

"Do You Know" Series



# "Breach" and "Remedy" of Contracts in Thailand

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In an earlier collection, the Asian Business Law Institute (ABLI) looked at the availability and operation, if any, of "indemnity" and "liquidated damages" clauses in commercial contracts in select civil law, common law and hybrid jurisdictions.

In this collection, ABLI briefly examines what happens in the event of a breach of contract and what remedies are available to the parties, issues perhaps closest to the heart of the parties.

The short article below provides a brief overview of "breaches" and "remedies" of contracts under Thai law.

## Breach

Under Thai law, to breach a contract is to fail to fulfill any of the binding terms of a valid contract.

As a breach of contract is not statutorily categorised under different levels or degrees of seriousness, cases are reviewed on an individual basis to determine if there is a breach and if the breach, whether minor or material, justifies claims by the non-breaching party.

Under the Thai Civil and Commercial Code ("CCC"), if a party does not begin to work in a proper time or delays meeting its obligations contrary to the terms of the contract, or if, without any fault attributable to the other party, delays or acts in a manner that it can be foreseen that the work will not be finished within the agreed period, the non-breaching party is entitled to terminate the contract without waiting for the time agreed upon for delivery. In other words, anticipatory breach is recognised under Thai law. However, Thai courts are historically conservative and have been reluctant to find anticipatory breach without clear evidence that a party will clearly breach the contract.

Thai law affords the party in breach various defences to a breach of contract claim. For example, the party in breach may argue that there has been no breach of contract as claimed, that the contract itself is illegal, that the non-breaching party has been fraudulent in entering into or performing the contract, among others. A defence could also be raised that the parties have agreed to a novation of the contract or otherwise accepted the performance of the particular obligation, even if that performance is not under the specific terms of the contract. The public policy argument, i.e., enforcement of the terms of a contract will violate public policy of Thailand, is also one defence that may be raised to a breach of contract claim.

The statute of limitation, or prescription period, for a breach of contract claim depends on the specific type of contract. Prescription periods are prescribed by the CCC by category of obligation, but vary for contracts between two (such as a leasing contract) and ten (for all types of contracts not specified in the CCC) years. Further, if claims are not for specific breaches of contract, but are based on some other legal theories, such as tort or criminal wrongdoing related to contracts, the prescription period may also vary. The period typically commences from the date of breach or knowledge of the breach or, where applicable, the date on which performance became due.

## Remedy

Remedies available to a non-breaching party include the right to claim for compensation and the right to claim for specific performance of the contract (where practicable). In addition, injunctive measures may be available, such as those to prevent certain actions that could impair contractual obligations or otherwise further damage a non-breaching party, or to require a party act in such a way that would meet contractual obligations.

Since all parties are required by the CCC to, among others, act in good faith in exercising their rights, the innocent party to a breach of contract claim must also abide by this rule.

Thai law does not require an innocent party to make a specific election of all the rights or remedies available to it in the event of a breach. However, the court determining remedies in a breach of contract claim has the discretion to decide what is the best available remedy claimed and available to the non-breaching party.

There is no specific law in Thailand that requires a party to mitigate the losses caused by the other party. That said, it is a recognised principle that a party has a duty to mitigate its losses. This in effect means that the court has a discretion to examine whether an injured party has mitigated its loss before awarding compensation to that party. Where there has been a clear failure by the injured party to act reasonably and in good faith to mitigate losses, the court may consider such facts in giving orders of relief to that party.

## Acknowledgment

ABLI is grateful for the insights provided by Michael Ramirez, Counsel (Dispute Resolution) of Tilleke & Gibbins International.

The expert is contributor to ABLI's latest project that aims at harmonising contractual clauses in Asia, covering 12 key contracting jurisdictions that include Australia, China, England, India, Indonesia, Japan, Malaysia, New York State, the Philippines, Singapore, Thailand and Vietnam.

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