

Enforcement of Foreign Arbitral Awards: Thailand and Vietnam

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1. Introduction

Thailand and Vietnam are major destinations for foreign direct investment (“**FDI**”) in Asia, resulting in significant levels of cross-border transactions. According to the World Bank, in 2018 and 2019 Thailand attracted a combined net inflow of about USD 18 billion in FDI.¹ During the same period, net inflows to Vietnam were USD 31.62 billion.² These high volumes of inbound investment inevitably lead to a higher risk of disputes with everyone from suppliers, contractors, joint venture partners, borrowers, and of course state-owned companies and government agencies.

International arbitration is a viable means of handling such disputes. Both Thailand and Vietnam are contracting states to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”), so arbitral awards from other member states are enforceable. With this in mind, an international arbitration award has to be enforced. This usually means filing cases in the local Thai and Vietnamese courts. As explained in this report, both Thailand and Vietnam have legislative frameworks in place to enforce arbitral awards, but in practice, enforcement can be a challenging and time-consuming endeavor. Before electing to pursue arbitration against private and state entities, foreign investors should be aware of how awards are actually enforced in these emerging Asian jurisdictions.

2. Thailand

2.1. Enforceability

Foreign arbitration awards are enforceable in Thailand against both private entities and state-owned enterprises (“**SOEs**”).³ Thailand has been a contracting state to the New York Convention, without further declaration and reservation, since December 21 1959⁴, and has enacted its principles as part of domestic law under the Arbitration Act, B.E. 2545 (2002) (the “**Arbitration Act**”). Section 41 of the Arbitration Act confirms that an arbitral award, irrespective of the country in which it was made, will be recognized as binding on the parties, and upon petition to a competent court, will be enforced, provided that the award

¹ See https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2019&locations=TH&most_recent_year_desc=false&start=2001

² See https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2019&locations=VN&most_recent_year_desc=false&start=2001

³ Under Thai law, SOEs are defined as legal entities (“juristic persons” in Thai legal parlance) where the state owns more than 50% of a company’s shareholding under the Budgetary Procedures Act B.E. 2561 (2018). (See Section 4 of the Budgetary Procedures Act.) For purposes of this report, “SOE” means an enterprise with any amount of government ownership.

⁴ See: <https://www.newyorkconvention.org/countries>

is made within the extent of the New York Convention.⁵ This applies to both private entities and SOEs. In practice, foreign arbitration awards from around the world are enforced in Thailand, both against Thai parties and foreign-invested companies based in Thailand. However, as described below, while the enforcement process is certainly doable, it takes time (sometimes many years), requires additional and often significant resources from a claimant, and with many practical challenges to overcome in actually recovering assets.

2.2. Procedure

To enforce a foreign arbitral award, the claimant must commence a new action in a Thai court against the respondent. Foreign arbitration awards are not “automatically” recognized. There is no difference in the general procedure to enforce a foreign arbitral award against private companies or against SOEs. The new action is essentially a lawsuit by the award-holding claimant (as plaintiff) against the losing respondent (as defendant). The claimant must file for enforcement in Thailand three years from the day that the award is enforceable.⁶

Regardless of whether the respondent is a private company or a SOE⁷, the competent court in which the arbitral enforcement award can be filed is either:

- a. The Central Intellectual Property and International Trade Court in Bangkok;
- b. The Regional Intellectual Property and International Trade Court;
- c. The court in which either party is domiciled; or
- d. A Court which has jurisdiction over the dispute submitted to arbitration.⁸

Regarding point d, this means that if the respondent is a SOE, and the dispute arises from or in connection with an administrative contract under the scope of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), the Central Administrative Court in Bangkok or a regional Administrative Court will be the competent court for award enforcement.⁹ After receiving the relevant petition from the claimant, the court is able to examine the case to determine whether to recognize and enforce the award. At this juncture, the respondent-defendant has the opportunity to challenge the enforcement action. The respondent-defendant can ask the court to refuse to recognize the award, or to set aside the award. If the respondent-defendant does contest the enforcement, the enforcement procedure can be significantly delayed. (Please see section 2.4, below for further information on enforcement challenges.)

To enforce the arbitral award, the award should be final (not interim or final interim) and should recite all pertinent facts. This includes the contract where the parties agreed to arbitrate, notices given, appearances of the parties, presentations made, and reasons for the award.¹⁰ The Arbitration Act mandates the following to enforce a foreign arbitral award in Thailand:

- a. A foreign arbitration is defined as an arbitration conducted wholly or mainly outside the Kingdom of Thailand and one party thereto is not a Thai national.

⁵ Arbitration Act, Section 41

⁶ Arbitration Act, Section 42

⁷ Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), Section 9

⁸ Id.

⁹ Decision re Overlap of Jurisdiction No.112/2561

¹⁰ Arbitration Act, Section 42

- b. The party seeking enforcement must produce an original copy of the award or a certified copy, an original copy of the arbitration agreement or a certified copy, and a translation in Thai of the award and arbitration agreement which must be certified by a sworn translator, officer of the Ministry of Foreign Affairs, a diplomatic delegate, or a Thai Consul.¹¹

2.3. Arbitration Agreements with SOEs and State Agencies

It is possible, though not easy or common, to enter into arbitration agreements with Thai SOEs and state agencies. This is largely due to a resolution issued by the Thai cabinet on July 14, 2015, which suggests that state agencies are recommended to avoid arbitration clauses in agreements made under the Public-Private Partnership Act, B.E. 2562 (2019), and in concession agreements where state agencies are the concession-granting party. However, the cabinet also resolved that should there be any issues, necessities, or a demand from another party which cannot be avoided, a state agency can seek an approval from the cabinet to enter an arbitration agreement on a case-by-case basis.¹²

This cabinet resolution was issued in accordance with the Royal Decree on Proposing Issues to the Cabinet and the Cabinet Meeting B.E. 2548 (2005), under which the term “State Agency” is defined to include SOEs as well.¹³ Therefore, this cabinet resolution is binding on SOEs. For example, on September 22, 2015, the cabinet approved an arbitration agreement for the Pipeline Crossing Agreement to be entered into by TOT Public Company Limited (as an SOE).¹⁴

If the proposed arbitration agreement to be made with an SOE falls under the scope¹⁵ of the Public Procurement and Supplies Administration Act, B.E. 2560 (2017) (the “**Procurement Act**”), additional rules apply. The Procurement Act requires that state agencies, including SOEs, must conclude the relevant contract in accordance with the forms prescribed by the Policy Commission with the approval of the Office of the Attorney-General (the “**Standard Form**”).¹⁶ If the contract must be deviated from the Standard Form in any area of key substance, or in a way which may put the state agency at a perceived disadvantage, then the state agency must refer the contract to the Thailand Office of the Attorney-General (the “**OAG**”) for approval.¹⁷ Since the Standard Form under the Procurement Act does not have a governing law or arbitration section, an SOE would have to seek approval from the OAG for approval before entering into an arbitration agreement.¹⁸

¹¹ Arbitration Act, Section 42

¹² Resolution of the Thailand Cabinet - July 14, 2015

¹³ Royal Decree on Proposing Issues to the Cabinet and the Cabinet Meeting, Section 3 - State (Government) Agency means government sectors, state-owned enterprises, local administrative organizations and other government agencies.

¹⁴ Resolution of the Thailand Cabinet **on September 22, 2015** - The cabinet approved to include an arbitration clause in the Pipeline Crossing Agreement according to a request from the Ministry of Information and Communication Technology. For other contracts related to the Project International Submarine Cable System for supporting the internet service of TOT Public Company Limited, the Ministry of Information and Communication Technology should ask for cabinet approval for each agreement according to Cabinet resolution on July 28, 2009, on agreements between state agencies and companies, which was revised by the Cabinet resolution on July 14, 2015. See https://resolution.soc.go.th/PDF_UPLOAD/2558/993157961.pdf (in Thai)

¹⁵ For example, goods, services, construction work, consultancy work and design or construction supervision work, including other operations as prescribed in the Ministerial Regulation.

¹⁶ PPSA Act, Section 93. A State agency shall conclude a contract in accordance with the forms prescribed by the Policy Commission with the approval of the Office of the Attorney-General. Such contract forms shall also be published in the Government Gazette.

¹⁷ Id.

¹⁸ Id.

2.4. Practical Challenges in Enforcing Arbitral Awards in Thailand

Based on the authors' experience, the two most common challenges a claimant faces to enforce a foreign arbitral award in Thailand is a vigorous enforcement challenge by the respondent-defendant, and difficulty to actually recover any assets – even if the Thai court recognizes the award and issues a judgment.

2.4.1. Grounds to Contest an Award

If the respondent-defendant contests the enforcement, it will immediately cause the proceeding to become more complicated, lengthy, and costly. Instead of obtaining a judgment to enforce the award in months, a contested claim may take years to resolve, especially when appeals are involved. Based on the authors' experience, enforcement of an uncontested claim may take about three to six months until judgment. A contested claim can take approximately six to 12 months, or more. If the losing party submits an appeal, a final judgment may not be issued for another one to three years or more.

The Arbitration Act permits a Thai court to refuse to enforce an arbitral award under the following circumstances:

- a. "A party to the arbitration agreement was under some incapacity under the law applicable to that party;
- b. The arbitration agreement is not binding under the law of the country agreed to by the parties, or failing any indication thereon, under Thai law;
- c. The party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings;
- d. The award deals with a disputed issue not falling within the scope of the arbitration agreement or contains a decision on a matter beyond the scope of the arbitration agreement. However, if the award on the matter which is beyond the scope thereof
 - can be separated from the part that is within the scope of arbitration agreement, the court may set aside only the part that is beyond the scope of arbitration agreement or clause;
- e. The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, if not otherwise agreed by the parties, in accordance with this Act; or
- f. The arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where it was made. Save where the setting aside or suspension of the award is being sought from the competent court, the court may adjourn the hearing of this case as it thinks fit; and if requested by the party making the application, the court may order the party against whom enforcement is sought to provide appropriate security."¹⁹

As such, the respondent-defendant can defend the case on any of the above grounds.

¹⁹ Arbitration Act, Section 43.

Furthermore, the court may also dismiss the enforcement action if it finds that the award involves a dispute not capable of settlement by arbitration under the law or if the enforcement would be contrary to public policy.²⁰ Indeed, the Arbitration Act makes clear that a Thai court has the authority to grant or deny the enforcement of the award, irrespective of the country in which it was made.²¹ "Public policy" is not defined in Thai law, so Thai judges have wide discretion in determining if enforcement is contrary to public policy.

For a domestic awards, a respondent can seek to set aside the award altogether.²² The same causes as stated above in (a) to (f) apply for a court to set aside the award. However, based on our experience, a common argument is that the recognition or enforcement of the award would be contrary to public policy.

2.4.2. SOEs and State Agencies

A regulation by the Office of the Prime Minister mandates that state agencies, which include SOEs, are required to comply with arbitration awards. However, the regulation also contains exceptions to compliance. The regulation states:

"If an agreement between a State Agency and private sector entity requires arbitration to be the dispute resolution method, and when the dispute arises, and the State Agency agrees to submit such dispute to arbitration, such State Agency is required to comply with the award of the arbitration made thereof, unless such award is made against the law governing the dispute, is made from any undue or malpractice, or is made beyond the scope of arbitration agreement."²³ *[Authors' Note: This is an unofficial translation]*

The result is that a state agency, including an SOE, can use the provisions of the Arbitration Act as stated above to request the court to reject the enforcement of the award, or to set aside the award. As such, based on our experience, a state agency is likely to argue that enforcement of the award is contrary to Thai public policy. Therefore it is incumbent on the claimant-plaintiff to ensure that it divorces the enforcement from any "public policy" issue when seeking to enforce the award at the relevant court.

2.5. Enforcing against Assets

After a Thai court recognizes the arbitral award, the claimant-plaintiff must take additional steps to enforce it. The claimant-plaintiff is now a judgment creditor, and can commence the legal execution process under the Thai Civil Procedure Code by filing an ex parte application requesting for a writ of execution within ten years from the date of the judgment.²⁴ The court will then notify another government agency called the Legal Execution Department (the "**LED**") to conduct the legal execution process.²⁵

²⁰ Arbitration Act, Section 44.

²¹ Arbitration Act, Section 41

²² Arbitration Act, Section 40

²³ Regulation of the Office of the Prime Minister re the Compliance with the Arbitral Award B.E. 2544, Clause 5

²⁴ Civil Procedure Code, Section 274

²⁵ Civil Procedure Code, Section 276

Importantly, a claimant-plaintiff cannot freeze the respondent-defendant's assets while the enforcement action is winding its way through the Thai court. As such, if the respondent is not a reputable company, it may transfer its assets before enforcement. This is a legitimate risk in Thai litigation.

It is the judgment creditor's responsibility to identify the losing party's (i.e. the judgment debtor's) assets. The judgment creditor must inform the LED of the assets to be seized. The judgment creditor must then assist the LED to seize or attach the property for the recovery of monetary debts²⁶. The seized or attached property will generally be sold at a public auction.²⁷ The proceeds will be eventually distributed to the judgment creditor²⁸. This process in itself may take years. The result is that if a respondent-defendant does not voluntarily comply with an award, it may be strategically beneficial for the claimant-respondent to seek a settlement – even for an amount lower than the award.

3. Vietnam

3.1. Enforceability of foreign arbitral awards in Vietnam

Foreign arbitration awards are enforceable in Vietnam against both private entities and SOEs. The legal grounds for the recognition and enforcement of foreign awards are the principles of compliance with international/bilateral treaties and reciprocity.²⁹ Vietnam is a member of the New York Convention. As such, every arbitral award rendered in another contracting state can be recognized and enforced in Vietnam, in accordance with the general conditions and procedures provided under Part 7 of the 2015 Civil Procedure Code ("**CPC**"). The recognition and enforcement of arbitral awards under other bilateral/multilateral treaties between Vietnam and other States are also conducted in accordance with the provisions of Part 7 of the CPC.

For arbitral awards rendered in a non-party state to the New York Convention, Vietnamese courts may still consider recognizing and enforcing the awards based on reciprocity.³⁰ The Vietnamese Supreme Court issued a report on the recognition and enforcement of foreign judgments in Vietnam, and discussed reciprocity. While the Supreme Court report was about court judgments, and not arbitral awards, the report provides an indication on the Court's views on reciprocity, which can be applied to enforcement of arbitral awards. The report states that Vietnamese courts should still consider handling a request for recognition and enforcement of a foreign judgment, without requiring that a Vietnamese judgment was previously recognized or will be recognized in the foreign country. However, if a foreign country has previously used reciprocity to refuse to recognize and enforce a Vietnamese judgment, Vietnamese courts can do the same in relation to the foreign judgment.³¹

3.2. Procedure

The general legal procedure to enforce foreign arbitral awards against private entities and SOEs are the same. The procedure is summarized in the table below.

²⁶ Civil Procedure Code, Sections 278 and 296

²⁷ Civil Procedure Code, Section 331

²⁸ Civil Procedure Code, Section 337

²⁹ 2015 Vietnam's Civil Procedure Code, Article 424.

³⁰ 2015 Vietnam's Civil Procedure Code, Article 424.1.b

³¹ Department of International Cooperation under Vietnamese Supreme Court, 6 May 2020, 'Report No. 173/HTQT'

| No. | Step | Remark |
|-----|--|---|
| 1 | Filing dossier | <p>Within three years from the effective date of the arbitral award, the judgment creditor must submit a request for recognition and enforcement to Vietnamese competent authorities.³²</p> <p>In most cases, a request for recognition and enforcement and its attachments must be filed directly with a competent court in Vietnam. The court should be the provincial court where the judgment debtor is located. However, if any international or bilingual treaties between Vietnam and the State where the award was rendered stipulates otherwise, the dossier should be submitted to Vietnamese Ministry of Justice for its coordination.³³</p> |
| 2 | Preparation for the first instance hearing | <p>After an official acceptance to handle the case, judges in-charge may request the parties involved to clarify any ambiguous points. The law provides a maximum time of four months for the preparation period.³⁴</p> |
| 3 | The first instance hearing | <p>After fixing a hearing date, the hearing can be postponed once if either party is absent with a reasonable cause. Upon the parties' submission of evidence and arguments, the court must issue a decision on whether to recognize and enforce the award on the same date of the hearing.³⁵</p> <p>Although the law does not allow to pause the hearing and resume it on a later date, based on the authors' experience, in practice local courts sometimes do so to allow a party to reasonably submit additional documents and evidence.</p> |
| 4 | Appealing the court's decision | <p>A party can file an appeal with a competent Superior Court within 15 days from the issuance date of the court decision.³⁶</p> |
| 5 | Preparation for the appellate hearing | <p>Parties have one month from when the appeal is received to prepare for the appellate hearing.³⁷</p> |
| 6 | The appellate hearing | <p>The decision of the Supreme People's Court is final and binding.³⁸</p> |
| 7 | Request for enforcement of the Award | <p>If the respondent/judgment debtor fails to voluntarily comply with the award, the claimant/judgment creditor can file a request for enforcement of the foreign arbitral award to the Civil Judgment Enforcement Agency ("CJEA") based on the court's decision on recognizing and enforcing the award. The CJEA may compel the judgment debtor to comply with the award.³⁹</p> |

³² 2015 Vietnam's Civil Procedure Code, Article 451.1

³³ 2015 Vietnam's Civil Procedure Code, Article 451

³⁴ 2015 Vietnam's Civil Procedure Code, Article 457

³⁵ 2015 Vietnam's Civil Procedure Code, Article 458

³⁶ 2015 Vietnam's Civil Procedure Code, Article 461.1

³⁷ 2015 Vietnam's Civil Procedure Code, Article 462.1

³⁸ 2015 Vietnam's Civil Procedure Code, Article 462.6

³⁹ 2008 Vietnam's Law on Enforcement of Civil Judgment, Article 46

3.3. Arbitration Agreements with SOEs and State Agencies

It is possible for foreign entities to enter into arbitration agreements with SOEs, since, under the law, SOEs are treated almost equally as private companies.⁴⁰ For disputes involving foreign elements, the parties can select the applicable law of the arbitration proceedings. It is feasible to hold a foreign arbitration with a Vietnamese SOE using foreign law. However, there are some mandatory provisions on the applicable law, which are as follows:

- a. If the object of a contract is immovable property, the law applied to any transfer of ownership rights and/or other property-related rights must be the law of the country where the immovable property is located;⁴¹
- b. If the applied law selected by contracting parties in a labor contract or a consumer contract adversely affect the minimum interests of employees or consumers as prescribed in the law of Vietnam, the law of Vietnam will prevail.⁴²

With respect to other government agencies, it is also possible to enter into an arbitration agreement, so long as the agency has an independent legal personality and is capable of suing or being sued under Vietnamese law, and the agreement is within the scope authorized by the Vietnamese government.⁴³ The agency is also able to decide on any relevant substantive matters, including the place of arbitration, procedural law, and substantive law.⁴⁴

Recently, a new law on public – private partnership (“PPP”) investment affirmed the possibility to settle an investment dispute between private entities and State agencies through arbitration. Under Article 97.4 of the PPP law, any disputes arising out of a PPP project between local authorities, including contracting authorities and foreign investors, or a project enterprise established by foreign investors, must be settled at a Vietnamese arbitration institution or court unless agreed otherwise under a contract or relevant treaties of which Vietnam is a member.⁴⁵ This article suggests that the parties can choose international arbitration as a dispute resolution under an arbitration agreement.

3.4. Practical Challenges in Enforcing Arbitral Awards

While the law, as described above, provides for the enforcement of foreign arbitral awards, in practice there are challenges. Indeed, based on the authors’ experience, enforcement of foreign arbitral awards against both private entities and SOEs is time-consuming and burdensome. First, there are no real effective sanctions for non-compliance. Administrative/criminal sanctions are available if the judgment debtor does not comply with the enforcement order, but government enforcement departments are usually reluctant to impose such measures. This is due to various reasons, such as a lack of governmental guidance in enforcing the measures, and hesitancy to impose such measures on SOEs or other government agencies.

⁴⁰ SOEs enjoy some exceptions to the enforcement of juridical documents issued by a foreign court in relation to any property that Vietnam has authorized the SOE to manage and operate to exercise sovereign authority

⁴¹ 2015 Vietnam’s Civil Code, Article 683.4

⁴² 2015 Vietnam’s Civil Code, Article 683.5

⁴³ 2015 Vietnam’s Civil Code, Article 76.2

⁴⁴ Law on Commercial Arbitration (2010), Articles 10, 11 and 14.

⁴⁵ Law on Public Private Partnership (2020), Article 97.4

Second, there is no effective information exchange system between the authorities to quickly seize the assets of a judgment debtor. Enforcement departments usually have to send letters and then go directly to each authority and related organization to request assistance. This can take a long time, and can frequently stall. As a result, there is a lack of willingness by authorities to share information and communication, or to cooperate with each other in a timely manner.

Third, there is a lack of necessary judgment enforcement personnel. The percentage of enterprises pursuing litigation/arbitration has increased considerably recently, which has resulted in a high number of cases being handled by the enforcement departments. The workload of the enforcement departments has greatly increased in proportion to the rise in disputes, but the current number of officers are not sufficient to handle cases effectively.

The overall rate of recognition of foreign arbitral awards by Vietnamese courts is low. According to statistics of the Ministry of Justice, only 49% of foreign arbitral awards (41 awards out of 83) were recognized in Vietnam from January 1, 2012 to September 30, 2019.⁴⁶ This is likely attributed to Vietnamese courts' general lack of experience in arbitration. However, the authors view that this is changing. Efforts by the Vietnamese Supreme Court and other intergovernmental organizations, such as the World Bank, has sought to increase local judges' awareness of the application of the New York Convention.

3.4.1. State agencies

Under Vietnam's Civil Procedure Code, a foreign arbitral award can be enforced in Vietnam against a state agency in accordance the procedure described above in section 3.2. However, there is a significant likelihood that a Vietnamese court may refuse to enforce the award based on the ground of public policy.⁴⁷ Even if the award is recognized in Vietnam, the State can still invoke its immunity from execution to cease the enforcement of the award inside the State's territory.

What is more, it is not possible to freeze any state assets before applying to a local court to enforce an award. Although the CPC allows a party to apply interim measures during the recognition and enforcement of a foreign judgment, there is no clear legislative or regulatory guidance on a similar application in the procedure for foreign awards. Indeed, in practice, some local courts have refused to apply interim measures when considering to recognize an arbitral award. The end result is that enforcing arbitral awards in Vietnam is challenging – and even more difficult if a SOE or state agency is the judgment debtor.

4. Conclusion

While both Thailand and Vietnam have legislative frameworks in place for enforcing arbitral awards against private entities, SOEs, and government agencies, in practice enforcement can be challenging. Respondents can drag enforcement actions out for years. Arguments on public policy grounds may be enough to sway courts to "protect the interests" of the state. Even if a claimant can successfully convince a local court to recognize the award, further obstacles remain that can hinder the actual recovery of the

⁴⁶ Ministry of Justice, Database for recognition and enforcement of foreign court's judgments and foreign arbitration awards. <https://moj.gov.vn/tttp/Pages/dlcn-va-th-tai-Viet-Nam.aspx>

⁴⁷ Article 102.3 of the 2013 Constitution of the Socialist Republic of Vietnam requires Vietnamese Peoples' Courts to safeguard, among other things, the interest of the State.

respondent’s assets. These obstacles are even more significant when the respondent is a SOE or state agency. However, with a good measure of patience, and persistence to stay the course while navigating the local judicial systems and execution agencies of Thailand and Vietnam, successful enforcement is still possible. And given the enormous importance foreign investment has to these countries’ economies, the authors view that enforcement of arbitral awards will become easier, including awards against the state.

— LEAD AUTHOR

John Frangos john.f@tilleke.com

— CONTRIBUTING AUTHORS

Thailand

Jessada Anasura jessada.a@tilleke.com

Pongpalin Chantrapirom pongpalin.c@tilleke.com

Vietnam

Cuong Manh Tang cuong.t@tilleke.com

Tu Anh Tran anh.t@tilleke.com

Duc Anh Tran duc.t@tilleke.com