

**MULTILAW LITIGATION AND
DISPUTE RESOLUTION
PRACTICE GROUP**

**ENFORCEMENT OF FOREIGN
JUDGMENTS PROJECT**



**INTERIM AND PRECAUTIONARY
MEASURES: QUESTIONS**

2019

I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

A. Is it possible to apply for an interim measure in order to assure the effective enforcement of a Court decision?

Answer: Yes.

Interim and precautionary measures are available under Division IV of the Civil Procedure Code. However, in practice these measures are only enforced when there is substantial justification that interference is necessary under the circumstances. If a Court is of the opinion that adequate protection cannot be provided for such interim relief measures, it is more likely than not to deny issuance of interim orders. The clear preference is, wherever possible, for a Court to defer an interim decision until final judgment.

B. Is it mandatory to pay court fees for this type of application?

Answer: In practice, interim measures are often applied for in conjunction with the filing of a plaintiff with the Court. Therefore, the fee for this particular type of application is usually incorporated with the filing fee. There is no additional filing fee, although the Court may require a post of security if it issues interim relief measures/orders.

C. What is the ordinary/average length of time for this kind of procedure?

Answer: The length of time for this sort of procedure differs across each application, as there are many aspects particular to a given application. A straight forward ex-parte application that does not involve the defendant typically takes anywhere from two to three days to a few weeks to complete. However, the actual time period depends on the justification provided by the complainant, the Court schedule and the emergency nature of such application. Thus, a lack of justification may make for a longer period of application. In addition, the Courts preference to involve the defendant in applications for interim relief, wherever possible, can further delay proceedings.

The actual timelines are largely determined by the urgency of the application and whether the Court believes a post of security will protect against possible damage to the non-moving party. Due to the temporary and usually necessary nature of such measures, it is rare for the Court to take over a year to process an application.

II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES.

A. For which types of interim measures are the parties allowed to apply? (e.g., injunction, freezing orders, caveat, restraining order, etc.)

Answer: The available interim measures for Thai disputes are listed under Section 254 of the Thai Civil Procedure Code. They include writs for seizure or attachment of property or temporary injunctions. In addition, orders authorizing the Registrar, competent official or any other person with legal power and duty

to alter registration of property in dispute (Registration order) are obtainable. The last, and harshest, measure pertains to the provisional arrest and detention of the defendant. A motion for an emergency application may be made on any of the above provisional measures. It must be noted that these interim measures are only available for non-petty cases.

III. PROCEDURE

A. Competent Court

1. Which court has jurisdiction to grant these interim and precautionary measures?

Answer: Whichever Court is conducting the trial of the present case has jurisdiction to grant the interim and precautionary measures requested by the complainant.

B. When can the application for interim and precautionary measures be submitted?

1. Is it possible to apply for it at the time the underlying lawsuit is filed? If YES: Are there any special requirements when so doing?

Answer: Yes.

An application can be sought at the time that an underlying lawsuit is filed if it fulfills certain requirements. Filing at this point in time is beneficial in immobilizing the defendant, but to do so, as in any other circumstance, requires significant justification.

C. Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g., deadline to submit the lawsuit)

Answer: No.

Section 254 provides that a plaintiff may only file an application for interim measures together with his plaint or at any time before judgment. The absence of an underlying lawsuit will rule out any possibility of interim measures. Such a requirement serves to treat parties fairly and impartially. Permitting a plaintiff to directly interfere with the defendant's activity constitutes an intrusion on rights and, hence, the Court requires a jurisdictional incentive in the form of an underlying case before acting.

D. Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?

Answer: Yes, the restriction on applying for interim measures is that it must be sought from the Court before judgment is rendered by the relevant entity. It should be mentioned that applications for interim measures at this point in time

do not necessarily receive a particular advantage in succeeding. A Court will ultimately base its decision on the likelihood of success upon granting the interim measure and the merits of the application.

E. Criteria used by the court for granting these measures

1. What requirements must be fulfilled in order to apply for an interim measure? (e.g., *periculum in mora*, *fumus boni iuris*, security, etc.)

Answer: The particular requirements that must be fulfilled when applying for an interim measure depends on the desired precautionary measure. Above all, Section 255 provides that any other necessary ground as the Court thinks is just and reasonable will suffice in accepting an application. This displays the Courts willingness to judge the situation in its entire context and, accordingly, make a well-informed decision.

Writ of seizure or attachment: the Court must believe that the defendant intends to remove the entire or some portion of the property in dispute or property in the Courts jurisdiction.

Temporary Injunction: the Court must be satisfied that the defendant intends to repeat or persist with the alleged conduct. The continuation of said conduct must also be expected to create trouble and injury and cause the property in dispute to be wasted, injured or transferred.

Registration order: the Court must feel that the defendant may proceed with registration or modification or cancellation of registration relating to the property in dispute or the defendant's property.

Provisional arrest or detention: the Court must be satisfied that the defendant is in hiding for the purposes of evading summons or other orders by the Court or that the defendant has removed or concealed any property or evidence relevant to the outcome of the dispute. Moreover, if the defendants conduct suggests that he is likely to leave the jurisdiction of the Court, an interim measure should be granted.

In addition, each interim measure may be expedited through a motion requesting an emergency application. If the information pushing for emergency action is well-founded the Court may permit such a request. Ultimately, the Court possesses discretion in deciding whether an emergency application is appropriate.

F. Procedure

1. Which are the main steps of the procedure after filing the interim measure application? (e.g., holding a hearing, presenting evidence, etc.)

Answer: After an application has been filed, the Court decides in what manner it will proceed. Upon receiving justifiable grounds, the Court may grant the application immediately and order its applicability without

delay. On the other hand, the Court may hold a hearing to examine the application. It is at this occasion that both parties are able to present their respective reasoning and opinions. The defendant may be asked to give testimony or evidence regarding the alleged misconduct requiring interim intervention.

2. Is it possible for the Court to order an interim measure without hearing the other party? (in *audita parte debitoris*). If YES, under what circumstances can the parties apply for it?

Answer: Yes.

Despite the Court's eagerness to inform the defendant of interim proceedings, they may grant interim applications without their involvement. A writ pertaining to seizure and attachment of property is applicable as soon as it is granted, even without the participation of the defendant. Temporary injunctions and Registration orders are also occasionally ordered without hearing the opposing party. Determining whether to hear the defendant depends on whether the Court feels that giving the defendant this opportunity will harm or damage the proceedings of the case. In practice, Thai Courts will often allow the defendant to voice his opinion before granting the application unless substantial evidence against the defendant exists.

3. What are the main steps of the procedure in this case?

Answer: This particular process is similar to the typical process of applying for interim measures. The only difference is the mere absence of the defendant. This means the defendant will not be summoned to hearings, examined or asked to give testimony. Such a procedure is very likely to be shorter than when that the defendant is involved.

G. Opposition of the defendant

1. Is it possible for the defendant to oppose interim and precautionary measures?

Answer: Yes, there are opportunities for the defendant to oppose such measures. The Court may allow the defendant to oppose the application for temporary injunctions and Registration orders. However, the defendant will only be able to do so if the Court believes it will not cause injury to the plaintiff. The defendant then submits his objection to impede the application at the hearing.

Section 261, as amended by Section 19 of the 2017 Civil Procedure Code, permits defendants to apply to the Court for withdrawal of any provisional order or writ if they are consequently injured or the application is based on insufficient grounds. Additionally, if a defendant is provisionally detained or arrested, they may apply to the Court for unconditional or provisional release on bail or a deposit as the Court sees fit.

Failing this, the defendant may apply to the Court of First Instance for an order requesting compensation for the damage caused by the interim measure.

2. Is it possible for the defendant to ask the Court for the substitution of the interim measure for a guarantee?

Answer: Yes.

The Civil Procedure Code provides for the provision of security usually through a deposit of money. Applicable to all Court stages (First instance, Appeal and Supreme Appeal), the requirement of security comes in circumstances that suggest a claimant's unwillingness to pay compensation upon the request of unjust interim measures. Typically, the security will amount to approximately 2.5% of the claimed amount. In addition, not more than 5% of the claimed amount for lawyers will be included.

H. Appeal

1. Are appeals allowed from the court decision ordering the measures or rejecting the defendant's opposition to them?

Answer: Yes.

Under Section 228, a party may appeal an order relating to applications for the protection of the rights of any party during trial.

2. Is it possible to enforce the interim measure once an appeal is filed?

Answer: An interim measure will remain in effect despite an appeal being filed and shall remain so while the appeal is pending. Section 231, however, adds that a defendant may request a stay of execution of the Courts judgment. Such a request will only be permitted if it is founded on reasonable grounds and will serve to free the defendant of the ordered interim measures.

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

A. Is it possible to enforce the interim measure when the other party obstructs it?

Answer: Enforcement is available where a party does not comply with the interim measure pronounced. The application for execution must be filed within ten years of it being pronounced. The Court shall issue a decree enforcing the judgment. If the opposing party persists in obstructing the interim order, they may become criminally liable or subject to punishment prescribed in the decree.

B. Is it possible to modify a previous interim measure?

Answer: Yes, an interim measure may be modified in several situations. A defendant may, typically, oppose an interim measure and thus request its modification. Moreover, if there is any change or modification throughout the duration of the trial, the Court may feel inclined to alter the interim measure.

C. When is it possible to raise an interim measure?

Answer: A request for interim measures may be made where the case is not a petty case. However, while this is the only condition required for application, orders for interim measures require the satisfaction of various requirements as justification before they are granted.

D. Are there any rules concerning the costs (e.g., lawyers' fees, etc.) related to the application?

Answer: Costs are, in theory recoverable for applications for interim relief, should the plaintiff seeking interim orders ultimately prevail in the underlying case. While parties are entitled to seek reimbursement for their full costs, Thai courts are conservative and rarely order reimbursement of amounts in excess of 100,000 Baht.

V. ARBITRATION

A. Is it possible to apply for an interim measure in order to assure the effective enforcement of an Arbitration Award in your country? If YES: what is the enforcement procedure?

Answer: Yes, interim and precautionary measures are available in regard to arbitral proceedings, but only after the award has been finally issued and is properly before a competent Thai court for enforcement proceedings. The process is similar to typical court proceedings, instilled to promote the effective enforcement of legal justice. Accordingly, the process in arbitral matters resembles that found in courts hearing standard civil claims. Thus, the provisions pertaining to provisional measures in the Civil Procedure Code apply mutatis mutandis to the process of applying for interim measures in Arbitration.

B. Are the arbitrators, entitled to order an interim measure?

Answer: No. Section 16 of the Thai Arbitration Act ascertains that provisional measures can only be imposed by the Competent Court. This reinforces the resemblance of the subject of provisional measures between the Arbitration and Court proceedings.

VI. FOREIGN PROCEDURE & ARBITRATION

A. Is it possible to apply for an interim measure before your country Courts in order to assure the effective enforcement of a foreign

Court Decision or Arbitration Award? If YES: how is this procedure executed?

Answer: Since foreign court decisions are not recognized in Thailand, no provisional measures exist concerning them. As for foreign arbitral awards and as noted above, no interim relief may be requested until such time that a competent Thai court has accepted a final arbitral award for enforcement proceedings. Until such time, there is no power of the Thai courts to issue interim relief measures.

VII. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION

A. Please state/provide any other issues of interest in your jurisdiction.

Answer: The primary issue of concern in the Thai court system is the general conservative nature of the courts in the review of interim relief applications. Wherever possible, Thai courts will defer an interim decision and avoid acting in a way that potentially compromises one party to a dispute. This has, at times, the effect of limiting true interim relief options, as it is almost always the preference of the Court, absent substantial justification for interim orders, to defer a decision on interim claims until issuance of the judgment on the underlying case.

Thailand

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FUNDAMENTAL PRINCIPLES: QUESTIONS

2019

I. RECOGNITION AND ENFORCEMENT OF A FOREIGN COURT DECISION (CIVIL AND COMMERCIAL MATTERS)

A. Ability to Apply for Recognition and Enforcement of a Court Judgment

1. Is it possible to apply for enforcement of a foreign court judgment in your country?

Answer: Thailand is not a member of either bilateral or multilateral treaties/conventions and hence is not bound to enforce foreign arbitral award. As such, a creditor must bring suit *de novo* in a competent Thai court in order to obtain satisfaction.

The remainder of this guide will therefore focus on the enforcement of foreign arbitration awards, as this is the only type of *foreign judgment* that is enforceable in Thailand. Thai Courts recognize the enforcement of foreign arbitral awards where the award is derived from an accepted country. Countries that are signatories of the New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards, 1958, and the Geneva Convention for the Execution of Foreign Arbitral Awards, 1927 are countries that may render arbitral awards that are binding on Thai arbitral proceedings.

B. Applicable Law: General Rules

1. Which laws are generally applicable to the enforcement of a foreign court judgment in your country?

Answer: The body of law that regulates foreign arbitral awards is the Thai Arbitration Act. Specifically, sections 41-45 deal with the recognition and enforcement of foreign arbitral awards.

C. Special Rules:

1. Are there any special rules regarding the enforcement of a foreign court judgment in your country?

Answer: Thailand does not enforce foreign arbitral awards from countries that are not mutual signatories with Thailand to international conventions for the enforcement of foreign arbitral awards. Foreign arbitral awards, which are the only enforceable foreign awards recognized by the Thai courts, are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Geneva Protocol on Arbitration Clauses 1923 (Geneva Protocol). These are the two conventions to which Thailand is a signatory. Any foreign arbitral awards outside of the scope of these two conventions will not be enforceable in Thai Arbitral proceedings.

2. **Does Thailand have a special procedure to enforce court judgments coming to it from European Union member states?**

Answer: No.

D. Average Duration of Enforcement Procedure

1. **What is the average length of time for this kind of procedure?**

Answer: The length of time required for the enforcement of foreign arbitral awards is typically one year. In this period the Court examines the application and proceeds to determine whether it should be applied. However, in practice, the opposing party often files a motion denying enforcement of said foreign arbitral award. This can have the effect of delaying the enforcement process. Where appeals are filed, then the delay could extend the enforcement process to approximately three years before the Court gives final judgment for the enforcement of an arbitral award.

II. DENIAL OF RECOGNITION AND ENFORCEMENT OF A FOREIGN COURT JUDGMENT: REASONS

- A. **Can a Court in your country deny recognition and enforcement of a foreign court judgment? If YES: what kind of reasons may justify denial?**

Answer: Yes. As noted, only foreign arbitral awards from a recognized signatory to an international convention are enforceable in Thailand. For otherwise qualified requests for enforcement of foreign arbitral awards, a Thai Court does nonetheless possess the ability to deny the enforcement of foreign arbitral awards when there is adequate justification.

Sufficient grounds for doing so, as detailed in Section 43 include: that the award was not legally binding or has been annulled in the country that issued it, the party against whom the award was sought was not properly represented whether by reasons of legal incapacity or insufficient notice or the award does not pertain to all the differences in the present dispute or contains decisions beyond the scope of the arbitration agreement. The composition of the arbitral tribunal or proceeding that is not in accordance with the agreement could also render the award not legally binding. An award contrary to the law applicable to the dispute or derived from an unlawful act may also be denied enforcement.

- B. **Costs and expenses**

1. **What kind of cost and expenses can a claimant expect in this enforcement procedure?**

Answer: Upon judgment, the arbitral tribunal will issue a filing fee for the use of a foreign arbitral award. The fee depends on the disputed amounts.

For disputes concerning amounts not exceeding 50 million Baht, 1% of the amount applied for the Court's enforcement is charged. However, this amount must not exceed 100,000 Baht. For amounts over 50 million Baht, a fee of 0.1% of the amount applied for the Court's enforcement will be incurred.

In addition, there are various arbitration fees and expenses such as witness, attorney and service fees. The amount is in accordance with the amount stipulated in the arbitral award, unless otherwise agreed by the parties (not including legal fees and expense). If the fees and expenses are not stipulated in the award, any party or the tribunal may request a court ruling on fees, expenses and commission of the arbitrator.

III. FORMAL REQUIREMENTS

A. Time limit

1. Is there a time limit to apply for enforcement of a foreign court judgment?

Answer: Foreign arbitral awards are subject to a prescription period of one year from the day the arbitral award was rendered. Lapsing outside of this time will render the foreign arbitral award invalid.

B. Final and Definitive Court Judgment: Provisional Enforcement

1. Is it mandatory for the judgment to be a final and definitive court judgment? If NO: Are there any special requirements to provisionally enforce a court judgment which is not final and definitive?

Answer: Yes, a foreign arbitral award must be final and definitive before it can be applied in Thailand. An award that is subject to proceedings or pending appeal is invalid.

C. Necessary Requirements

1. What necessary requirements must the foreign court Judgment fulfill to be recognized and enforced?

Answer: Per Section 44, to be recognizable and enforceable, a foreign arbitral award must satisfy the initial threshold as a final and conclusive judgment. Moreover, it must not go against public policy or the good morals of Thailand. It must also pertain to all the relevant facts of the present case.

D. Other Formal Requirements: Court Fees

1. Is it mandatory to pay Court Fees for this kind of application?

Answer: Yes, Court fees accompany the application for enforcement of foreign arbitral awards, the amounts of which are outlined above.

E. Are there any other formal requirements in your country to enforce a court judgment?

Answer: As mentioned above, for a foreign Court judgment to be enforced, Thailand must be a signatory and proactive member of the convention. Furthermore, the foreign arbitral award must fulfil certain requirements and adhere to the nature of Thai law.

IV. PROCEDURE

A. Competent court

1. Which Court or courts are competent to decide an enforcement application?

Answer: Arbitral enforcement actions must be filed in the court with jurisdiction to hear the underlying substantive claim, had it been filed in Thailand. This means that, depending on the nature of the claim, an enforcement proceeding could be properly filed in one of many courts of original jurisdiction.

B. Informational Requirements for the Application to Enforce a Foreign Court Judgment

1. What information must be contained in the enforcement application of a foreign court judgment?

Answer: An enforcement application, also known as a petition, must contain pertinent information regarding the case at hand. It is similar to the filing of an underlying complaint. Basic information such as the facts and parties of the dispute, award requested to be enforced, relevant countries and reasons for arbitration are included in this document.

C. What documents must be included with/attached to the application to enforce a foreign court judgment?

Answer: An application for the enforcement of a foreign arbitral award must be accompanied by an array of evidence and supporting documents as required by Section 42. First and foremost, there must be an original copy of the award. In addition, an original copy of the arbitration agreement must

be attached and all documents must be translated into Thai, with the translation certified by an authorised official.

D. Phases of the Procedure

1. What are the phases of the procedure to enforce a foreign court judgment?

Answer: The process of enforcement is initiated by the filing of an application with the Competent Court. The application must be accompanied by three necessary documents above. The Court must then, without delay, promptly examine and inspect the application to ensure that it fulfils all necessary requirements for its enforcement. The Court shall then render judgment on the award's enforceability provided the opposing party has requested an opportunity to challenge the application.

E. Opposition of the Defendant

1. Can a defendant oppose this enforcement application?

Answer: Yes. If the defendant can furnish proof that indicates that the arbitral award should not be enforced, the Court will not recognize the foreign arbitral award.

2. Are there a limited number of reasons for the defendant to oppose to the enforcement of the court judgment? If YES: what are those reasons?

Answer: The reasons that a defendant may rely on to challenge the enforcement of foreign arbitral awards are listed in Section 43 of the Thai Arbitration Act. The defendant can produce proof that the party in the arbitration agreement was under some legal incapacity to oppose the Thai Court's enforcement process. Alternatively, they can demonstrate that the arbitration agreement is not binding under relevant laws or that proper advance notice of arbitral proceedings was not given to the losing party. If the foreign arbitral award does not deal with a dispute falling within the scope of the arbitration agreement or contains decisions beyond the scope of the arbitration agreement, the foreign arbitral award may, at times, be rendered invalid. Additionally, if the composition of the arbitral tribunal or proceedings was not in compliance with the parties' agreement or laws of the country, the award may not be recognized. Lastly, if the arbitral award is not yet binding or has been set aside/suspended, the Thai Court will have to reconsider their decision.

F. Appeal and its Consequences in this Procedure

1. Is it possible to appeal a court decision to recognize and enforce a foreign court decision?

Answer: Under the Thai Arbitration Act, it is only possible to appeal foreign court decisions if certain circumstances exist. The appeal must be filed within 90 days of the date of the award. Most prominently, if the award is contrary to public order or the good morals of the people or public order, it may be appealed. Secondly, if the order or judgment is not in accordance with the arbitral award, an appeal may be permitted. If an arbitrator dissented in award, then enforcement of the foreign arbitral award may be appealed. Lastly, if the order for enforcement of the award concerns provisional measures under Section 16 of the Thai Arbitration Act, there is a chance that it may be appealed. It should also be noted that any appeals must be directed to the Supreme Court or Supreme Administrative Court.

2. Can this appeal suspend the enforcement?

Answer: A pending appeal will not suspend the enforcement of a foreign arbitral award. However, an opposing party may file an application seeking to stay the enforcement of said foreign arbitral award pending a determination of enforceability on appeal.

G. Recovery of judicial costs and expenses

1. Are there any rules concerning recovery of the judicial costs incurred as a result of the enforcement application?

Answer: There is no specific mention in the Thai Arbitration Act concerning recovery of costs when applying for enforcement of a foreign arbitral award. However, Section 46 of the Thai Arbitration Act does state that any fees and expenses pertaining to arbitral proceedings shall be included in the final award by the arbitral tribunal. Alternatively, a party may file a motion to the competent court requesting allocation of costs, as permitted under the Thai Civil and Commercial Code.

V. RECOVERY OF THE DEBT

A. Means of Enforcement

1. What types of assets are subject to enforcement of the court's judgment?

Answer: The Thai arbitration system does not set any specific boundaries on the range of assets that may be subject to enforcement. In practice, the arbitral award often pertains to monetary assets to ensure compensation to the winning party. Alternatively, the Court may make special orders that

relate to the return or adjustment of property to fit the justified claim of the plaintiff. Therefore, the Court does not set particular limits on what type of assets may be concerned due to its naturally narrow view of assets when enforcing awards.

VI. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION

A. Any other issues of interest in your jurisdiction

Answer: It should be noted that Thailand is a civil law system and, as such, enforcement proceedings before the competent courts are before a panel of judges. There is no jury system. Another point of relevance is that it is quite common for parties to defend vigorously applications for enforcement, typically due process challenges, such as claims that they did not have a proper opportunity to defend the underlying arbitral claim. While these arguments may often lack substantial merit, there is generally a desire to delay ultimate enforcement to delay payment under the award and or to encourage a resolution via settlement.

Thailand

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