

CLASS ACTIONS ARE COMING TO THAILAND – AND THEY MAY CHANGE THE LEGAL AND CORPORATE LANDSCAPE

“Class actions” are coming to Thailand and they have the potential to significantly change civil litigation and corporate practices in Thailand.

Class actions are litigation cases that combine the claims of several (often in the thousands or more) claimant parties against one or possibly a few defendants. They are lawsuits that would generally never be brought under normal rules of court procedure because the number of claimant parties is too numerous to manage in one case, or because each of the claims is too small to justify the expense of bringing any of them to court individually, or both. Class actions address both of these issues and allow for such claims to be brought together and managed in one case, thereby creating a large enough aggregate claim to cover the litigation expenses.

Thus for example, some typical hypothetical class action cases might be: a bank or a telecom service provider overcharging each of its customers for an unjustified fee of Thai Baht 1,000; or a car manufacture or pharmaceutical company producing a defective product that causes harm to their end consumers. Successful prosecution of such class action claims provides justice to such claimants and incentive for responsible corporate behavior not otherwise currently available in Thailand.

Thailand aims to achieve these ends through a change in law by the **Act Amending the Civil Procedure Code of Thailand (“CPC”) Act (No. 26)**. The Act was published on 8 April 2015 and will take effect on 4 December 2015. It adds 49 additional sub-sections to the CPC that will govern class actions in Thailand. As defined by the Act, a “**Class Action**” is a court proceeding in which a **Plaintiff** pursues his interests, as well as, the interest of others who constitute a “class” of people like him. A **Class** is defined (in part) by the Act as “a group of persons having identical rights arising from common issues of fact and law, as well as possessing identical characteristics specific

to the Class . . . ”

To initiate a Class Action, a Plaintiff must file their own case and also request the Court to allow their case to become a Class Action for the benefit of the other Class Members. The type of cases in which that Act allows a Plaintiff to request Court to allow a Class Action are quite broad and include any cases involving torts, breaches of contract, and “any other claims relating to other laws. . .” The Act provides some “examples” of such other laws and it appears that the intent is for Class Actions to be applicable to most, if not all, civil actions; in other words it appears that it will not be applicable to cases regarding family, intestate, criminal, or matters not traditionally considered strictly “civil cases”.

Once requested, the Court will then allow the case to proceed as a Class Action if it finds that:

1. The case and allegations on which its bases its case are clear and are equally applicable to both the Plaintiff and the Class Members;
2. The Plaintiff has demonstrated specific and sufficient identical characteristics apply to the Class;
3. The number of Class Members is so large that the case would be cumbersome and inconvenient under the non-Class Action specific CPC rules of procedure;
4. Proceeding by way of Class Action would provide justice more efficiently than proceeding under the non-Class Action specific CPC rules of procedure; and
5. The Plaintiff has sufficiently demonstrated that it is one of the Class Members and meets the qualifications of the Act; and that the Plaintiff and the Plaintiff’s lawyer will represent the Class effectively and fairly.

The Act requires that all Class Members be notified of the Class Action both by mail and publication or other media means that the Court deems appropriate. Such notice is undoubtedly essential as it advises the Class Members that unless they formally “opt- out” of the Class Action, they will be bound by the final outcome of the case for better or worse. If they choose to remain in the Class it also tells them what rights they have to participate in the case.

However, although the Act provides that the Court filing fee will be calculated based only on the Plaintiff’s claims, it also requires the Plaintiff to deposit funds to cover the Court related expenses associated with the Class Action. Thus, one area where this

latter requirement may impede the pursuit of a Class Action is notice to the Class Members. If the Plaintiff is poorly funded, possibly even as result of the defendant's conduct, and the number of Class Members is comparatively too numerous, the Plaintiff may not be able to advance sufficient funds to cover the cost of notice. In such event, the action will be dismissed without the claims, justified or not, being resolved.

One element of the Act that may address the Plaintiff's funding issues is its provision for payment of the Plaintiff's lawyer. The Act provides that if the Plaintiff wins the case, the Court will determine the amount to be paid to the Plaintiff's lawyer. This will be based on the Plaintiff's lawyer's submission of fees and expenses to the Court. Where the judgment is a monetary, the Court may award such fees and expenses to the lawyer but not exceeding an amount equal to 30% of the monetary judgment awarded to the Class. (However, the Court may not award any costs of the Class Action that the lawyer may have advanced on behalf of the Plaintiff, such as the Plaintiff's deposit to cover Court expenses.

It may be that well-funded lawyers will venture to fund promising Class Action cases where the Plaintiff cannot. But only time will tell if Thai Court Class Action judgments and lawyer fee and expenses reimbursed thereby will justify such pre-financing by lawyers—particularly when the Plaintiff is unable to provide the funds to cover the Court's expenses.

It should be noted that, where the Act has not provided otherwise, the usual CPC procedural provisions also apply to Class Actions. This includes the CPC's rules on taking evidence. In Thailand the evidence that the Court evaluates is provided by each party separately to support its respective case. This is not necessarily the same elsewhere.

In the United States, for instance, where the modern class action began several decades ago, parties to a lawsuit, including class actions, must provide all evidence relevant to the case or which may lead to relevant evidence even if such evidence is detrimental to the party providing the evidence. If a product or service provided was deficient, who would be more likely to possess evidence of such deficiency than the one who originally made such product or provided such service? Thus, it is easy to see where such a rule would and has resulted in many successful outcomes for plaintiffs in class action cases in the United States against harmful product and service providers.

But the U.S. rule is not applicable in Thailand. Thus, it remains to be seen how effective Class Actions in Thailand will be where the defendant will generally only be required to produce evidence favorable to its case.

Finally, it should also be noted that the Act contains several broad provisions that leave much to the Court's discretion. However, the Act also gives the President of the Supreme Court of Thailand the authority to issue regulations under the Act. Thus, we would expect initial regulations detailing how the Act will be implemented to be issued prior to the Act's effective date in December 2015.

Although there are currently some questions as to how the Act will operate in practice and how effective it will be in addressing its intended purposes, overall this addition of the modern legal mechanism of Class Actions should be viewed as a positive contribution to litigation, corporate practices, and the public interest in Thailand.

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