however, the Criminal Court and Civil Court take the place of the provincial Court for most purposes.

The nine Courts of Appeal (whose jurisdiction is also geographically limited) hear appeals from the Courts of First Instance in all cases except those in which right of appeal lies directly to the Supreme Court (see below). The Supreme Court is the final avenue of appeal.

With certain exceptions, trials in all Courts of First Instance are heard by two judges. However, trials in the IP-IT Court are heard by two career judges and one associate judge who has relevant commercial experience. Judges in other specialist Courts may also be assisted by associate judges with relevant expertise.

3 What is the role of the judge (and, where applicable, the jury) in civil proceedings?

Thailand has no jury system. Judges take a passive role, ruling on matters of fact and law after hearing evidence and submissions from competing parties. Judges have the power to bring about an agreement or compromise at any stage of the trial and, in the interest of doing so, may order mediation prior to the trial by consent of both parties. Judges may also order that proceedings take place in private, or that the parties appear without legal representation.

Thailand is a civil law jurisdiction and there is no system of binding judicial precedent. However, Supreme Court decisions are generally used as guidelines in subsequent cases on similar issues.

4 What are the time limits for bringing civil claims?

Claims for personal injury or wrongful acts (ie, torts, in broad terms) are barred by prescription after one year from the day when both the wrongful act and the identity of the prospective defendant became known to the injured person. In any case, the maximum time limit within which claims may be brought is 10 years from the date when the wrongful act was committed. For many contractual disputes the prescription period is either two or five years (depending on the nature of the claim). A 10-year period applies where no other time period is specified. However, no action for defective goods can be entered later than one year after discovery of the defect. Other prescription periods apply in particular circumstances (eg, annulment of a shareholders' resolution). Prescription periods fixed by law cannot be extended or reduced by agreement of the parties.

5 How are civil proceedings commenced, and what is the typical procedure which is then followed?

A civil action is commenced by filing a complaint setting out the nature of and basis for the claims and a request for remedies. Upon acceptance of the complaint, the Court will issue a "summons to answer" which the plaintiff must ask the Court to serve on the defendant. If the defendant fails to accept the writ, the Court may issue an order for substituted service. Failure by the defendant to submit a defence may result in a default judgment as long as the plaintiff has shown evidence of a *prima facie* case. The defendant may file a counterclaim to which the plaintiff may reply by way of a defence to the counterclaim. A third party may become a party in a case by way of interpleading.

After the exchange of pleadings, a pre-trial conference led by the judge will be scheduled for possible compromise negotiations or for identification of the issues in dispute (the "settlement of issues"). The Court will assign among the parties the burden of proving particular matters in issue. After this procedure is concluded, dates for the trial ("taking of evidence") will be scheduled. Pursuant to the Constitution of Thailand, the hearing of a case requires a full quorum of judges, and only the judge(s) who sat at the hearing of a case can give judgment in the case. Through recent improvement in case management, periodic (eg, monthly) trial hearings are gradually being replaced by single continuous hearings without adjournment unless necessary. All Court proceedings are carried out in Thai language.

The judicial system favours a full hearing and adjudication on the merits rather than early disposition on technical grounds. There is no concept of summary judgment, although claims not exceeding Baht 40,000 may be dealt with by the Courts of First Instance under the equivalent of a small claims procedure.

6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

Pre-trial discovery is unknown in Thailand. However, civil procedures allow a party to petition for an immediate taking of certain evidence if there is reason to believe that such evidence will be lost or become inaccessible when proceedings are commenced. A party intending to show evidence in support of the case (such as documents, inspection of a place or thing, or testimony of any factual or expert witness) must file a list of the evidence with the Court no less than seven days prior to the first day of trial. Where necessary, an additional list of evidence may also be filed within 15 days from the day of the taking of evidence. Evidence not filed at the Court within these time limits is inadmissible without the consent of the Court.

In most cases original documents will be required. For cases in the IP-IT Court, the Court may admit English language documents provided both parties consent. In practice, material documents are usually submitted with a Thai translation. In all other cases any documents in a foreign language must be translated. Except in some specialised Courts, where evidence-in-chief may be admitted in the form of a witness statement, witnesses must attend to give oral evidence at trial and may be cross-examined by opposing parties.

7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

An extension of a procedural time limit is subject to the Court's approval, and hearings can be postponed only for reasons acceptable to the Court. The Court must avoid adjournments where possible. Civil litigation may take between 12 and 48 months from filing the complaint to judgment by the Court of First Instance, though longer periods are not unknown. Appeals in the upper Courts may take an additional 12 to 24 months at each level.

8 What interim remedies are available to preserve the parties' interests pending judgment?

Protective measures before judgment, such as temporary restraining orders and attachment of property, are available at any time after the complaint has been filed. However, such measures are difficult to obtain and are unusual in practice. The Court must be satisfied that the defendant intends to remove or conceal assets, that there is a real need for a temporary injunction, or that other urgent grounds exist. The Court may require the applicant to deposit money with the Court as security for any compensation that the defendant may be entitled to receive if the applicant's claim should ultimately fail.

9 What substantive remedies are available?

The Court has the power to grant a wide range of remedies on application by a party or, where permitted by law, as it sees fit. Those remedies include injunctive relief, declarations, orders for an account of profits and the transfer of property and, most commonly, a monetary award of damages to compensate for loss suffered. Non-compensatory ("punitive" or "exemplary") damages are rarely awarded.

10 What means of enforcement are available?

Judgments and orders are enforceable by further Court procedures and, where necessary, by legal execution officials. The creditor must initiate the enforcement action. Standard means of enforcement include:

- (i) issuance of an execution decree empowering a legal execution officer to seize the debtor's property and sell it through auction;
- (ii) Court examination of the judgment debtor or other persons who are believed to have useful information on property liable to execution of the judgment;
- (iii) attachment of properties which are to be subsequently delivered or transferred by a third party to the judgment debtor; and
- (iv) order requiring a third party that owes a debt to a judgment debtor to pay that debt to the judgment creditor instead.

11 Does the Court have power to order costs? Are foreign claimants required to provide security for costs?

Legal costs (including lawyers' fees) may be apportioned between the parties at the Court's discretion, although they are usually borne by the losing party. However, the allowable amount in respect of lawyers' fees is small and varies within prescribed limits according to the amount in dispute.

A non-resident plaintiff may be required to deposit security to cover future payment of the defendant's Court costs and legal fees in the event that the plaintiff loses. If the plaintiff does not comply with such an order, the case will be dismissed.

12 On what grounds can the parties appeal and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

Appeals against judgments by the Court of First Instance are generally submitted to the Court of Appeal. Any further appeal lies to the Supreme Court. However, in an attempt to avoid the delays that occur under normal procedures, appeals against judgments rendered by specialised Courts (eg, the IP-IT Court) can usually be submitted directly to the Supreme Court. In particular, an appeal regarding a question of law may be filed directly with the Supreme Court, as long as there is no objection from the respondent and upon approval of the Court of First Instance. No appeal lies on questions of fact if the value of the property or the amount in dispute does not exceed Baht 50,000, or Baht 200,000 for appeals to the Supreme Court.

Appeals must be lodged within one month of the date of judgment and they proceed on a documents only basis. Questions of fact or law may be raised on appeal, so long as those questions were addressed in the Court of First Instance and are stated in the appeal document.

An appeal does not operate as an automatic stay of execution. However, the appellant may apply to the Court for a stay of execution at any time prior to judgment by the Court of Appeal. A stay of execution may be granted if the appellant deposits an amount of money in Court sufficient to cover the judgment debt and costs of the action and execution, or has provided security for such an amount to the satisfaction of the Court.

13 To what extent can domestic and/or foreign state entities claim immunity from civil proceedings?

Thai law is not entirely clear on this issue. But it is generally considered that foreign states and foreign and domestic state agencies/enterprises/etc can only claim immunity for acts of a governmental nature. Immunity does not extend to acts of a commercial nature which could equally be performed by a private company or individual. Domestic state bodies may also be sued in the Administrative Courts in respect of various administrative acts and functions, and in respect of “administrative contracts” (eg, concession agreements), as provided in more detail in the relevant law.

Thai law provides that “state property” is immune from execution procedures, and similar immunity is often conferred by the law establishing particular public sector bodies.

14 What procedures exist for recognition and enforcement of foreign judgments?

A foreign judgment cannot be enforced directly, and it will not provide sufficient grounds for attaching a judgment debtor’s assets within the jurisdiction. The creditor must begin new proceedings in Thailand on the merits of the claim. However, the foreign judgment can be relied on as evidence of the debt and may be recognised as a claim adjudicated abroad. In order to determine whether a claim adjudicated abroad is entitled to be recognised in Thailand, the Court will examine whether the foreign Court that decided the case had the necessary jurisdiction and whether the foreign judgment was final.

15 Is it permissible for lawyers to charge contingency or conditional fees, or other fee arrangements based on the result of the litigation/arbitration?

Thai law will uphold a contract unless it is expressly prohibited by law or contrary to public order or good morals. There is no specific law or rule prohibiting contingency or conditional fees or other legal fee arrangements based on the result of litigation/arbitration. The issue of public order and good morals will be considered on a case-by-case basis, but in general it is understood that such arrangements will be permissible under current law. In practice, results-based fee arrangements are not unusual.

Arbitration

16 Is the arbitration law based on the UNCITRAL Model Law?

Thailand’s Arbitration Act B.E. 2545 (2002) came into force on 30 April 2002 and is substantially based on the Model Law. It is available online at <http://www.arbitrators.org/branch/thai/thaiarbitrationact.pdf>

17 What are the main national arbitration institutions?

The main arbitration institutions are the Thai Arbitration Institute and the Thai Commercial Arbitration Committee established by the Board of Trade. Parties may pursue *ad hoc* or institutional arbitration subject to such rules as they agree.

18 Are there any restrictions on who may represent the parties to an arbitration?

Yes. Although foreigners may act as arbitrators, foreign lawyers may only represent parties to an arbitration:

- (i) where the dispute is not governed by Thai law, or
- (ii) irrespective of the governing law, where enforcement of the arbitral award need not be requested in Thailand.

19 What are the formal requirements for an enforceable arbitration agreement?

In order for an arbitration agreement to be enforceable under the Arbitration Act, there must be a clear agreement by the contractual parties to submit all or certain of their present or future disputes to arbitration. Furthermore, the arbitration agreement must be “in writing”, whether in the form of a contract or an exchange of information, letters, telegrams, facsimiles or other documents of a similar nature and bear the signatures of the parties (including electronic signatures).

20 Can the Court refuse to stay litigation if there is a valid arbitration clause?

The Court must strike litigation out of Court where there is an arbitration clause unless it is satisfied that the arbitration agreement is null, void, inoperative, unenforceable or incapable of being performed.

21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed, and who is the appointing authority?

The Arbitration Act requires that an odd number of arbitrators be appointed. If the arbitration agreement is silent as to the required number of arbitrators, only one arbitrator shall be appointed. If the parties are unable to agree on the arbitrator, either party may file a motion with the competent Court requesting the appointment of an arbitrator.

22 Are restrictions placed on the right to challenge the appointment of an arbitrator?

The appointment of an arbitrator may be challenged only where circumstances exist that give rise to “justifiable doubts” as to the arbitrator’s impartiality, or where the arbitrator lacks qualifications agreed by the parties.

23 Does the domestic law contain substantive requirements for the procedure to be followed?

No, save that the tribunal must treat the parties with equality and give each party an opportunity to present its case. In the absence of any prior agreement governing the matter, the arbitrators have the power to follow such procedure as they deem appropriate. The Arbitration Act follows the Model Law in providing detailed procedural provisions regarding matters such as where the arbitration may be held and the language of the hearing.

24 On what grounds can the Court intervene during an arbitration?

The arbitrators, or any party with the approval of the majority of the tribunal, may make an application for Court intervention, where they are of the opinion that a proceeding can only be carried out by a Court (such as summoning a witness or ordering production of a document). So long as the request is within its jurisdiction, the Court shall accept the application.

25 Do arbitrators have powers to grant interim or conservatory relief?

No. However, the parties may file with a competent Court an application for provisional measures for the protection of the interests of the party before or during arbitration proceedings. The Court may grant such relief if satisfied that it would have had jurisdiction to make such an order if the application had been made in the context of pending litigation.

26 When and in what form must the award be delivered?

The award must be in writing and signed by the arbitrators and clearly state the reasons for the decision. The decision must be cast by a majority of votes from the arbitrators. The Arbitration Act does not stipulate a time limit for delivery of the award. Copies of the award must be sent to each party.

27 On what grounds can an award be appealed to the Court?

A party may apply to the Court within 90 days of receipt of the award for the award to be set aside on grounds essentially identical to Article 34 of the Model Law.

28 What procedures exist for enforcement of foreign and domestic awards?

Thailand is a party to the New York Convention and no reservations were entered on accession.

Thai law does not distinguish between domestic and international awards. A party seeking to enforce either type of award will have three years to file its application with the Court, and the grounds for denying enforcement will essentially be those set out in Article V of the New York Convention.

29 Can a successful party recover its costs?

The tribunal's award may include directions with respect to costs, including the tribunal's own charges. The usual rule is that costs follow the event. However, under the Arbitration Act a party's legal fees and expenses are not recoverable unless otherwise agreed in the arbitration agreement.

Alternative dispute resolution

30 Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings?

In any case pending at the Court of First Instance, where the Court considers there is a possibility of settlement and with the consent of the parties, it is the practice of the Court to stay the proceedings and refer the matter to mediation. In mediation, issues in dispute will be heard by an independent third party in an attempt to reach a settlement of some or all of those issues. An initial settlement meeting is also required by the rules of the Thai Commercial Arbitration Committee before a dispute can proceed to arbitration under those rules.

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Herbert Smith's Bangkok office provides legal advice under Thai and some foreign laws, in Thai and English languages. We advise on general legal issues, assist in the preparation and interpretation of contracts, and help our clients to resolve commercial disputes. We offer specialist skills in the energy, construction and international business sectors with a team that includes Thai lawyers and resident foreign professionals.

Herbert Smith has particular expertise in the field of dispute resolution. We advise local and international clients in domestic and international arbitration, in all main areas of Thai litigation, and in other forms of commercial dispute resolution. We provide top quality, commercially aware legal advice, based on familiarity with Thai markets and long experience of local and international laws and business practices.