

IN-DEPTH

Construction Disputes

THAILAND

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Construction Disputes

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In-Depth: Construction Disputes (formerly The Construction Disputes Law Review) is a useful guide to the most consequential aspects of international construction disputes, highlighting the practical implications of the relevant case law, statutes and procedures. Topics covered include time bars as condition precedent to entitlement; right to payment for variations; concurrent delay; suspension and termination; penalties and liquidated damages; defects correction and liabilities; overall liability caps; and much more.

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Introduction

Based on the industry outlook for the construction sector in Thailand conducted by a well-known Thai finance institution, the sector is expected to experience steady growth, with projections indicating an annual increase of 3.0 to 4.0 per cent from 2024 to 2026. This growth is largely driven by public sector investments in large-scale infrastructure projects, particularly within the Eastern Economic Corridor (EEC). Public construction investment is forecasted to expand at a rate of 3.5 to 4.0 per cent, while private sector construction, including residential and commercial real estate, is expected to recover gradually, growing at 3.0 to 3.5 per cent. This recovery is supported by improving consumer purchasing power and ongoing infrastructure developments.

The construction industry's expansion often correlates with an increase in disputes. This is because construction is a highly capital-intensive undertaking, involving substantial amounts of money, extensive details and the need to complete projects within set timelines. These factors can easily lead to differences in opinion and misunderstandings.

In the context of construction disputes, we believe that there will be three primary areas of disputes: delays, defects and defaults, as briefly demonstrated below:

1. Delay (the construction not being completed within the agreed timeline). Delay disputes typically arise over which party is responsible for the delay and whether the contractor should be penalised. If the delay is caused by the employer or factors not attributable to the contractor's fault or negligence, the employer is generally obligated to extend the construction period for the contractor. Conversely, if the delay results from the contractor's fault or negligence, the contractor must pay penalties as stipulated in the contract.
2. Defect (any defect or imperfection in the construction work). Defects in construction are often caused by the contractor, but they may also result from flaws in the design, construction methods specified in the contract, or the materials supplied by the employer. When assessing construction delays, courts typically consider whether the delays were caused by *force majeure* events or other factors beyond the contractor's control and not due to the contractor's fault. Such factors may include an employer's order to temporarily halt work, government mandates to stop the project, or additions or variations to the scope of work. An unreasonably short extension period imposed by the employer is also taken into account. This issue of construction defects is another common source of disputes.
3. Default (breach of contract). Because construction contracts contain numerous terms and conditions with many details to follow, while the employer may have fewer responsibilities, breaches still happen frequently, such as failing to make timely payments, failing to pay, or not extending the construction period when necessary. On the other hand, the contractor has many more responsibilities due to being in charge of the construction, making them more prone to contract breaches if they are not careful. In some cases, it appears that the contractor intentionally breaches the contract, for example, by deviating from the design or using incorrect materials. Breaches of contract are another major source of disputes.

For the resolution of construction disputes, disputes in Thailand are commonly resolved through either the courts or arbitration as the primary methods of dispute resolution. Generally, when disputes arise and the parties involved cannot reach an agreement, the case will go to court for a decision. However, the court process may be lengthy, the parties cannot choose the judge who will hear the case, and the proceedings must be conducted in Thai. These factors have led to an increasing preference for arbitration as a method to resolve construction disputes.

Year in review

There are a large number of construction disputes being litigated in courts in Thailand. In 2023, one of the cases worth mentioning related to the construction matter in which the Supreme Administrative Court ruled on an impressive high-rise condominium located in the central business district of Bangkok: Ashton Asoke Condominium Project, by affirming the decision of the Administrative Court of First Instance, which revoked all governmental authorisations on the construction of the Ashton Asoke Condominium Project. This impacted the developer of the condominium project (Ananda Development PCL) immensely. Ananda Development PCL is one of the most reputable real estate developers listed on the stock exchange of Thailand, and jeopardised hundreds of individuals who had previously acquired units in the condominium. Normally, most individual buyers (including some corporate buyers) of real estate properties do not feel the need to conduct a legal due diligence investigation on each real estate property that each of them is looking to buy, and they may not be aware of the legal exposures or risks they have put themselves in. Therefore, in an abundance of caution, this may be an opportune moment for all real estate buyers (including individual buyers) to start considering measures such as legal due diligence to help identify the exposures or risks presented by each prospective real estate property.

In addition to the above, there is the issue of the interpretation of the conflict between public order or good morals in the enforcement of arbitral awards. This arose in a case where a tribunal awarded the contractor a construction fee for variation work that the employer, a government department, was obligated to pay. The employer subsequently petitioned the Administrative Court to set aside the arbitral award, claiming that its enforcement contravened public order or good morals. In 2023, the Supreme Administrative Court provided a rationale in its judgment, stating that when determining whether an arbitral award conflicts with public order or good morals, the court must evaluate whether the award is based on facts and legal principles that undermine the core structure of the legal system, or if it is so evidently unjust that it violates common perceptions of justice, thereby conflicting with public order or good morals. This judgment from the Supreme Administrative Court will serve as a precedent for considering this issue.

Courts and procedure

Court and jurisdiction

Thailand does not have a specialised construction court. Construction disputes shall be brought before the Court of Justice or the Administrative Court, where cases can be categorised as follows:

- **General Construction Contract Disputes:** These disputes involve private entities or cases where a government entity engages with a private entity under a non-administrative contract. Such disputes are governed by the Thai Civil and Commercial Code (CCC), which upholds the principle of freedom of contract, provided the terms and conditions do not violate public order or the law, nor are they impossible to perform. Disputes in this category are resolved through the Court of Justice as a civil case.
- **Administrative Construction Contract Disputes:** When a construction contract involves the government and is classified as an administrative contract (such as contracts for infrastructure projects like roads, dams, government offices and railways), the Public Procurement and Supplies Administration Act BE 2560 (PSA) and relevant regulations apply. These disputes are handled by the Administrative Court, which has jurisdiction over matters involving public contracts.

Procedure

Court of Justice

In Thailand, construction disputes are considered civil cases, and the court proceedings are governed by the Thai Civil Procedure Code, with no specific procedural rules tailored exclusively for construction cases. The general overview of the case proceedings for the court of first instance is as follows.

Initiating a case

The plaintiff is required to submit the claim in writing to the court of first instance, where the complaint must clearly set forth the nature of the claims and the requests for enforcement, as well as the allegations on which these claims are based. In addition, when filing the complaint, a court fee of 2 per cent of the claim amount is required, capped at 200,000 baht, with an additional fee of 0.1 per cent for claims exceeding 50 million baht. After the complaint is filed and accepted by the court, the court shall schedule a case management hearing as initially selected by the plaintiff and serve a writ along with a copy of the complaint to the defendant.

Statement of defence

The defendant who receives the service of the complaint is entitled to submit the statement of defence within a specified time frame, typically 15 or 30 days depending on the method of receipt as stipulated by law. The time frame may be extended upon request and subject to the court's discretion. Additionally, the defendant may also assert a counterclaim against the plaintiff in the statement of defence.

Determination of disputed issues

After the defendant files the statement of defence or the plaintiff files the statement of defence to the counterclaim, the court will determine the issues in the case and set the burden of proof on the parties based on the complaint and statement of defence. Subsequently, the court will schedule dates for witness examinations, allowing the parties to present their witnesses to the court.

Witness examination session

During the witness examination session, the witnesses are required to take the stand before the court and will be cross-examined by the opposing party's lawyer. The lawyer of the party who presented the witnesses will then conduct a re-examination. In civil cases, upon request, the court may allow the parties to submit written witness statement of their witness seven days prior to the witness hearing of each party in order to expedite examination proceedings. All proceedings carried out by the court are conducted in the Thai language, including pleadings and communication. If documentary evidence is in a foreign language, its Thai translation is normally required. Additionally, if the witness is a foreigner and cannot speak Thai, that witness must give their testimony or statement through a sworn interpreter.

Closing statement

Upon the completion of the witness examination session, it is optional for the parties to submit a formal written closing statement to the court, which serves to summarise the essential facts and evidence that should be taken into account in the case.

Judgment

The Court of First Instance will render judgment upon the completion of the witness examination session. In practice, the judgment will be rendered within a period of one to three months, depending on the complexity of the case.

If either party is dissatisfied with the judgment rendered by the Court of First Instance, they can submit an appeal to the court within one month from the date of pronouncement of the Court of First Instance's judgment. The opposing parties are required to submit a response to the appeal within a specific time frame, which is typically 15 or 30 days depending on the method of receipt as stipulated by law. Subsequently, the Court of Appeal will consider and render its judgment, taking into account the facts and evidence presented in the Court of First Instance.

A judgment of the Court of Appeal will be final, unless permission for appeal to the Supreme Court is granted. The appeal to the Supreme Court is discretionary and requires permission from the Supreme Court. Parties dissatisfied with the Court of Appeal's judgment can seek permission by submitting a motion for permission along with an appeal within one month from the date of pronouncement of the Court of Appeal's judgment. The Supreme Court has discretion to give permission to appeal for cases that fall within the specifications outlined by law.

Administrative Court

In cases involving administrative construction contracts, the case will be brought before the Administrative Court, where an inquisitorial system is used. In this system, the court plays a significant role in finding and investigating the facts of the case.

The general overview of proceedings in the Administrative Court of First Instance is outlined below.

Initiating a case

Upon submission of the complaint by the complainant to the competent Administrative Court, a court official conducts a preliminary examination of the complaint to ensure its compliance with the applicable laws and then arranges for it to be reviewed by the President of the Administrative Court. The court may decide to accept the case, order amendments to the complaint, or reject the case. If the case is accepted, the court shall serve a writ and a copy of the complaint to the respondent.

Statement of defence, objection to statement of defence and supplementary statement of defence

The respondent is required to file a statement of defence within 30 days from the date of the receipt of a copy of complaint or within any other period specified by the court. Upon the respondent's submission of the statement of defence, the complainant is allowed to file objection to statement of defence within 30 days from the date of the receipt of a court order or within any other period specified by the court. Upon the complainant's submission of the objection to statement of defence, the respondent is allowed to file supplementary statement of defence within 15 days from the date of the receipt of a court order or within any other period specified by the court.

Inquisitorial investigation process

As the court plays a significant role in finding and investigating the facts of the case, the court possesses the authority to independently gather facts, evidence, experts or evidence other than adduced by the parties. This may include ordering third parties or government authorities to submit requested evidence or compelling individuals to appear before the court for inquiry. Once the court determines that the facts and evidence are sufficient for making a decision, it will notify both parties of the final date for fact finding.

Hearing and judgment

Following the final date for fact-finding, the court will schedule the initial hearing. At the hearing, the Judge-Rapporteur shall summarise the relevant facts and the issues in dispute, after which each party will have the opportunity to present either a verbal or written statement. Upon completion of the parties' statements, the Judge-Commissioner of Justice will present an oral statement that includes an analysis of the facts and an independent opinion, which is not binding on the judgment. Subsequently, the court will either pronounce the judgment or schedule a separate hearing for its pronouncement.

If either party is dissatisfied with the judgment rendered, they can submit an appeal to the Supreme Administrative Court within 30 days from the date of pronouncement of the

Administrative Court of First Instance's judgment. The opposing parties are required to submit a response to the appeal within 30 days from the date of the receipt of court order along with copy of appeal or within any other period specified by the court.

Alternative dispute resolution

Statutory adjudication

Thailand does not impose statutory adjudication, but parties may opt to include it as part of their contractual agreements. In such cases, the parties must follow the agreed-upon preconditions before escalating the dispute to arbitration or court proceedings; for example, the Dispute Avoidance/Adjudication Boards.

Arbitration

Thailand does not impose mandatory or have special domestic arbitration for construction disputes, therefore parties are free to choose international and local arbitration if they prefer, but under the arbitration clause.

In Thailand, both domestic and foreign arbitral awards (made in a country that is a contracting state to the New York Convention) can be enforced by the Thai courts under the Arbitration Act BE 2545 (2002).

In terms of the enforcement of the arbitral award, the party seeking enforcement of the arbitral award has to file an application with the competent court (i.e., the Central Intellectual Property and International Trade Court or a court where arbitral proceedings were conducted or a court that has jurisdiction over the area in which each party is domiciled (the Court of First Instance), as the case may be). The application for enforcement must be made within three years from the day the award is enforceable.

If a party to the arbitration wishes to file an application to set aside an arbitral award with the Court of First Instance, it must do so within 90 days of receiving the arbitral award. However, under the Arbitration Act, the Thai court is considered a competent authority for setting aside an arbitral award seated in Thailand.

The court fees for enforcing or setting aside an arbitral award not exceeding 50 million baht is equal to 0.5 per cent (for a domestic award) and 1 per cent (for a foreign award) of the arbitration award up to a maximum of 50,000 baht (for a domestic award) and 100,000 baht (for a foreign award). For an arbitral award exceeding 50 million baht, the fee will be subject to an additional court charge of 0.1 per cent for both domestic and foreign awards.

Other ADR methods

The Thailand Arbitration Center (THAC) offers mediation services for dispute resolution. When parties request mediation, the arbitration institution appoints a mediator to facilitate the process. If the parties reach a settlement and agree to have an arbitral award based on the settlement agreement, the arbitral tribunal shall issue the award in accordance with the settlement agreement, without necessarily stating the reasons, as per the Rules of the

Thailand Arbitration Center on Arbitration from a Mediation Settlement Agreement through Mediation of the Dispute BE 2560 (2017).

Construction contracts

In Thailand, generally, a construction contract is classified as a 'hire of work' contract under the Thai Civil and Commercial Code (CCC), which does not require a written agreement. In terms of contract interpretation, pursuant to Sections 171 and 368 of the CCC, contracts are interpreted based on the true intentions of the parties, rather than relying solely on the literal meaning of the terms. Interpretation must also be done in good faith and according to customary practices. Pre-contract documents, such as email correspondence, memos and other materials created prior to the contract's execution, play a crucial role in determining the parties' true intentions. However, the main challenge is proving the terms and conditions of the agreement and their interpretation, especially when there is limited written evidence.

Public procurement including construction projects is primarily governed by the Public Procurement and Supplies Administration Act BE 2560 (PSA) and Regulation of the Ministry of Finance on Public Procurement and Asset Management, BE 2560 (2017). These establish the procedures and principles for government contracts, including those involving construction, where the government is a party. Construction contracts entered into with governmental bodies generally adhere to the standard agreement prescribed by the Regulation of the Ministry of Finance under the PSA, whereby contractors are typically not permitted to modify or adjust the significant terms and conditions of this standard agreement. If alterations to essential terms are necessary, approval must be obtained from the Office of the Attorney General.

In private procurement, parties may choose to use standard agreements developed by various organisations, create their own custom contracts, or utilise contracts from the International Federation of Consulting Engineers (FIDIC). The duties and liabilities of the parties are governed by their mutual intentions, as reflected in the terms and conditions of the construction contract.

Common substantive issues and remedies

In addition to the delays, defects and defaults mentioned in the first section, there are common substantive issues to discuss as outlined below.

Prescription period

Under Thai law, a contractor must file a claim for the price of work within two years from the date they have the right to claim payment, unless the claim is related to the employer's (debtor's) business activities. In that case, the contractor is entitled to claim the price of work within five years.

For instance, if the contractor is claiming payment for work such as building a house or a fence for a private individual, they must file a complaint within two years. However, if a developer employs the contractor to build houses intended for sale to third parties as part of a housing estate business, the contractor is entitled to file a claim for the price of work within five years.

Additionally, if the claim is related to requesting damages or the return of retention money or the breach of contract, the contractor is entitled to file a claim within 10 years.

Variation works

It would not be an understatement to say that there is no project without variations. The reasons for variation work arise from various sources, especially from three main parties involved: the owner, the designer and the project manager. If the agreement has clear terms and conditions for the variation order, the resolution of this matter will follow the agreement. However, when there are no terms and conditions covering certain circumstances for variation work, disputes will arise regarding whether the variation work is valid and, if so, what the price for such variation should be, with the burden of proof falling on the party making the allegation.

Suspension and termination

Thai law does not expressly stipulate procedures for the suspension of works. Therefore, such procedures are primarily governed by the terms and conditions of the contract itself. However, in the context of construction contracts, which are considered reciprocal contracts under Thai law, the contractor may exercise the right to suspend work if the employer fails to pay the agreed-upon price for the work performed. This suspension can continue until the employer fulfills their payment obligations.

Furthermore, suspension of works may occur due to *force majeure* events, either as recognised under Thai law or as specified within the contract. *Force majeure* events can temporarily or permanently relieve parties from performing their contractual obligations, depending on the nature of the event and the provisions outlined in the contract.

For the termination, under Thai laws, a party may terminate the contract under the terms and conditions specified within the contract itself or under the provisions of law, whereby the non-breaching party have the right to demand compensation.

Penalties and liquidated damages

Penalties and liquidated damages are considered penalties under Section 379 of the Thai Civil and Commercial Code (CCC). Pursuant to Section 383 of the CCC, the court has the discretion to reduce these penalties and liquidated damages to a reasonable amount if it deems them excessively and unreasonably high.

Defects correction and liabilities

Under Thai law, liability for defects can be claimed within one year from the date of delivery of the work, or within five years if the work involves a structure on land other than a wooden

building but the defect liability period can be extended by agreement between the parties. However, the employer is not entitled to file the contractor for the defect within one year after the defect appeared.

The parties did not regard the terms and conditions of the contract as essential

In construction contracts, while various terms and conditions are stipulated, the significance of each term can vary based on the parties' actions and interpretations. If one party breaches certain terms and conditions and the other party ignores these violations, or if the parties practice differently from the terms and conditions specified in the contract, it may indicate that those terms and conditions are not regarded as essential. There are several precedent cases, particularly regarding delivery periods or payment terms, where the non-breaching party's inaction demonstrates that they do not consider these terms and conditions as essential for enforcement or for justifying termination of the contract. Consequently, the parties may be deemed to have waived their right to enforce those specific terms and conditions.

Outlook and conclusions

Construction matters represent a specific type of dispute. Issues often arise during ongoing construction, but their resolution is typically postponed until after the project is completed, as neither party wishes to risk delays or complications. In addition, a common challenge in construction disputes is improper documentation or limited written evidence. This can lead to large and complex post-completion disputes, with numerous items requiring resolution by a judge or arbitrator.

In Thailand, there have been efforts to promote the concept of dispute avoidance/adjudication boards (DAABs) in construction contracts as an ideal solution. DAABs allow for the resolution of disputes on a rolling basis, concurrent with the construction process. This approach helps filter out minor issues, leaving only major disputes for arbitration or court, but it comes with additional costs that the parties must consider.

For the litigation, nowadays the court is striving to expedite the proceedings for the interest of justice and to reduce the time spent on litigation whereby the Act on the Timeframe of Judicial Proceedings BE 2565 (2022) mandates that all judicial authorities, including the courts, establish clear time frames for the proceedings. Consequently, on 24 January 2023, the Office of Judiciary issued the Judicial Regulation on the Timeframe for Court Cases BE 2566 (2023), which is summarised below:

1. Court of First Instance: The Court of First Instance is required to adhere to strict timeline for its proceedings from six months to one year from the date of accepting the complaint. The specific timeline is determined based on the type of cases, which includes special management cases, ordinary cases and extraordinary cases.
2. Court of Appeal: The Court of Appeal has four different types of cases (special urgent cases, urgent cases, special cases and general cases). The timeline for

these cases ranges from four months to one year from the day the Court of Appeal receives the case files from the Court of First Instance.

3. Supreme Court: The general timeframe is one year from the date of receipt of the case files from the Court of First Instance.

However, the time frames mentioned above may be extended under certain circumstances, such as settlement negotiations between the parties, suspension or stay of proceedings, and other unforeseen difficulties.

Looking ahead, parties in the construction industry should exercise diligence in their contract negotiations and project management, ensuring that the contract's terms and conditions are practical and that potential issues during construction are identified and addressed early for efficient resolution with proper documentation. This approach will ultimately support smoother project delivery and execution while mitigating the complications associated with large and complex construction disputes.

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