

# **WINNING** **CONSTRUCTION DISPUTE**

A Tactical Guideline for Advancing Your Case





# Construction Dispute

Like many other places in the world, the construction industry in Thailand is tough business. Almost all projects are awarded under some sort of pressure from tight competition, aggressive bidding, limited funding, a rushed deadline or squeezed profit margins. Hence, it is unavoidable that differences, conflicts, and disputes more frequently arise among key stakeholders in construction projects.

Disputes can vary in their nature, size and complexity, but one thing in common: they are disruptive for everyone in the project. A typical construction project involves multiple parties whose scope of work and completion correlate to each other's within the projects itself. Any problems, changes or delays from one party can result in a damaging domino effect that costs other parties time and money. The whole project could be affected and it is not good news all round. So, it is everyone's interest that a dispute is resolved quickly, efficiently and amicably. Some disputes can be managed through an early negotiation or mediation; some are inevitably progressing as a formal litigation or arbitration.

This guideline identifies the crucial construction disputes that often go down the litigation or arbitration route. It also incorporates suggested strategies to manage disputes effectively and to prepare for a strong case when it goes to the court or the arbitration. All too often, clients come with (what they thought to be) valid and strong arguments to their claims - but not until we review all facts and evidence.

We have seen cases whose chance of winning is diminished simply due to inadequate supporting documents. The parties may have no clue about the merit of their respective position under Thai law. The underlying fault is obviously the lack of knowledge of legal standing under Thai law.

This guideline is the culmination of years of experiences from our litigation practice representing those key industry stakeholders, including owners, contractors, developers, property investors, insurers, and other key players. I trust that this guideline will be embraced by the whole industry as a useful and tactical tool that will help them to advance their case and winning it – where the dispute cannot be avoided.

I hope you find this informative. Irrespective of your legal troubles in Thailand, please do not hesitate to contact us for more information about our litigation services, or if you require fresh opinion on any situation you may be facing, feel free to call me at any time.

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# Construction Issues

A dispute arises when any party in a construction project cannot resolve a particular issue(s) on its performance, which impacts the project work to be carried less efficiently and causes the other party to incur additional costs, delay, defects or loss. At an early stage of the dispute, typically the parties will try to engage in a negotiation or mediation (sometimes with the involvement of a third party) with the hope to reach an amicable settlement. The most obvious benefits of this early dispute resolution method are cost saving, timely resolution, less interruption to the project while still maintaining a good relationship between the parties. Nonetheless, some disputes are so complex that these avenues and other alternatives have failed miserably leaving the disadvantaged party no choice except to file a lawsuit or a request for arbitration. As a matter of facts, in these recent years, more parties in a dispute confront each other in the court more often than in the past. It has seen a substantial increase in a number of lawsuits/arbitration cases brought before the Thai court/arbitration for the cases related to the construction. Not only the number of filings has escalated, but also the value of the claims has exploded significantly. The rise of multi-million dollar disputes tells us that despite being regarded as a harsh and troublesome business, the construction industry in Thailand remains as a prevalent and growing sector today and will continue to grow for years to come.

For the parties embroiled in the legal proceeding, they must carefully examine their facts, both strengths and weaknesses, upon which their chance of winning are largely dependent on. It is important to obtain an independent advice from qualified attorneys in order to fully understand the merit of their respective case. How do you stand contractually and legally under the Thai law? Is there a realistic expectation to win in Thai courtroom? What is the right value of your claim? Considering time, resources and cash currently available, how far can you go through the lawsuit? Are you willing to accept the offer to settle your claim early in the process? These are the key questions that the parties should weigh on when going through the lawsuit, so that they can properly manage their expectation and effectively work toward the resolution.

To help you address those questions, and hence preparing you better for the case, we set out this guideline to list the major construction issues that often end up in a lawsuit. Under each circumstance, you will learn how Thai law governs construction contracts and disputes, and how the Supreme Court interprets the law and creates the precedent for the particular circumstance. Essentially, you will familiarize yourself with the relevant laws and how they are being interpreted by the court. Having equipped with this legal knowledge early on in the game, you, either as an owner or a contractor, can strengthen your case in the court or arbitration.

***"To successfully advance your case in Thai court, it is prudent to understand the particulars of Thai law that governs construction contracts and disputes."***







# 1. Delay

Dispute over delay is one of the most frequently encountered problems in the construction industry, and not surprisingly, among the most commonly litigated issues. Construction projects, given their unique characteristics, contain huge contractual and delivery risks. All the parties involved have vested tremendous interest in the project, including costly supply of manpower, hefty resources, heavy equipment, and substantial funding. Any party causes delay in the project due to whatever reason can cause significant economic damage to the other party and the whole project. The longer the delay takes place, the higher the cost overruns and the greater the liability is incurred in the litigation. So, it is essential for all the parties to follow the on-time performance and on-time payment.

In the construction project, the Contractor is mainly responsible for keeping eyes on the progress. Based on a signed contract, the Contractor must follow the well planned work schedule. The Contractor must also coordinate with its subcontractors so that all the subcontracting work can be completed in a timely manner.

Typically there is a clause in the contract that imposes a late penalty or liquidated damages on the Contractor if the construction work fails to meet a scheduled completion date (the deadline), and the Owner uses the delay in completion as an excuse for not paying the last installment of the contract price. It is noted that the court has the power to reduce the late penalty or liquidated damages if the court thinks it is disproportionately high.



# Who is Responsible?

Presented next are the major causes of delay that frequently arise as the subject of litigation. Depending on the cause of delay and contract terms, the court has expressed its opinion in regard to which party is responsible for the delay, or which party is entitled to particular relief, or which party must bear the cost of the delay under the party's contractual obligations.

## Failure to Hand over Site

The Owner typically warrants that the Contractor will have the adequate access to the site to begin the work on a timely manner. In one Supreme Court judgment, it was held that it is responsibility of the Owner to hand over the site to the Contractor within the commencement date. Owner's failure to do so can obstruct the progress in the project and is considered Owner's breach of contract.

## Bad Weather

Most construction contracts will hold the Contractor responsible for the delay even if the delay is caused by the bad weather. The contract stipulates that the Contractor must take into consideration the weather conditions at the site when planning for the project schedule at the time of contracting. So, the Contractor should be liable for the extra time in case the project encounters bad weather.

## Labor Shortage

The court upholds delay damages against the Contractor for failing to live up to its obligation under the contract to adequately staff the manpower. The Contractor is ultimately responsible for the lack of labor.

## Additional Work or Scope Change

Typically, the additional work or the change to the scope of work is not attributable to the Contractor, but the Owner. The Owner will request the Contractor to submit a proposal for the cost and time for the additional work. In practice, some construction contracts like FIDIC impose a deadline on the Contractor to seek an extension of time or an additional contract price. Timely notice by the Contractor of its intent to claim for additional compensation is essential to document the parties' agreement when the scope is changed. Contractor's failure to send such notice shall waive Contractor's right in claiming for additional compensation.

## Different Site Conditions

Delay can happen when the Contractor (surprisingly) finds the land in the site has different conditions from those specified in the Terms of Reference. Most construction contracts will hold the Contractor liable for creating delay under this circumstance. It is the Contractor's responsibility to discover those conditions through a full investigation of the site prior to contract signing or bidding. (In the reality, the Contractor might not make any investigation of the underground of the site prior to signing a construction contract.) So, the Contractor is not entitled to additional money and extra time to deal with different site conditions.







# Contractor vs. Owner over Delay



During the course of construction, the Contractor has a duty to constantly monitor the schedules and watch out for any delay. Failure to perform work in accordance with the project schedule can result in significant liability. From the Contractor's perspective, if any portion of delay in construction is not attributable to him, the Contractor should take the following actions to protect himself from liability for delay costs.

## Seek Extension

The Contractor should vigorously seek an extension of time from the Owner (or Owner's Consulting Engineer). All details of every cause of delay should be spelled out in the request. If a construction contract like FIDIC imposes any deadline to seek an extension of time (or an additional contract price), the Contractor must ensure a request be made within a deadline, which is typically 14 or 28 days from the date that the Contractor becomes aware of the circumstance.

## Repeat Correspondence

If the Contractor is not satisfied with the allocation or the rejection of extra time, the Contractor should reiterate his position in subsequent pieces of correspondence. These pieces of correspondence will be construed in Contractor's favor, once a dispute goes to the court or arbitration.



In the event of the delayed handover attributable to the Contractor, the Owner should make a reservation in the certification of completion. The Owner must reserve his right to charge the late penalty/liquidated damages or other compensation for the late delivery, on the spot upon acceptance of the work. Under Section 597 of the Civil and Commercial Code, failure to make such reservation when issuing the certificate of completion can cause the Owner to lose his claim. The right to charge will cease to exist even if the Owner has not paid a construction price to the Contractor yet. Essentially, the Owner wants to deduct the claim for the late delivery from the payment of the contract price to be made to the Contractor.

#### **Section 597 of the Civil and Commercial Code:**

*“If the employer has accepted the work without reservation, the contractor is not liable for the delay in delivery.”*

#### **Supreme Court Judgment No. 3838/2547:**

*“The Contractor failed to build a commercial building within a deadline. The Owner used the building without making any reservation. It was held that the Owner did not have the right to charge a late penalty because the Owner accepted the handover of the work without making any reservation.”*

The above Supreme Court precedent implies that any use of a constructed work is considered by the court to be the acceptance of the handover of completed work without making any reservation to charge the late penalty or liquidated damages.

It is noteworthy that the court tends to apply Section 597 to the case of partial (monthly) handover of the work as well. In this particular circumstance, the deadline to complete the entire work has passed, but the Contractor manages to finish a portion of the work and makes a monthly handover of such partial work to the Owner. To preserve his right of the late penalty, every time the Owner accepts any late handover of the partial work, the Owner must make a reservation to charge the late penalty on the spot. According to one Supreme Court precedent, Owner's withholding of a payment of a contract price is not considered to be Owner's reservation of right to charge the penalty.

#### **Supreme Court Judgment No. 3012/2552:**

*“A construction contract provided for 16 portions of the work and 16 installments. The Contractor failed to complete the entire work within a deadline. Later the Owner accepted the handover of the 14th portion and the 15th portion of the work from the Contractor and made the 14th installment and the 15th installment to the Contractor accordingly (after a scheduled completion deadline had been missed) without making any reservation to charge the late penalty. It was held that the Owner did not take the completion deadline as essential element and the Owner was not entitled to charge the Contractor the late penalty.”*

When the Owner allows the Contractor to continue to work even after the deadline is missed without making any reservation to charge the late penalty, the Owner is deemed to extend the deadline and does not treat a completion deadline as an essential element. In this case, the court deems that the Owner waives his right for the late penalty on the ground that the Owner does not consider the completion deadline as the essential element.

#### **Supreme Court Judgment No. 1601/2527:**

*“The Contractor failed to complete the work within the deadline. But the Owner still allowed the Contractor to continue to perform the work. It was held that the Owner did not consider the completion deadline as essential element and was not entitled to charge the Contractor the late penalty set forth in a construction contract.”*

## 2. Defects

No construction project is flawless. In other words, each construction project has its own defects no matter how experienced all parties involved. Construction defects are, not surprisingly, the next reasons that disputes are often end up in the court room.

During the construction, the Owner may find work that is not conformance with the specified standards. Ideally, the Owner should not accept any construction work with defects, but wait until the Contractor duly rectifies those defects at Contractor's own cost. If a construction contract states that the Owner must issue a certificate of completion upon completion of the work, the Owner must make a reservation by highlighting those defects upon acceptance of the work. Section 598 of the Civil and Commercial Code provides that if the Owner accepts the delivery of the defective work without making any reservation on defects, the Contractor shall not be liable for those defects.

### Section 598 of the Civil and Commercial Code:

*"If the employer has accepted a defective work either expressly or impliedly, the contractor is not liable unless the defect was such as could not be discovered when the work was accepted, or it had been concealed by the contractor."*

In light of significant risks and liabilities associated with defects, once any defects exist in the work, the Owner should take the following actions.

- Record and take a picture of each defect.
- Notify the Contractor of the defects in writing.
- Suspend any payment of the contract price.
- Request the Contractor to rectify the defects before issuing any certificate of completion.
- Refuse to accept the handover of the defective work until they are rectified.
- If it is necessary to accept the defective work, the Owner should make a note documenting the defects in the works and that the Contractor agrees to rectify.
- If the Contractor refuses to rectify the defects, the Owner may notify the Contractor of his intention to exercise the right to deduct the rectification cost from the contract price to be paid to the Contractor.  
(Note: The Owner cannot deduct more than his is entitled, but only the amount that covers the cost of rectifying the defects. To the extent there is contract price remaining, the Owner is still obliged to pay the remaining to the Contractor.)



Viewed from the perspective of the Contractor, typically the Owner uses the defects in the work as an excuse for not paying the last installment of the contract price. Ultimately the Owner wants the Contractors to rectify the defects without any additional charge, otherwise the Owner wants to deduct the compensation from the payment of the contract price to be made to the Contractor. Therefore, the Contractor should attempt to rectify the allegedly defective work and resolve any construction issues with the Owner in order to get paid on time.

In some cases, the Owner acts not in good faith by identifying new defects only after the Contractor rectifies the old defects. To minimize this kind of conflict, the Contractor may request the Owner to make the last request for rectifications.



### 3. Change to Work Scope

Dispute over the scope of work regularly occurs when the construction designs are not yet finalized but the construction is rushed to start due to whatever reasons. It can easily lead to design errors and a bunch of changes to the scope of work as the construction is progressing. Often when the description of the plans/specifications is unclear, the Owner and the Contractor are likely going to have different interpretation that can be difficult to ascertain and leave the parties to fight over the change.

Change to the work imposed after the project commencement increases the risk and likelihood of disagreement and delay. The Owner might insist that the change is a part of the agreed scope of work, hence put the responsibility to the Contractor. The Contractor on the other hand may argue that the change is outside the scope of work, and that he is entitled to recoup the time and cost dealing with the change.

If the Owner needs to change the scope of work, reduce or increase, ideally both the Owner and the Contractor should enter into a written agreement with greater details as to a revised contract price and a rescheduled completion date (a new deadline) for a lump sum contract. In the lump sum contract, if the parties do not agree in writing on the additional work, the Contractor may not be able to claim for the additional contract price and will have an issue later with the scheduled completion date.

If the Contractor performs the additional work outside the original scope of work without any written agreement on the contract price, Contractor's right to charge for the additional work may be called into question. Most construction contracts (like FIDIC) will demand the Contractor to submit a request the additional contract price for the additional work within a specified deadline (i.e. 14 or 28 days from the date that the Contractor becomes aware of the circumstance), otherwise the Contractor is deemed to waive the right to his claim.

A construction contract provides that any agreement on the additional work must be made in writing by both parties. In one Supreme Court judgment, it was held that the Contractor is not entitled to claim for the compensation for the additional work because the Contractor and the Owner did not have any written construction contract for the additional work.

#### **Supreme Court Judgment No. 6866/2552:**

*"A construction contract provided that any additional work shall be computed at a new rate in writing by the parties. And it did not appear that the Owner and the Contractor agree on the additional work and the contract price for the additional work in writing (written agreement on the additional work), the Contractor was not entitled to claim for the contract price for the additional work from the Owner."*





## Important of Correspondence

Whatever happens during a construction either the Owner or the Contractor should communicate with each other in writing or at least by email. Written correspondence or even the email will be crucial in a court or an arbitration proceeding. Shooting out an email or a notice is still favorable to your side even if the counterparty does not agree with your side's argument. Verbal communication carries minimal weight in the courtroom or arbitration.



## 4. Unpaid Contract Price

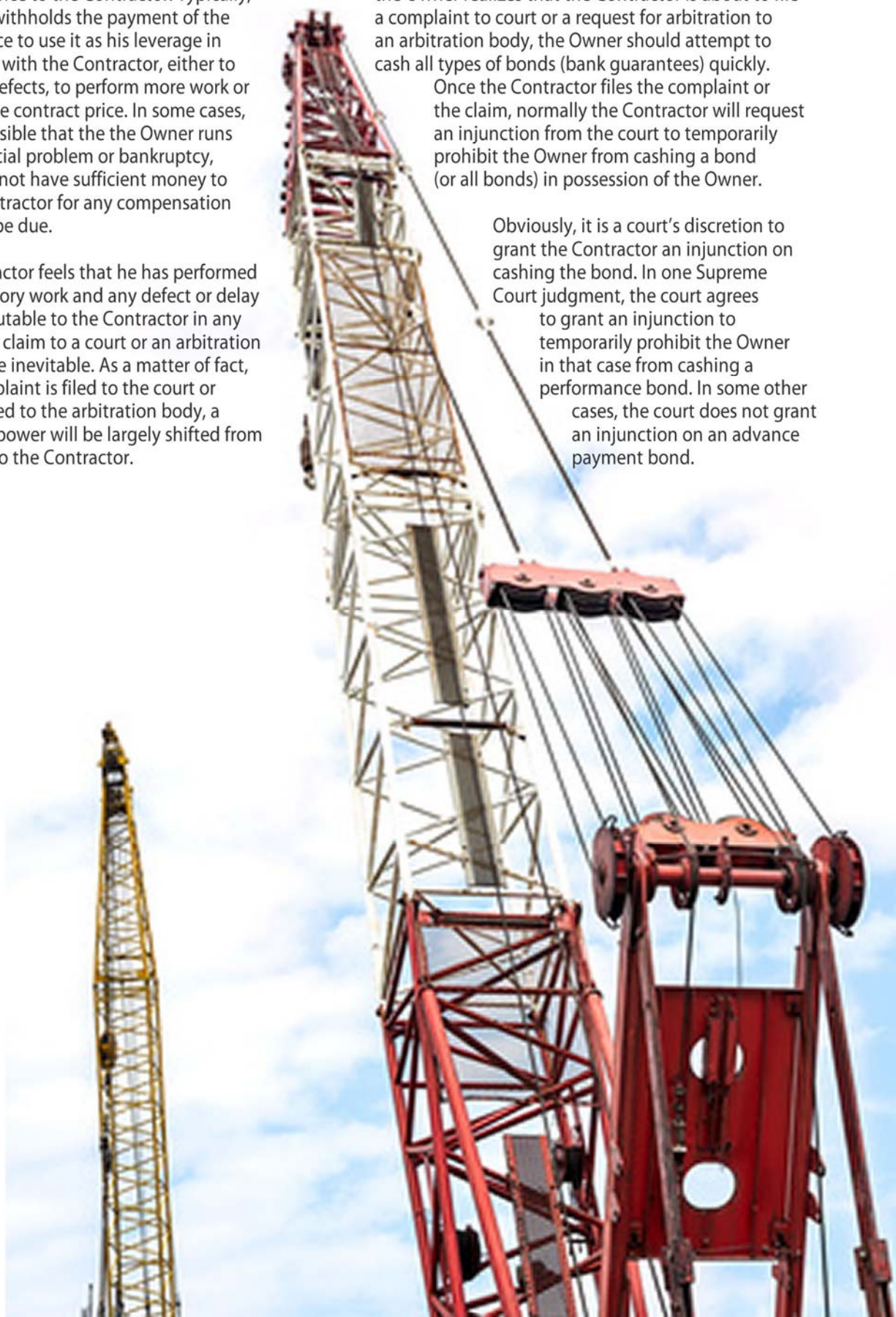
A great deal of construction litigation arises when the Owner fails to make a payment of a contract price to the Contractor. Typically, the Owner withholds the payment of the contract price to use it as his leverage in negotiating with the Contractor, either to rectify the defects, to perform more work or to reduce the contract price. In some cases, it is also possible that the the Owner runs into a financial problem or bankruptcy, hence does not have sufficient money to pay the Contractor for any compensation that might be due.

If the Contractor feels that he has performed the satisfactory work and any defect or delay is not attributable to the Contractor in any way, filing a claim to a court or an arbitration body may be inevitable. As a matter of fact, once a complaint is filed to the court or a claim is filed to the arbitration body, a bargaining power will be largely shifted from the Owner to the Contractor.

In the perspective of the Owner, if he has the right reason behind the unpaid contract price, as soon as the Owner realizes that the Contractor is about to file a complaint to court or a request for arbitration to an arbitration body, the Owner should attempt to cash all types of bonds (bank guarantees) quickly.

Once the Contractor files the complaint or the claim, normally the Contractor will request an injunction from the court to temporarily prohibit the Owner from cashing a bond (or all bonds) in possession of the Owner.

Obviously, it is a court's discretion to grant the Contractor an injunction on cashing the bond. In one Supreme Court judgment, the court agrees to grant an injunction to temporarily prohibit the Owner in that case from cashing a performance bond. In some other cases, the court does not grant an injunction on an advance payment bond.





# Bonds (Bank Guarantees)

In the construction industry, the Contractor is often required to place bonds upon securing the construction contract. These bonds must be obtained from a locally trustworthy commercial bank by the Contractor. The purpose is to provide some sort of security or guarantee for the Owner should the Contractor fail to complete the work satisfactorily according to the terms and conditions laid out by the contract. In this case, the Owner is guaranteed compensation equal to the monetary loss up to the amount of the bonds. There are three types of bonds commonly used in the construction industry.

## 1. Advance Payment Bond (Bank Guarantee for Advance Payment)

At the beginning of the project, when the Owner makes an advance payment to the Contractor, the Owner will in return require the Contractor to furnish an advance payment bond. The advance payment bond is to ensure that the Contractor will in good faith start the project, instead of taking the money and running away with it. The advance payment bond is equal to an amount of the advance payment, which is typically 5% or 10% of a contract price.

Once the Contractor delivers each portion of the work to the Owner, instead of paying the Contractor say Baht 100, the Owner will deduct Baht 5 or Baht 10 to recover the advance payment. It is possible that the Owner and the Contractor may agree to recover the advance payment at a rate greater than the percentage of the advance payment, say 30%. Upon handover of the entire work or upon recovery of the full amount of the advance payment, the Owner will return the advance payment bond to the Contractor.

## 2. Performance Bond (Performance Guarantee)

The Owner has a legitimate concern that the Contractor might poorly complete the work. To mitigate this risk, the Owner asks the Contractor to furnish the Owner with the performance bond typically in the amount equal to 5% or 10% of a contract price. Normally, upon completion of the work, the Owner will return the performance bond to the Contractor. In some cases, if there is no warranty bond, a contract may provide that the Owner will return the performance bond to the Contractor upon the expiration of a warranty period.

## 3. Warranty Bond

The Owner faces another risk in construction. Many defects unfortunately do not appear right away before the handover, but later after the handover when some aspects of construction fails. A great deal of disputes arise when the Contractor, despite being accountable for, is reluctant to rectify these defects. To avoid this risk, upon making a payment of each installment of a contract price, the contract allows the Owner to deduct a retention money of 5% or 10% of each payment. The Owner may hold this retention money until an expiration of a warranty period, typically one or two years after a handover date. If the Contractor needs some cash, the Owner may allow the Contractor to exchange the retention money with a warranty bond after the handover of the work. In the event that the Contractor fails to rectify any defects during the warranty period, the Owner may cash this warranty bond to pay for any rectification cost.



# Our Expertise

When the dispute escalates to the point that litigation or arbitration becomes inevitable, the parties are strongly advised to seek legal representation from a qualified attorney with construction experience and expertise. Litigation or arbitration is a formal (and binding) dispute resolution through a court system. It involves a series of steps, including preparation of a complaint (lawsuit) or a request for arbitration, submission of formal proceeding to the court or the arbitration body within a statutory limitation on time, court hearing/trial and ultimately a resolution of the matter. The procedure of the litigation or arbitration can be painstaking, heavy documentation and must be closely monitored according to a schedule. Anyone who has ever been involved in the lawsuit or arbitration understands the frustration and the considerable time and resources spent in the process. That's the reason it is important to use a competent litigator who is familiar with construction disputes and has hands-on construction expertise to assist the parties throughout the dispute process.

## Understanding Local Law

As one of the most active construction law practices in Thailand, we have a profound understanding of the local law and relevant Supreme Court precedents that govern construction contracts and disputes in Thailand. In particular in a complex construction disputes, our experts can assist clients in a detailed case assessment from the outset to objectively examine their legal standing under the Thai law.

Timeliness is crucial factor in handling construction litigation and our team is skillful with respect of the procedural aspects of case under the local Thai law. Although Thailand court system has the reputation for being slow due to long queue, but recent reforms have improved this situation to certain degree. We try to minimize the uncertainty of the litigation by meticulously monitoring the case and pro-actively keeping the clients updated with the status of the case.





## In-Depth Knowledge in Construction Industry

We take pride of our background and in-depth technical knowledge in the construction industry. Our litigators are noted for their familiarity with the technical terms of construction law and FIDIC conditions of contract. We can draft a sophisticated construction contract that specifies terms to protect the represented party's interest and provides a mean of dispute resolution that is most likely to produce the results the client wants. We can determine the merit of the claim based on the professional skills and interpretation of contracting conditions and technical specifications.

## Proven Track Record

Clients hire us because they recognize our strong track record of success in litigating construction disputes. We have represented various key stakeholders in lawsuits involving allegations of construction defects and damages in numerous projects. We work directly with project owners, developers, contractors and engineers at site to understand the issues and challenges. Clients can draw on the firm's extensive experience to draft a robust claim and provide them with the strategic approach that can maximize the outcome of the ongoing dispute.

## Seamless Communication in English

Construction litigation often involves numerous plaintiffs and defendants, multiple disciplines, and large volume of contracts. Thus, in this non-English speaking litigation, seamless communication and accuracy in translation are significantly important. Clients can rely upon our highly English proficient attorneys to handle their English document-heavy litigation, in a speedy manner, without losing any important facts in the translation.



# Contact Us

For further information about our work, services and fees, please contact us at the below:

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