

SUING THE SOVEREIGN UNDER THAI LAW

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I. INTRODUCTION

Before dealing with the issues raised in the practicum, it is useful to give a general idea of the mechanisms of control over Thai administrative power and certain remedies provided by the Thai Constitution (1997). Thailand has adopted the parliamentary system and the concept of separation of powers into legislative, executive, and judicial branches. According to the parliamentary system, public administration is controlled not only by the government, but also by the parliament, its committees, and the courts.

In addition, the Constitution provides certain mechanisms of control of administration, such as Ombudsmen and Human Rights Commission. The Ombudsmen and the Human Rights Commission have wide power of investigation and recommendation to the administration, but if the administration fails to comply with their recommendation, they do not have the power to enforce it. They may report this failure to the prime minister or minister in charge to take action. In case no further action is taken, they can only prepare reports and submit opinions and suggestions to the parliament and eventually to the public. It should be noted that bringing a lawsuit to court automatically excludes relief from the Ombudsmen and the Human Rights Commission.

Regarding Thai Courts, they are divided into four separate systems as follows:

1. *Constitutional Court*: competent to adjudicate cases concerning the implementation or interpretation of the Constitution and other cases provided in the Constitution and the law.
2. *Military Court*: competent to adjudicate criminal cases where military officials are involved.
3. *Administrative Court*: competent to adjudicate "administrative cases," such as cases involving a dispute in relation to an unlawful act, order or regulation, certain torts committed by state agencies and their officials, and including disputes regarding state contracts that are classified as "administrative contracts."

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4. *Ordinary Court of Justice*. competent to adjudicate cases outside the jurisdiction of other Courts, especially ordinary civil and criminal cases.

Unlike the U.S. Court of Federal Claims, Thai Administrative Courts have jurisdiction, not only over civil matters concerning monetary claims, but also over cases involving a dispute in relation to an unlawful act, order, or regulation. Moreover, certain cases, though involving state agencies or their officials, are excluded from the jurisdiction of Administrative Courts especially cases within the jurisdiction of the specialized courts such as tax, intellectual property, and international trade courts.

According to the Act on Establishment of Administrative Courts and Administrative Court Procedure (1999) (Administrative Courts Act), Thai Administrative Courts are divided into two levels: (1) Supreme Administrative Court and (2) Administrative Courts of First Instance. The Supreme Administrative Court and the Central Administrative Court have been functioning only since March 9, 2001. In cases where there is a dispute over the competent jurisdiction among the Court of Justice, the Administrative Court, the Military Court, and any other Court, it shall be decided by a committee¹ chaired by the president of the Supreme Court of Justice called the "Committee to Resolve Conflicts of Jurisdiction or Competence between Different Courts."² Now I will discuss the four specific issues raised in the practical exercise respectively.

II. FORUM AND REMEDIES

In the old days, Thailand adopted the common law principle that "the king can do no wrong." The government agencies thus enjoyed immunity from private suits. The citizens could seek relief from the courts only by bringing a lawsuit against officials. That might be a reason why the Civil and Commercial Code, promulgated in 1925, conferred legal personality to government agencies in order to make them subject to civil responsibilities arising from the wrongful acts of their officials. According to the Supreme Court interpretation, however, the government agencies still enjoyed immunity until the promulgation of the Constitution of 1949, which laid down the principle whereby a person had the right to sue a *state agency which was a juristic person* for the first time to be liable for an act or omission done by its officials or employ-

1. THAIL. CONST. § 248, available at <http://www.krisdika/go.th/law/image/lawpub/ell102540/1.htm>.

2. Act on the Resolution of Conflicts of Jurisdiction (1999) (Thail.).

ees. Note that this provision recognizes the right of a private citizen to sue state agencies but not the state itself. This principle has been in force until now, as can be seen in the Thai Constitution (1997), section 62: "The right of a person to sue a state agency, state enterprise, local government organisation or other state authority which is a juristic person to be liable for an act or omission done by its Government official, official or employee shall be protected by law." Moreover, the Act on State Officials' Liability for Tort recognizes the right of Thai citizens to sue state agencies for damages caused by state officials in the performance of their duties. Therefore, if FIXIT thinks that Thailand is in breach of contract, the first remedy is to bring an action against Thailand in Thai Court. The state of Thailand can be sued only through its agencies, however, not because of the principle of state immunity but because of the principle of the "juristic person." Under Thai law, only a person, whether natural or juristic, can sue or can be sued in court. In the case of a juristic person, an entity will be granted legal personality only by virtue of the Civil and Commercial Code or other laws. Except in international law, there is not any domestic law conferring legal personality to the state. That is why, since 1947, the Supreme Court of Justice in Thailand has consistently held that the government cannot be sued in court. In practice, the state can be sued through government agencies such as ministries, departments, provinces, and state enterprises, which act for the state and have been given legal personality by law. In this case, the contract of maintenance must be concluded between FIXIT and the government agency concerned to be effective. We can surmise that this contract will be entered into by FIXIT and Thailand's Ministry of Defense and, in case of breach of contract by the Ministry, the action may be brought against the Ministry of Defense, but not against the state itself.

Since Thai Courts are divided into four separate systems, FIXIT should first determine whether this contract is administrative or not, in order to determine the court in which FIXIT could bring a legal suit. The answer to this question is important because it will determine the law applicable to the contract, both substantive and procedural, including the competent court and its procedure. According to the Act on Establishment of Administrative Courts and Administrative Court Procedure,³ this contract shall arguably be classified as an administrative contract because it fulfills the two

3. Act on Establishment of Administrative Courts and Administrative Court Procedure (1999) (Thail.) [hereinafter Administrative Courts Act].

following conditions: (1) it is concluded by Ministry of Defense, which is an administrative agency or person acting on behalf of the state, and (2) it falls into a category of contracts provided in section 3 of Administrative Courts Act, i.e. a contract to provide public service.⁴

Therefore, if FIXIT thinks that Thailand is in breach of the contract, FIXIT can bring a lawsuit against Thailand in Administrative Court. According to the principle of exhaustion of administrative remedies, however, as provided in section 42, paragraph 2 of the Administrative Courts Act, as a prerequisite the plaintiff should have exhausted administrative remedies, such as appeal against the administrative order.⁵ Under Thai law, this rule is basically applied to administrative orders or to the request of additional compensation in a matter of expropriation. Its application is not mandated with respect to the challenge to specific regulations or disputes involving state contracts. In Thailand, there is no equivalent of the U.S. Contract Disputes Act that requires all claims related to the contract disputes first be submitted to the contracting officer. In practice, however, to maintain good relationship with the administration, the plaintiff usually undertakes an informal procedure before bringing a lawsuit to court—sending a notice or letter to the government agencies concerned to request they take or refrain from certain administrative action. In this case, FIXIT is therefore entitled to sue Thailand in the Administrative Court of First Instance without giving any prior notice, although sending a prior notice or an informal request for relief is advisable.

According to the Administrative Courts Act, FIXIT can bring an action in the Administrative Court by submitting a plaint directly to a competent official of the Court or submitting it by registered post within one year as from the day the cause of action is known or should have been known. If the Court accepts the plaint, the state agencies concerned may assign an official of that agency or the public prosecutor to defend the agencies in the lawsuit.

FIXIT may be barred from bringing a lawsuit to the Administrative Court though because of a fundamental issue surrounding the scope of the Court's jurisdiction. According to section 47 of the Administrative Court Act, the plaintiff has to bring the case to the

4. *Id.* Section 3 "administrative contract" includes a contract at least one of the parties of which is an administrative agency or a person acting on behalf of the state and which exhibits the characteristic of a concession contract, public concession contract or contract for the provision of public utilities or for the exploitation of natural resources.

5. *Id.* § 4, ¶ 2.

Administrative Court in the jurisdiction in which he/she is domiciled or where the cause of action has arisen. In a case where the cause of action has arisen outside the Kingdom of Thailand, a plaintiff who is not domiciled in Thailand can file a case with the Central Administrative Court only if he is of Thai nationality.⁶ Otherwise, if the place of conclusion of the contract or the place of performance of contract that is the cause of action is located outside Thailand and FIXIT is not domiciled in Thailand, FIXIT cannot bring a lawsuit against the government agencies to the Thai Administrative Court.

Regarding the claim of FIXIT for additional payments of one million dollars (U.S.), it is useful to examine this problem separately into two following issues: (1) expenditures for removal of toxic waste and (2) payment to the subcontractor FAMILIA. According to the Act on Conflicts of Laws (1938), FIXIT and Thailand, the parties to the contract of different nationalities, may choose Thai law to be the law applicable with regard to the essential elements or effects of the contract⁷ insofar as it is not contrary to the public order or good morals.⁸ Therefore, the right of FIXIT to additional payment is subject to the clause of the contract as well as to Thai law.

As for the expenditures arising from the disposal of toxic waste, it is necessary to examine the clauses of the contract to see whether this work is within or beyond the scope of the contract. If this work is beyond the scope of maintenance contract, as FIXIT claims, and FIXIT can prove that the costs are significantly increased due to this factor, it is the duty of Thailand, as provided in the contract, to pay for the additional cost since this increased cost is unforeseeable by the parties at the time of the conclusion of the contract, or the risk of the presence of toxic waste was something in the control of Thailand.⁹

6. Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure cl. 29, ¶ 3 (2000) (Thail.).

7. Act on Conflicts of Laws § 13, ¶ 1 (1938) (Thail.). The question as to what law is applicable in regard to the essential elements or effects of a contract is determined by the intention of the parties to it. If such intention, express or implied, cannot be ascertained, the law applicable is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been made.

8. *Id.* § 5.

9. It is noted that the standard contract as provided as annex to the Prime Minister Office's regulation of procurement provided that all extra or additional work done shall be valued at the rates and prices set out in the Contract.

In contrast, the claim for payment to FAMILIA is more controversial. Although this contract contains an equitable adjustment clause and FIXIT is able to prove the existence of threats from the officials of ALIENA, the Thai Court is unlikely to decide in FIXIT's favor on this issue for two reasons. First, no work is actually performed by FAMILIA that might give rise to payment under the contract. Second, payment to FIXIT for FAMILIA is contrary to public policy. If the Court orders payment to FIXIT, it means that the Court is in favor of this practice, which is considered a kind of bribery or corruption under Thai law. This is the risk that FIXIT undertakes because in Thai contract law, each party takes the risk in the performance of his obligations, unless otherwise provided by law or contract. If FIXIT cannot tender the performance within the time specified in the contract because of a circumstance for which it is not responsible, however, it is not in default and not obliged to pay the compensation. Practically though it has to bear the expenses of the delay without having the right to compensation from the state. That is why the price of important state contracts is sometimes higher than usual because it is calculated considering all risks of the contractor. To minimize inflated bids, state contracts sometimes contain a clause indicating a detailed list of such risks which gives rise to compensation to the contractor.

In conclusion, according to Thai law, FIXIT may demand additional payment for expenditures in removing toxic waste but not for the payment to the subcontractor FAMILIA.

In addition to judicial control, FIXIT may have recourse to legislative control. It can forward a petition to the Parliament committees, in both the House of Representatives and the Senate. The committees are largely empowered to investigate the matter. This may not be an effective and rapid solution for this case, however. First, the committees have a multitude of petitions and they have discretion as to whether they will even address the matter and to give priority to any matter they consider important. Second, as a political body, the committees usually select to proceed on the matters which interest the public in general rather than those that involve solely private interests.

Moreover, FIXIT also has recourse to "administrative control," to request the higher authorities of the government, usually the minister in charge, to review the decision of the department managing the contract. In reviewing the decision, the minister or authorities concerned may consult the Office of the Attorney General or the Juridical Council, which are two principal state legal counselors.

But FIXIT has little chance that the decision will be modified in its favor, especially in this controversial case.

With regard to other independent organs of control, FIXIT may seek relief from the Ombudsmen. The Ombudsmen are not likely to give satisfaction to FIXIT because the Ombudsmen have only the power of making recommendations and, in a case of such controversy, they may only recommend the prompt consideration of the dispute. Besides, bringing a lawsuit to the Administrative Court will automatically exclude recourse to Ombudsmen.

In summary, bringing a lawsuit to the Administrative Court against Thailand, if the case is within its jurisdiction, is most advisable in this case, although other remedies are still available.

III. DISCOVERY, TRIAL, OR FACT-FINDING

Upon receiving a case, the Chief Justice of the Administrative Court will distribute the case to a division.¹⁰ The senior judge of the division will then entrust the case to a judge of that division, called the “judge in charge of the case” or “rapporteur,” who will take charge of the case. He will examine the complaint, determine whether it is complete and correct, and issue an order accepting it and instructing the defendant to prepare an answer. He will conduct the case until he considers that the facts are sufficient for the Court to deliver a judgment and then present the case to the division. He plays a very important role in conducting the case under the Rules of Administrative Court procedure,¹¹ through an “inquisitorial system” where the administrative judge plays an active role in conducting cases and collecting evidence.¹² The Court does not simply hear the facts; rather, the Court has the power and duty to search for the truth.

10. Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure, cl. 37 (2000) (Thail.). Upon receipt of the plaint from the competent official of the Court, the Chief Justice of the Administrative Courts of First Instance shall, without delay, distribute the file of the case to a division for trial and adjudication in accordance with the rules provided in section 56. *Id.*

11. In addition to the Act on Establishment of Administrative Courts and Administrative Court Procedure (1999) (Thail.), the Rules of procedure are mainly provided in the Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure (2000) (Thail.) and its amendments.

12. Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure, cl. 5 (2000) (Thail.). The administrative court procedure shall be based upon the inquisitorial system as prescribed in the law on Establishment of Administrative Courts and Administrative Court Procedure and this Rule. *Id.*

A. Fact-finding by the Court

After the complaint is accepted, the rapporteur will be empowered to gather facts and evidence on behalf of the division. In collecting facts, the rapporteur is entrusted to exercise the following powers:

(1) to issue an order summoning the administrative agency or state official concerned to give statements or opinions in writing in connection with the performance of work of the administrative agency or state official involved;

(2) to issue an order summoning an administrative agency or state official to furnish an object, document or other relevant evidence or give opinions on any particular matter or send a representative or state official of that administrative agency to give explanations or statements for supplementing the consideration;

(3) to issue an order summoning the parties to give statements or evidence for supplementing the consideration;

(4) to issue an order summoning the person concerned with case to give statements or furnish evidence for supplementing the consideration;

(5) to inquire into or issue an order on any matter which does not amount to the delivery of judgment, in accordance with the regulation prescribed by the general assembly of judges of the Supreme Administrative Court.

In a case of compelling necessity, the rapporteur has the power to examine a place, person, or any other object to supplementing the consideration.¹³

In a case where Thailand or its official is instructed by the court to present the evidence within the specified time, and it seeks to avoid providing its answer or documents or fails to act within such specified time, it shall be deemed as not having any supporting evidence or as accepting the facts vindicated by the evidence of the other party, as the case may be, and the Administrative Court shall proceed with the trial and adjudication as it thinks just.¹⁴ Moreover, the Court may report such conduct to the superior, superintendent, supervisor, or prime minister to proceed with corrective action, give directions, or take a disciplinary action against him, without prejudice to the power of the Court to inflict upon such official the punishment of contempt.¹⁵

13. Act on Establishment of Administrative Courts and Administrative Court Procedure, § 61 (1999) (Thail.).

14. *Id.* § 57, ¶ 3.

15. *Id.* § 57, ¶ 4.

In the trial and adjudication, the Administrative Court may examine and inquire into facts as appropriate. The Court may hear oral evidence, documentary evidence, expert testimony, or evidence other than the evidence adduced by the parties, as appropriate.¹⁶

In brief, the Thai Administrative Court has wide power to demand facts and evidence from the government agency and its officials through the inquisitorial system provided in the Act and the Rule of the General Assembly of Judges of the Supreme Administrative Court. The Court also has the power to issue an order summoning the party or the person concerned to give statements as it thinks fit.¹⁷

B. *Discovery or Fact-finding by the Parties*

In light of the fact that Thailand employs the “inquisitorial model” of adjudication, there is no system of discovery in Thailand through which a party or his attorney is entitled to demand, without court order, facts and evidence from the opposite party. Upon an application by a party, however, the court may issue an order summoning the other party, an administrative agency or its official, or the person concerned to furnish any document or evidence to the court.¹⁸ After the document or evidence has been furnished to the court, any party has the right to examine evidence in the case file unless it is protected by law or the court orders its nondisclosure for the purpose of preventing damages to the state affairs. When evidence is protected against nondisclosure, the court may order the preparation of a summary and furnish it to the other party, or the court may allow the other party to have an opportunity to inspect, or to request a copy or certified copy of the summary. Whatever the case may be, the disclosed evidence is not admissible in the trial and adjudication under the principle of “audi alteram partem.”¹⁹

In conducting the inquiry or the trial, the examination of witnesses is conducted by the court, not by the parties. Each party may ask the court permission to ask questions to the other party.

16. *Id.* § 55, ¶ 3.

17. Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure, cl. 51, ¶ 1 (2000) (Thail.).

18. *Id.* cl. 5.

19. *Id.* cl. 65. The Court has a discretion to hear evidence obtained in pursuit of the proceedings, without limitation to that presented by the parties, provided that the interested party must be afforded an opportunity for inspection or knowledge thereof or to produce evidence in affirmation or rebuttal thereof. *Id.*

In the case at hand, FIXIT has no power under the Administrative Courts Act and the Rules of Administrative Court Procedure to demand Thailand provide necessary information or written answers, nor to subject state personnel to pre-trial questioning without a court order. In the case of confidential documents, FIXIT may get a summary of such documents by court order.

Even though FIXIT has no power to obtain the information from Thailand under the Administrative Courts Act and the Rules of Administrative Court Procedure without a court order, FIXIT should be able to obtain such information from Thailand by using the Official Information Act (1997) (similar to the U.S. Freedom of Information Act). Thailand may be the first country in the Southeast Asia to adopt such an act. Under this Act, a private person has the right to request any official information in possession of the government agency by reasonably describing the information or documents sought. The responsible state agency provides the requested information within a reasonable period of time, unless the request is excessive or submitted frequently without reasonable cause.²⁰ The state agency or official may decline to disclose information only if it falls under certain exceptions provided in the Act.²¹ FIXIT cannot exercise this right now because the

20. Official Information Act, § 11 (1997) (Thail.).

21. *Id.* § 15.

A state agency or state official may issue an order prohibiting the disclosure of official information falling under any of the following descriptions, having regard to the performance of duties of the state agency under the law, public interests and the interests of the private individuals concerned:

- (1) the disclosure thereof will jeopardize the national security, international relations, or national economic or financial security;
- (2) the disclosure thereof will result in the decline in the efficiency of law enforcement or failure to achieve its objectives, whether or not it is related to litigation, protection, suppression, verification, inspection, or knowledge of the source of the information;
- (3) an opinion or advice given within the state agency with regard to the performance of any act, not including a technical report, fact report or information relied on for giving opinion or recommendation internally;
- (4) the disclosure thereof will endanger the life or safety of any person;
- (5) a medical report or personal information the disclosure of which will unreasonably encroach upon the right of privacy;
- (6) an official information protected by law against disclosure or an information given by a person and intended to be kept undisclosed;
- (7) other cases as prescribed in the Royal Decree.

An order prohibiting the disclosure of official information may be issued subject to any condition whatsoever, but there shall also be stated therein the type of information and the reasons for non-disclosure. It shall be deemed that the issuance of an order disclosing official information is the exclusive discretion of state officials in consecutive levels of command; provided that, a person who makes a request for the information may appeal to the Information Disclosure Tribunal as provided in this Act.

right of an alien under this Act is effective only when it is determined by a ministerial regulation and the relevant regulation has not yet been issued.²² In the future, if this right is granted to FIXIT by ministerial regulation and the state official still refuses to disclose such information, FIXIT shall be entitled to appeal this decision to the Information Disclosure Tribunal, comprised of a panel of at least three members. This Tribunal has to review the decision of the officials within thirty days of the receipt of the complaint, but this period can be extended not more than thirty days. In practice, however, many decisions of the Tribunal are not rendered within that period of time. The decision of this Tribunal is deemed final.

IV. ENFORCEMENT

If FIXIT wins the case and Thailand fails to comply with the judgment, FIXIT would have to request that the court affirmatively enforce its judgement. Tardy payment is usually penalized by interest at the fixed rate of seven and a half percent per year if the rate is not provided by law or contract. If the debtor refuses to pay, the creditor has the right to ask the court to enforce the judgment by seizing the debtor's property and selling it at auction. FIXIT cannot use this means against Thailand because the state property is legally protected. According to section 1307 of the Civil and Commercial Code, no seizure of state property can be effected, whether such property forms part of its *domaine public* or not.²³ Therefore, although Thailand can be sued in Thai courts, but FIXIT cannot enforce judgment against Thailand in Thai courts, the execution seems to depend on the will of the government agency or its officials. In practice, the government agencies usually execute the judgment within a reasonable time. This has been reaffirmed by the circular of Ministry of Finances at the beginning of this year requiring government agencies to comply with the judgment ordering the compensation within fifteen days after the notification of the judgment.²⁴ In case of delay, FIXIT may use other mechanisms to speed up the execution. FIXIT may petition the higher authorities, especially the minister in charge of that agency or the parliament committees, to investigate the delay.

22. *Id.* §§ 4, 9, 11.

23. Civil and Commercial Code, § 1307 (Thail.).

24. Circular of the Ministry of Finances (March 4, 2002) (Thail.) (addressing the subject of Expenses relating to the litigation).

V. INTELLECTUAL PROPERTY

According to section 36 of the Patent Act of 1989, the patent holder has the exclusive right regarding the patent, petty patent, and design pattern. In cases where the right of the patent holder is infringed upon, the Patent Act empowers the court²⁵ to order the infringer to pay damages to the patentee up to the amount the court deems appropriate, relying on the adverse effect of the injury, including the loss of benefits and the expenses necessary to protect the rights of the patentee. In addition, any person who directs or assists the infringement is also criminally liable as an instigator or accomplice and shall be liable for compensation as well.²⁶

Therefore, according to Thai law, INVENTIX has the right to demand compensation from the infringer, FIXIT.²⁷ Although Thailand benefits from the infringement, INVENTIX cannot demand Thailand be responsible for such infringement because Thailand is not the infringer, instigator, or accomplice and did not directly commit any infringement. Moreover, according to the facts given in the practicum, the contract between Thailand and FIXIT requires FIXIT to use the equipment comprising an invention described in and covered by a patent of Thailand. This may imply the Thailand's intention to comply with the Patent Law and not to infringe the right of patentee. Thus, according to the facts given in the practicum, Thailand shall not be responsible for the damages caused to INVENTIX, although some academicians claim that Thailand should be responsible to FIXIT under the provision of unjust enrichment.²⁸

If Thailand is found responsible for the compensation, Thailand may dispute the validity of the patent based on its novelty, lack of inventive step, or non-existing invention. In this case, Thailand and INVENTIX have to prove their arguments. According to Thai law, the burden of proof in a civil infringement case is favorable to

25. It should be noted that this case will be brought to the Intellectual Property and International Trade Court, which is part of the Ordinary Court of Justice, not to the Administrative Court.

26. Dhajjai Subhapholsiri, Ministry of Commerce, *Intellectual property system of Thailand*, 106, 112-113 (2001).

27. Patent Act, § 77 (1989) (Thail.).

28. Civil and Commercial Code, § 406, ¶ 1 (Thail.). Any person who, through an act of performance made by another person or in any other manner, obtains something to the prejudice of such other person without legal ground, must return it to the latter. The acknowledgement of the existence or non-existence of a debt is deemed to be an act of performance. *Id.*

the patentee, INVENTIX. If INVENTIX can prove that the product made by Thailand has the same or similar characteristics with the product produced with the process of the patentee, it is presumed that Thailand uses INVENTIX's process unless it is proved otherwise. This provision forms an exception to the conventional law of evidence that the claimant bears the burden of proof.²⁹

In brief, it is most likely that according to Thai law, INVENTIX cannot claim compensation from Thailand for the use of its invention during the performance of the maintenance contract.

29. Subhapholsiri, *supra* note 26, at 113.